

WINNING SAFER WORKPLACES



A Manual for State and Local Policy Reform

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By CPR Member Scholar Rena Steinzor and
CPR Policy Analysts James Goodwin, Michael Patoka, and Matthew Shutz
and
Liz Borkowski and Celeste Monforton

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this manual as well as to the Bauman Foundation and the Deer Creek Foundation for their generous support of CPR's work in general.

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Executive Summary

On June 7, 2011, on a stretch of North Carolina highway between Raleigh and Durham, Jesús Martínez Benitez, 32, and Luis Castaneda Gómez, 34, were working on installation of new water mains. The two worked alone at their assigned task: descending into an underground bunker that housed valves critical to the water lines' operation. When co-workers came to pick up Benitez and Gómez, they found the men slumped inside the four-by-six foot bunker, 12 feet below ground. Both had died of asphyxiation, most likely the result of one of the men passing out in the low-oxygen enclosed space and the other making the fatal decision to rush to save him without adequate protection. The company that employed Benitez and Gómez had a history of violating occupational health and safety (OHS) laws, including failing to train workers on how to avoid unsafe conditions. Sadly, the men's deaths, like thousands of others every year, were completely preventable.

Cold comfort though it may be to their families, friends, and co-workers, Benitez's and Gómez's deaths helped advocates propel a new ordinance through the Durham City Council that requires potential contractors to answer detailed questions about their compliance records and safety plans. The ordinance will help ensure that future contracts do not go to companies that disregard their duties to protect workers.

Such reforms are emblematic of the progress that can be made at the state and local level when workers and their advocates are prepared to offer practical solutions and policymakers are ready to act. In this manual, we outline nearly two dozen proposals for state and local policy reform that would empower workers, fix OHS laws, and strengthen the agencies that strive to promote workplace safety. Some proposals are

simple to understand and self-contained, that is, they focus narrowly on problems with OHS laws or agencies. For example, beginning on page 35, we describe how the fines for violating OHS laws are too weak to provide strong deterrent effects and should be strengthened so that the punishment not only fits the crime but also induces other employers to be more conscientious about their OHS-related responsibilities.

Other proposals in these pages are more ambitious, addressing serious problems with solutions that would fundamentally change the relationship between workers, employers, and government enforcement agencies. For example, giving workers the right to sue their employers for violating OHS standards (discussed at p. 27) and establishing corporate manslaughter laws (see p. 42) are policies that might only be adopted by truly progressive state legislatures under pressure from workers and a strong coalition of allies.

We present this broad range of proposals so that workers and their advocates have a full menu of ideas to consider. The manual is divided into three main chapters and 14 individual sections, each addressing a particular problem and outlining progressive solutions to that problem. The individual solutions are designed to stand on their own so that workers and their advocates can refer to individual sections without having to read the manual cover to cover.

In Chapter 1, we focus on empowering workers, addressing five topics: health and safety committees that effectively involve workers in preventing occupational injuries and illnesses; education and training designed to provide workers a knowledge base for action; improved protections for whistleblowers; the right to refuse

unsafe work; and statutes that would give workers and their advocates the power to sue employers for failure to abide by OHS standards and regulations.

In Chapter 2, we turn our attention to making sure that companies tempted to cut corners on worker safety know that they can expect to pay a high price for doing so. We identify ways to strengthen the criminal and civil penalties imposed on employers that do not comply with OHS standards, reform laws so that employers must correct dangerous conditions as soon as they receive citations from OHS inspectors, and utilize government statistics to engage in “shaming” campaigns against scofflaw employers.

In Chapter 3, we set our sights on the government agencies that can promote improved occupational health and safety. In addition to suggesting improved oversight of OHS agencies and better procedures for investigating occupational fatalities, we address how other agencies could bolster the work of officials who are directly empowered by OHS laws. Government

contracting and procurement decisions, for instance, should take better account of bidders’ OHS programs. Code-enforcement agencies, like fire marshals and building inspectors, could partner with OHS agencies to expand oversight.

We encourage workers and their advocates to use this manual as a starting point for discussions about how the ideas presented here correlate to their individual and organizational goals. We focus on changes to laws and policies that are designed to prevent occupational injuries and illnesses, not the safety nets available to workers after they are hurt (e.g., workers’ compensation, tort law, and disability insurance). Those safety nets are important, but space and resource constraints prevent us from addressing them here. This manual also does not address organizing strategies, research and resource needs, partnership opportunities, or other issues necessary for successful campaigns, since those issues depend on local factors. Such work is vital, but we focus here on the ideas around which such campaigns might be built.



Introduction

Despite notable improvements in occupational health and safety over the last few decades, far too many workers still suffer on-the-job injuries and illnesses that could have been prevented. Four to five thousand workers die on the job each year, an average of more than 10 every day. The number of workers who suffer occupational injuries or illnesses each year is hundreds of times the number who die on the job.¹ The sad truth is that the people who bear the brunt of unsafe working conditions are increasingly the working poor, immigrants, and others struggling simply to put food on the table and keep a roof overhead. These victims and their equally at-risk co-workers have both a real and a perceived lack of power in relation to their employers, leaving them unable to demand the engineering controls, improved work practices, and other actions that employers should take to eliminate occupational hazards.

That is precisely why strong laws and regulations are so critical. Workers' advocates—unions, local worker centers, legal aid organizations, plaintiffs' attorneys, and a variety of other public interest groups—are a powerful force for stronger safeguards, as evidenced by many hard-fought victories over the years.

Chief among those victories was passage of the Occupational Safety and Health Act (OSH Act) of 1970. A watershed achievement, the OSH Act established the basic structure of today's occupational health and safety (OHS) regulatory system: The federal Occupational Safety and Health Administration (Fed-OSHA) has the power to write health and safety standards and to enforce them through unannounced workplace inspections and a graduated system of civil and criminal penalties; employers can challenge alleged violations through an administrative pro-

cess overseen by the independent Occupational Safety and Health Review Commission; and, critically, individual states can opt to establish their own OHS agencies that take the place of Fed-OSHA so long as the "state-plan" agency is at least as effective as Fed-OSHA in carrying out Congress's mandate to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions."²

The OSH Act also preserved individual states' workers' compensation programs. In the early part of the 20th century, state legislatures throughout the United States enacted new laws that limited workers' right to sue their employers following an on-the-job injury or the onset of an occupational illness. With limited access to the courts, workers instead file claims for compensation, which are resolved through an administrative process. Critically, workers do not need to prove that an employer was at fault to obtain compensation, so the workers' compensation system is—theoretically—a simpler route to recovering the costs of occupational injuries and illnesses than was the process of suing an employer in court. For employers, the workers' compensation system provides some level of cost control and predictability, since workers' compensation payments are disbursed by insurance providers rather than the employer. The OSH Act was designed to complement the workers' compensation system—OHS standards should prevent many occupational injuries and illnesses, while the workers' compensation system should provide medical care and financial compensation when workers are injured. In practice, some injured workers receive prompt and adequate compensation, while others face substantial hurdles and may never receive the compensation they should get (see the Appendix



for more on shortcomings in the workers' compensation system).

The OSH Act, as implemented by Fed-OSHA and its state-plan partners, has succeeded in reducing overall injury and illness rates significantly over the last 45 years. But the Act is imperfect, the agencies struggle to fulfill their mission with insufficient resources, and workers still face substantial OHS risks. By some measures, we have hit a plateau in our collective efforts to ensure safe and healthful working conditions for all. This is not because workplace health and safety is an unachievable goal. Rather, the better explanation is that our current OHS system needs reforms to address the changing nature of work in the United States and the changing role of government in our lives.

One of the most significant economic trends affecting workers' health and safety is the increas-

ing mobility of the workforce. It has become rare for a worker to spend an entire career with a single company, and transient workers have less bargaining power than long-term employees. In fact, such major retail companies as Walmart and Amazon employ hundreds of thousands of workers through their supply chains but rely increasingly on staffing agencies to fill their labor needs—a strategy that allows them to change the size of their workforce on a day-to-day basis, while also passing the buck on OHS and workers' compensation responsibilities. Changes to the way government works have also slowed progress toward safer workplaces. The federal rulemaking process is so ossified, so paralyzed, that Fed-OSHA is, for all intents and purposes, unable to begin work on even a single new standard and finalize that standard within any one presidential administration.

The good news is that workers' advocates at the state and local levels are mounting successful worker safety campaigns on a regular basis. In recent years, at the urging of advocates, state and local governments have tackled a wide range of issues, including the following:

- After two workers died while working inside a manhole on a city-funded job with a company that had racked up dozens of health and safety citations, Durham, North Carolina adopted a new policy for choosing companies to complete city projects. Companies bidding for the contracts are now required to provide information on their safety and health programs, injury data, and workers' compensation rates.
- In response to temporary workers encountering problems getting payment or workers' compensation from temporary staffing agencies, Massachusetts passed the Temporary Workers Right to Know Act. Now, staffing agencies must provide workers with written information about their job assignments, health and safety training requirements, protective equipment that should be available, wages, and information about the staffing agency and its workers' compensation carrier.
- Following a newspaper series on cancer-stricken health care workers and a campaign by health care workers and other advocates, Washington State adopted a regulation to protect health care workers from exposure to chemotherapy agents and other hazardous drugs. Employers whose workers may be exposed to such drugs (e.g., through touching, breathing, or needle sticks) are now required

to develop control programs with procedures for the drugs' storage, use, and disposal.

- Waste recycling workers face a multitude of health and safety hazards. Some have been fatally injured. In California, Worksafe, the International Longshore Warehouse Union, the East Bay Alliance for a Sustainable Economy, and other allies pressured municipalities to require that new franchise agreements with waste collection and recycling companies include provisions ensuring these workers earn decent wages and benefits and are protected from dangerous working conditions. Accordingly, Oakland and Fremont city councils passed resolutions in early 2014 that direct their city managers to address these issues when negotiating contracts.

These groups and their counterparts in other cities and states throughout the country have the opportunity to transform OHS policies in ways that, largely for political reasons, have not worked at the national level. In doing so, they may provide the momentum that is needed to push Congress and others to establish better protections for all workers. National right-to-know laws, which promote better understanding of chemical hazards in the workplace, for instance, came to be adopted only after workers and their allies succeeded in passing similar laws at the state and local levels in the 1970s and early 1980s. The proposals described in the pages that follow could be a starting point for discussions among workers and their advocates about the next generation of OHS reforms. Success at the local and state levels could again lay the groundwork for national reform.

How to Use This Manual

This manual is intended for workers' advocates who want to press their state legislators, state agencies, and local officials to adopt laws and policies that will better protect workers from occupational health and safety hazards. Each section of the manual has four principle pieces: a description of a problem, a proposed solution or interrelated set of solutions, notes on challenges related to the proposed solutions, and some useful examples. We cite some examples of national-scale efforts to reform the OSH Act or Fed-OSHA policies, but these references are intended only to provide guidance on the substance of the proposals. Given the deadlock in the U.S. Congress and the slow pace of action at Fed-OSHA, this manual proceeds from the premise that for now, state and local advocacy is the best approach to testing the solutions outlined below.

The manual outlines a menu of ideas from which state and local advocates might choose issues around which to build campaigns. We have steered away from ideas centered on particular hazards, focusing instead on cross-cutting issues designed to empower workers, eliminate the economic benefits of ignoring the law, and strengthen the institutions that enforce the law. We have also limited our discussion of workers' compensation, tort law, disability benefits, and other "safety net" programs that provide benefits to workers who have suffered occupational injuries or illnesses. Other individuals and organizations in the community have applied their expertise to such topics; our main focus here is on laws and standards that will prevent tragedies in the workplace.

We want to emphasize that this manual is merely a starting point for collaborative discussions about improving OHS conditions. Our

hope is that organizations operating at the state and local levels will use the manual to prompt discussions among worker-members and client groups about their most significant OHS concerns. So we present a broad array of ideas, some more readily achievable than others, but all with the potential to transform the way workers, the public, and lawmakers approach the issue of occupational health and safety.

The manual does not discuss organizing strategies, research and resource needs, partnership opportunities, or other issues that undergird successful campaigns. Local conditions dictate how best to achieve campaign goals, so discussion of those issues is beyond the scope of this document. Again, others in the community have greater expertise on organizing strategies; we stick to policies in these pages.

Recognizing the vibrant community of workers' advocates who have achieved success in many arenas but may be new to the world of Fed-OSHA and state-plan OHS agencies, we have included a short overview of the OSH Act and workers' compensation at the end of the document. It begins on page 74.

Advocates who are interested in campaigning for any of the reforms discussed in this manual should prepare for employers to argue that federal law "preempts" new state laws or regulations. While a detailed discussion of preemption is beyond the scope of this manual, we provide a brief overview and note special preemption-related issues at appropriate points in the recommendation sections below. We urge advocates to consult with an expert on the preemption issue as they prepare to campaign for any of the solutions recommended in this manual.

In general, state-plan states have substantial leeway to expand upon the minimum OHS requirements set by Fed-OSHA, while states covered by Fed-OSHA are more constrained. These principles are derived from the U.S. Supreme Court’s 1992 *Gade* (pronounced “Gay-dee”) decision, in which the Court ruled that if Fed-OSHA has issued a standard covering a particular OHS issue, only state-plan states may establish their own standards on that issue. Legislators in states under Fed-OSHA’s jurisdiction are therefore limited to writing laws that address issues not covered by a Fed-OSHA standard. The Supreme Court also left open the possibility that “laws of general applicability,” which are aimed at enhancing public safety (not just worker safety) and only regulate employers insofar as they are members of the general public, may not be preempted by Fed-OSHA standards.

To help clarify where preemption is a significant hurdle, we have included symbols at the beginning of each “Solution” section of the manual.

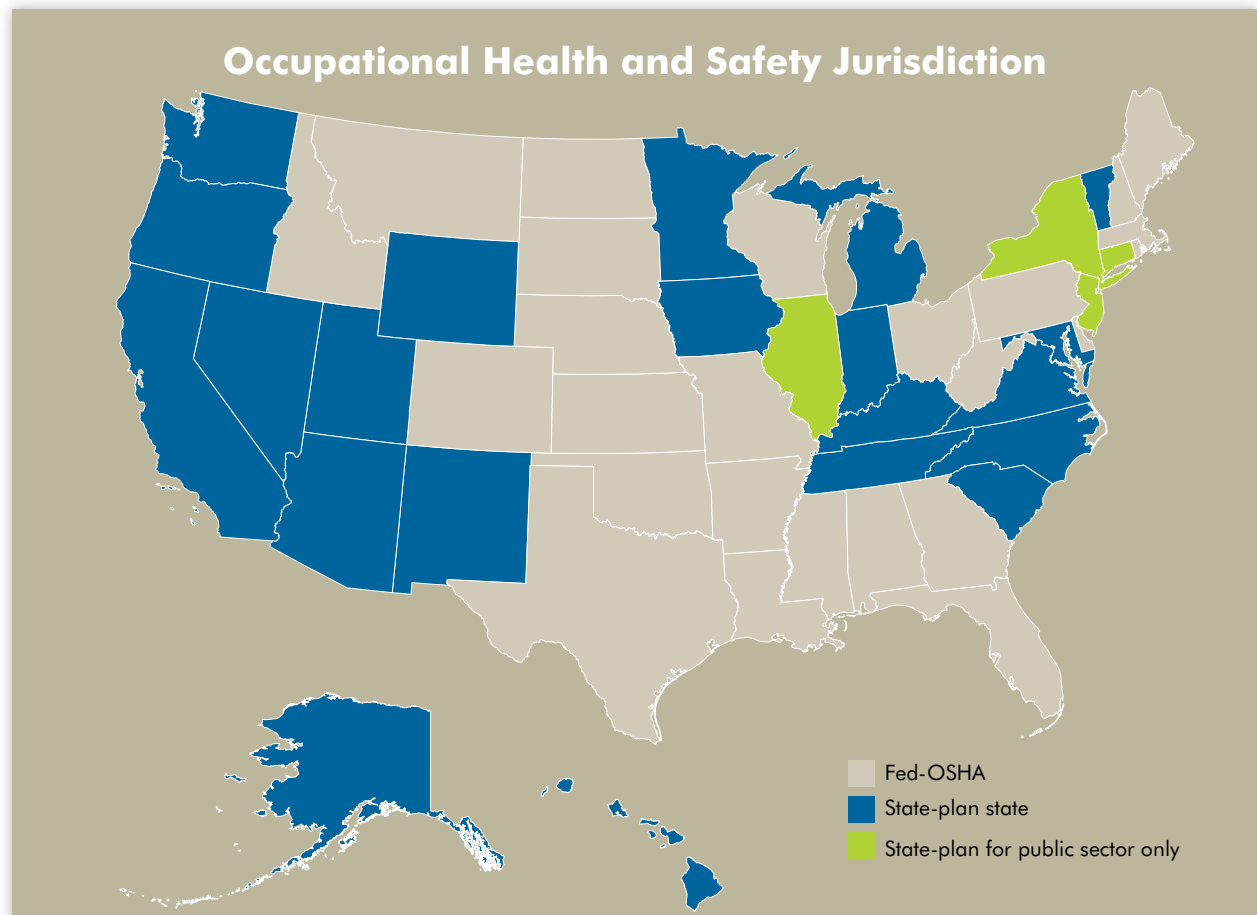


The solid map of the United States icon indicates that the proposed solution is possible in both state-plan states and states within Fed-OSHA’s jurisdiction.



The green map of the United States icon indicates that the proposed solution is only possible in state-plan states.

See the Appendix, at p.74, for a more detailed description of Fed-OSHA and state-plan jurisdiction



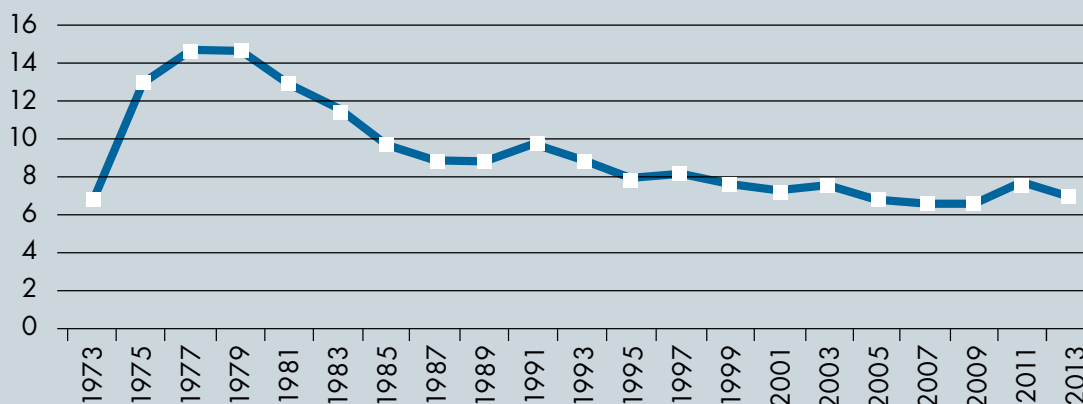
Chapter 1: Empowering Workers

Experience shows that when workers are empowered—when they act collectively to influence working conditions—positive change is eminently possible. To truly empower workers would require revolutionary changes to the labor market, political institutions, and the social safety net. But within the boundaries of occupational health and safety (OHS) law and policy, workers’ advocates can campaign for targeted reforms that give workers more power with respect to individual employers—an important step in long-term organizing efforts. In this section, we describe health and safety committees, expanded OHS education and training requirements, stronger whistleblower protections, and “citizen suits” as promising campaign issues that hold the potential to generate real power for workers to demand changes from their employers.

The reforms in this section are designed to empower workers to act without having to rely on state or federal OHS agencies. The federal Occupational Safety and Health Administration’s (Fed-OSHA’s) total budget and the pass-through funds that go to support state-

plan OHS agencies have never been sufficient to protect workers and have failed to keep up with inflation and changes in the workplace, preventing Fed-OSHA and state-plan OHS agencies from maintaining an inspection workforce that keeps pace with the growing U.S. economy. The most striking way to illustrate how this resource shrinkage has played out is to look at how the ratio of OHS inspectors to workers has changed over time.³ In the late 1970s, Fed-OSHA had about 15 inspectors per 1 million workers, and even that was not enough to adequately enforce the law. Today, that number has dwindled to about seven inspectors per 1 million workers. These inspectors are hardworking and dedicated to protecting workers, but there are simply too few of them to be the main bulwark against employers who create dangerous working conditions. Furthermore, government-created OHS standards are a floor upon which to build, not a ceiling intended to inhibit protections. Workers can demand additional protections if they are empowered. The reforms outlined in this section will give more workers the power to demand the protections they deserve.

Fed-OSHA Compliance Officers per 1 Million Workers (1973–2013)

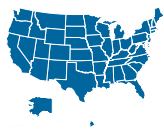


Health and Safety Committees: Involving Workers in Prevention

PROBLEM

Inadequate protection for workers against employer retaliation, incomplete training on workplace hazards, difficulty stopping dangerous work, and myriad other problems that prevent workers from having safe and healthful work can all be linked to the large power disparity between workers and their employers. That power imbalance is related to the “representation/participation gap”—that is, the difference between the worker-management relationship that workers want and the relationship that they actually experience.⁴ One measure of the gap is the oft-cited decline in private-sector union participation, which has dropped from a high of about one-third of the private workforce in 1950 to less than 10 percent today. Some employers have experimented with different forms of non-union employee representation (e.g., Volkswagen’s “works councils”), but their mandates vary and OHS issues are not always a focal point.

SOLUTION



Joint labor-management health and safety committees can give workers a stronger voice in the OHS policies at their workplaces.

State legislatures can adopt legislation—some have already—requiring employers to establish health and safety committees. Such legislation is possible in both state-plan states and states covered by Fed-OSHA. Even without legislation, committees can be established through a union contract or by collective action of a group of workers.

The basic concept of a health and safety committee is simple: A select group of non-



management workers at each worksite sits on a formal committee, alongside an equal or lesser number of management-selected representatives. Committee members meet regularly to discuss health and safety issues, including hazards related to equipment and chemicals, the effect of pace and duration of work on health and safety, and the workers’ education and training needs. Committee members might conduct regular inspections or safety audits, review “close calls” (when injustices and fatalities are narrowly avoided) and incident reports, or accompany OHS agency officials during an inspection. Effective committees play an important role in ensuring that hazards are identified and corrected through these activities, as well as by making formal recommendations on work practices and engineering controls. Committees can also help implement whistleblower protections and workers’ rights to refuse dangerous work, as discussed below.

Health and safety committees hold great promise as a tool for giving workers more power over their working conditions. Worker involve-

ment in health and safety policy decisions builds on workers' expertise and knowledge and promotes localized, worksite-based problem solving. When the committees identify hazards and use their authority to pressure employers to fix problems, they have the potential to make health and safety improvements faster than could be achieved by filing a complaint to the relevant OHS agency and waiting for the inspection and appeals process to play out. And committees can protect whistleblowers by making abatement recommendations or filing OHS complaints on their behalf and thereby shielding them from managers who might retaliate.

State legislation can set forth critical aspects of health and safety committees, including:

■ **A size trigger**

State laws on health and safety committees can establish a trigger that determines when a committee is required, based on the number of employees (e.g., committees are required for all employers with more than 5, 10, or 25 employees). The smaller the trigger the better, since there is evidence that, especially in high-hazard industries, small firms have worse safety records than larger firms.

■ **Structure**

The size of the committee and its makeup can be flexible, within limits—employer representatives must never outnumber worker representatives, and, for large worksites, the number of worker representatives should be proportional to the number of workers (e.g., one worker representative for every 100 employees at a worksite with 500 or more employees).

■ **Membership**

Worker representatives should be elected by workers for set terms, with the ability to serve multiple terms. At unionized worksites, worker representatives should be selected by the

workers' bargaining representative or union. Contingent or temporary workers have unique concerns that should be represented in the committee's membership, perhaps through a position on the committee reserved for a contingent or temporary worker (who would be elected by other contingent workers). The chairperson for the committee should alternate between a management representative and a labor representative.

■ **Compensation**

Worker representatives should be paid their normal wages (including overtime, if appropriate) for time spent on committee duties.

■ **Locations**

Employers with multiple locations should have a committee at each location. Exceptions may be appropriate for construction companies, trucking companies, or other firms that can be adequately served by a centralized committee.

■ **Frequency and conduct of meetings**

Committee meetings should happen on a fixed schedule (e.g., monthly). Effective committees establish their own rules governing how agendas will be set, who will chair meetings, and how the minutes will be recorded.

■ **Duties and functions**

The most important work for health and safety committees occurs outside of the regular meetings. Committees should develop policies and practices that encourage workers to identify and report hazards and ensure that employers do not have programs in place that discourage employees from reporting hazards or injuries. They should also ensure strong whistleblower protections and effective policies on the right to refuse dangerous work. Committees should develop worksite-specific training requirements and tap the worker representatives on the com-

mittee to act as peer trainers, delivering the worksite-specific training to their co-workers. To aid in the development of good training programs, the employer should pay for annual health and safety training for all worker representatives on the committees. Health and safety committees should conduct investigations of incidents that led to injuries or fatalities, and act as a clearinghouse where workers can report “close call” incidents. The committee should investigate the incidents and make recommendations for preventing similar incidents in the future.

■ Recommendations

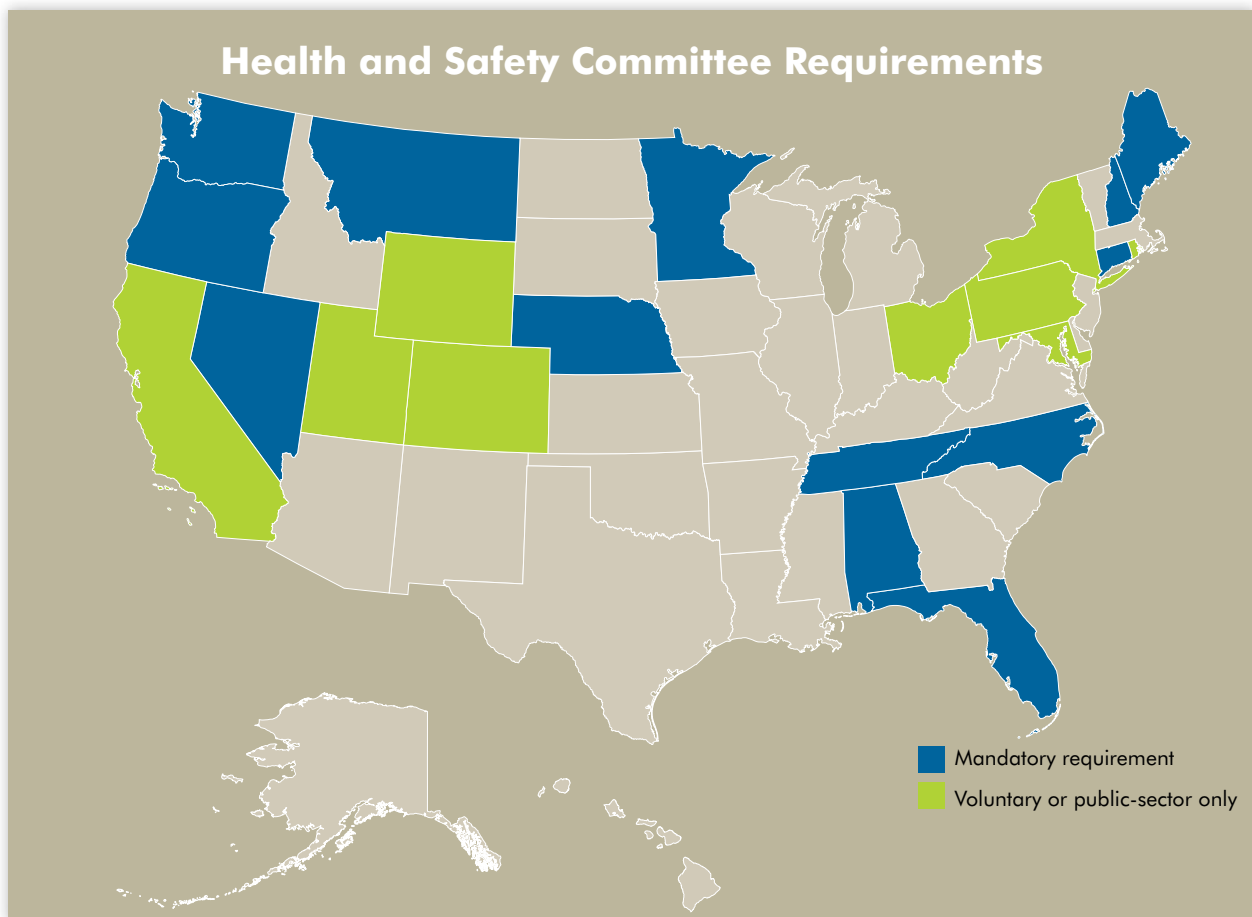
Committees (and individual committee members) should have the power to issue recommendations to the employer on ways to correct hazards.

■ Enforcement

OHS agencies must have the power to cite employers that fail to ensure compliance with committee composition, activity, and recordkeeping requirements. This enforcement authority is critical to preventing “paper tiger” committees that do little to help workers.

Many states have adopted statutes that require employers to develop health and safety committees or create financial incentives for doing so. Often, these requirements are tied to workers’ compensation programs, since committees can be an effective way to reduce OHS risks, which in turn reduces workers’ compensation costs.

Most state legislatures have a recurring process in which they consider reforms to their workers’ compensation programs on a biennial or some other regular basis. In recent years, much



to the chagrin of workers and their advocates, these review cycles have tended to focus on cutting benefits and otherwise limiting workers' compensation programs instead of strengthening them. Health and safety committee requirements have been a bright spot for workers, though. Many legislatures have included committee requirements in their workers' compensation reform efforts either as a concession to workers who are losing on other aspects of the legislation, or as a way to cut costs and create a more "business friendly" climate in their state.

CHALLENGES

The most serious issue standing in the way of health and safety committees is the potential conflict with the National Labor Relations Act (NLRA). Written improperly, a state law requiring health and safety committees might demand a committee structure or set of duties that conflict with the NLRA, thereby invalidating the law. Advocates who are considering pursuing a campaign to establish health and safety committees should consult with an NLRA expert.

Briefly, the issue is that the NLRA prohibits employers from interfering with or dominating labor organizations. A joint labor-management committee is likely to be considered a "labor organization" under the NLRA if it has members who are elected by workers to deal with an issue—health and safety—that is a mandatory topic of bargaining under U.S. labor law. The NLRA's prohibition on employers interfering with or dominating labor organizations would prevent an employer from contributing financial or other support to the committee. That would mean the committee could not meet on company property and workers' representatives could not be paid for time spent on committee functions. Practically speaking, there is no way the committee could function effectively. The relevant provision of the NLRA, section 8(a)(2), was intended to stop employers from forming

"company unions," a tactic employed in the early part of the 20th century to disrupt union organizing. But because of the broad language of the NLRA, modern-day programs intended to give workers more power over their working conditions can run afoul of the law. A full discussion of the relevant law is beyond the scope of this document, but the key takeaway is that there are ways to work around the NLRA problem. It is possible to structure the committees and their powers in a way that ensures management does not dominate or interfere with the committee's work, thereby securing compliance with the NLRA. As outlined below, 23 states require or encourage the establishment of health and safety committees. Labor law experts can help workers' advocates design state legislation in a way that ensures compliance with the NLRA, while accomplishing the goal of requiring health and safety committees.

When Congress considered amending the OSH Act in the early 1990s to include a requirement that all employers with more than ten employees establish health and safety committees, trade associations and their member companies objected on other grounds.⁵ As with any proposal designed to benefit workers, employers raised concerns about costs. But they came up with inflated numbers that were hard to reconcile with cost analyses produced by Fed-OSHA and state agencies that had recently established health and safety committee mandates. Employers also argued that they should have the flexibility to decide whether to establish a health and safety committee, not a mandate. However, employers are unlikely to establish voluntarily the committee structures, policies, and procedures that ensure meaningful worker involvement and effective committees. A formal study conducted for the Department of Labor concluded that voluntary committees often amount to little more than "paper tigers."⁶ And a more recent study of health and safety committees

established under Pennsylvania’s voluntary program found that too much flexibility can lead to ineffective committees.⁷ Nonetheless, some flexibility can be written into the law by giving employers the opportunity to seek variances from the law’s requirements upon a showing that their programs are at least as effective as the statute’s requirements. (Legislation based on a strict mandate also helps minimize the NLRA problem because an employer is less likely to be found to illegally “dominate” a committee when the employer did not voluntarily create it.)

EXAMPLES

Mine workers bargained to establish the first joint labor-management committees with a health and safety aspect to their work over a century ago. Since then, thousands of companies in many different industries have voluntarily created such committees, labor unions have

bargained for their establishment in many contracts, and 23 states have adopted some form of law or policy that encourages their formation. In the early 1990s, members of the U.S. Congress introduced two bills that would have amended the OSH Act to require employers with 11 or more employees to form health and safety committees.⁸ The bills provide a useful example of legislative language that sets the basic parameters for health and safety committees that would be effective and would fit within the constraints of the NLRA.

Advocates might also find successful models for health and safety committees where they were created without a statutory mandate but are overseen by OHS experts. For instance, many collective bargaining agreements have health and safety committee requirements that were designed by unions’ OHS experts.

Occupational Health and Safety Management Systems

In this manual, we present recommendations about health and safety committees separately from recommendations about improved education and training, but the two issues are closely related. In many workplaces, both effective joint labor-management health and safety committees and job-specific training programs are part of a comprehensive occupational health and safety management system, sometimes referred to as an injury and illness prevention program (I2P2).

Occupational health and safety management systems vary in design, but the most effective systems share a core set of features that include management leadership, employee participation, planning, implementation and operation, evaluation and corrective action, and management review. (See the American National Standards Institute (ANSI) Z10 consensus standard.)

Thirty-four states either require employers to establish occupational health and safety management systems or have guidelines that encourage them. Fed-OSHA maintains a website with links to the programs, which may be a useful resource for advocates interested in pursuing reforms related to health and safety committees or improved education and training requirements. (<https://www.osha.gov/dsg/topics/safetyhealth/states.html>)

Education and Training: Providing Workers a Knowledge Base for Action

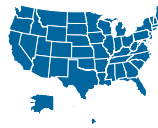
PROBLEM

Too often, workers get incomplete information and insufficient training from their employers. To stay safe on the job, workers need to know about the hazards they may encounter, how to perform their job tasks safely, and what they can do to address unsafe conditions or access workers' compensation after suffering a job-related injury or illness. Various laws and regulations require employers to make specific kinds of information available and provide certain types of training, but these piecemeal rules often leave workers with only a partial understanding of the hazards they face, their employers' duties to eliminate or manage the hazards, and how to exercise their rights.

The problem of insufficient OHS education and training is especially acute in the sectors of the labor market that have made widespread use of temporary labor. Take, for example, the tragic death of Day Davis at the Bacardi bottling plant in Jacksonville, Florida. Hired as a temp worker and eager to prove his mettle on his first day at a new job, Davis was crushed by a piece of equipment that was set to run while he was underneath it cleaning broken bottles. Among other violations, Fed-OSHA determined that Bacardi had failed to train Davis on the hazards associated with the equipment or safe use procedures—such as cutting power to machines when workers are making repairs or cleaning up.⁹ Insufficient training has been an issue in so many cases involving temporary workers in the last few years that Fed-OSHA has taken steps to clarify the joint responsibilities of staffing agencies and host employers with regard to training requirements.¹⁰

Further complicating matters, training, warning signs, and hazard communications are not always in the language or format best suited for the workers who are supposed to benefit from them. Improper language and format is an acute problem in industries or geographical regions that rely heavily on foreign-born workers or those with low literacy.

SOLUTION



Improvements to education and training requirements can ensure that workers have the knowledge they need to demand better OHS protections. To get a full picture of the health and safety aspects of their jobs, workers need to know about all potential hazards, past and present exposures to any hazards that may be variable (e.g., chemical exposures), the type and severity of the harm the hazard can cause, the regulatory and legal system that places responsibility on employers to eliminate hazards, and the mechanisms for redress when injuries or illnesses occur. State legislatures can enact laws that provide for OHS information-sharing and training. Unions can also make these demands in contract negotiations, but the recommendations below focus on statutory changes that would help non-unionized workers, too.

State legislators in every state can take the simple, commonsense step of requiring employers to inform workers about the education and training requirements that apply to their jobs. This requirement would force employers to regularly review the OHS standards relevant to their industries and keep track of the training requirements that apply to all jobs that their work-

ers undertake. Fed-OSHA has more than 100 standards that mandate some type of training for workers across a range of industries.¹¹ Only a small number might apply to a given job, but it is the employer's responsibility to know what those requirements are and to ensure they comply with them. State laws mandating that employers disclose to workers the relevant training regulations would also provide workers with a virtual checklist that they could use to keep tabs on whether their employer is providing sufficient OHS training.

Only state-plan states' legislators should attempt to expand on Fed-OSHA's education and training requirements. The OSH Act's preemption provisions bar legislators in states covered by Fed-OSHA from adding to the federal OHS education and training requirements. State-plan states that opt to expand on the minimum federal standards could greatly enhance workers' knowledge of OHS hazards by requiring a more comprehensive hazard analysis and communication program. Critical elements of that program might include:

- **A mechanism for providing all new hires with OHS-specific training**

Legislators should outline in general terms the minimum requirements of new-hire training and should authorize the state's OHS agency to establish regulations and guidance that will provide employers with additional details. Legislation could set out a minimum number of hours for training on hazards and on the employer's duties to eliminate and manage those hazards (e.g., eight hours for new hires). It could also mandate that workers receive training on best practices for identifying hazards and the procedures for reporting hazards to management, refusing unsafe work, and reporting unresolved problems to government agencies.¹² As described above, joint labor-management health and safety committees can be responsible for



developing worksite-specific training materials, and worker representatives on those committees can be responsible for training other workers.

- **A requirement that ensures workers get “refresher” and “new task” training**

Refresher training reinforces to employers that they bear the ultimate responsibility for workers' health and safety. It also gives workers an opportunity to refresh their knowledge of hazards and the ways they are supposed to be eliminated or controlled, to discuss new or emerging hazards, and to review policies and procedures for dealing with OHS concerns. Employers also should be required to provide specialized training any time workers are assigned new tasks or begin using new equipment.

- **Expanded access to injury and illness records**

State legislatures could improve access to individual firms' injury and illness records, such as OSHA-300 logs, company audits, and workers' compensation records, by requiring that the data be posted online through the state-plan OHS agency's website (without revealing workers' identities). Doing so would enable workers to access the data at the time and place of their

choosing. It would also allow potential employees, customers, competitors, contractors, suppliers, and the media to access the data, increasing the number of potential actors who might press a firm with high injury and illness rates to take action to create a safer workplace.

A comprehensive hazard analysis and communication program could be tied to the work of health and safety committees. For instance, the health and safety committee could develop training programs, conduct training, and verify effectiveness. Worker representatives on the committee also could serve as a resource for co-workers who need help understanding the OHS-related information that employers might be required to provide.

State lawmakers in all states can also mandate that employers provide workers with information about the other key program relevant to their on-the-job health and safety: workers' compensation. Most states require employers to put up posters that give workers rudimentary information about the workers' compensation system, such as the name of the employer's workers' compensation insurer and claims administrator.¹³ But workers deserve to know more than just the basics, including:

- The process for filing a claim, including relevant timelines and documentation requirements;
- Information about benefits available through the workers' compensation system, including a clear statement describing benefits that will be unavailable if a claim is not filed;
- The percentage of claims that the employer or its insurer appeals, so that workers will know ahead of time the employer's track record for challenging workers' compensation claims; and
- A disclosure about workers' rights to enlist an attorney at any time after the injury, to

help navigate the complicated procedures for obtaining benefits.

Workers also need to know about whistleblower protections, their legal protections when they refuse unsafe work, the proper channels for raising OHS concerns in the workplace, and how to file a complaint with an OHS agency if hazardous conditions are not satisfactorily addressed. (The two sections of this manual immediately following this section provide details on whistleblower protections and refusing unsafe work.) These issues can be addressed in plain-language documents provided to workers before the first day on the job and on an annual basis thereafter, as well as on a prominently displayed poster within the workplace.

Fed-OSHA and various state-plan OHS agencies provide sample documents that employers can use to educate workers, often in English and Spanish. State lawmakers in all states should mandate that employers educate and train workers in a language and vocabulary that they understand.

CHALLENGES

The first counter-argument that advocates should expect to hear when pushing for improved OHS education and training requirements is that Fed-OSHA regulations preempt states from acting. This argument is primarily a concern in states that do not have a Fed-OSHA-approved state plan. The U.S. Supreme Court, in its 1992 *Gade* decision,¹⁴ invalidated an Illinois regulation that established certain training and certification requirements beyond what Fed-OSHA's standards required. The Court's ruling creates a barrier to expanding OHS education and training requirements in states where Fed-OSHA has authority. Nonetheless, legislators in states covered by Fed-OSHA might work around this problem by mandating that employers simply inform workers of the educa-

tion and training requirements that apply under Fed-OSHA's standards. By not adding new education or training requirements, the problem of preemption may be avoided.

For workers, the problem with improved OHS education and training requirements is that, in reality, knowledge is not power—power is power. Workers need a mechanism that gives them an enforceable power to demand improved working conditions, based on the information they receive through improved OHS education and training requirements. This need is addressed by some of the other recommendations in this document, including the creation of workplace health and safety committees with genuine worker involvement, the enhanced whistleblower protections, the establishment of a right to refuse dangerous work, and citizen-suit provisions. Those recommendations go hand-in-hand with improved OHS education and training requirements, which would strengthen workers' ability to use those tools.

EXAMPLES

In 2012, the Governor of Massachusetts signed a law known as the Massachusetts Temporary Worker's Right to Know Act, which was designed to combat a number of problems that plague the temporary or third-party labor market. One of those problems is that temp workers are often sent to jobs without any knowledge of what they will be doing or what health and safety protections they should expect. The Temporary Workers Right to Know Act therefore requires staffing agencies to provide workers with "job orders" that include, among other things, disclosure of whether the position requires special clothing, tools, licensing, or training.¹⁵ This type of reform could be enacted in any state because it does not expand on Fed-OSHA standards; it merely requires an employer to explain the duties it owes workers.

California's workers' compensation regulations provide a useful example of state disclosure requirements that relate specifically to workers' compensation. Employers must post in each workplace a one-page poster that provides workers with an easy-to-understand overview of the workers' compensation claims process, as well as some basic information necessary to initiate the process, such as the employer's claims administrator, workers' compensation insurer, and contact information for individuals who can advise injured workers.¹⁶ Even more useful, California requires employers to provide workers with a "Time of Hire" pamphlet that explains the workers' compensation system in more detail, but still in plain, easy-to-understand language.¹⁷

A Win for Workers: The Massachusetts Temporary Worker Right to Know Act

A Massachusetts coalition of faith leaders, labor organizations, and safety and other advocacy groups worked with state agencies and representatives of the staffing industry on legislation to better protect temporary workers from employer abuse. Far too many low-wage temp workers are not told what their job will be or how much they will be paid. The new state law, which took effect in January 2013, requires staffing agencies to provide temporary workers basic information about their job assignments; name and contact information about the staffing agency; its workers' compensation carrier; and any special clothing, tools, and safety training for each job assignment.

Whistleblower Protection Laws: Deputizing Workers to Identify and Report Hazards

PROBLEM

Workers face powerful disincentives to raise OHS concerns. Those who do may face retaliation, including having their hours cut or being fired. Indeed, some employers overtly threaten workers with such consequences if they report health and safety problems. Workers may also face retaliation for filing workers' compensation claims for injuries and illnesses that occur because of unsafe work environments. All these forms of retaliation are illegal, but workers report that they occur often.

Fear of retaliation can strongly discourage workers from reporting OHS concerns or from filing workers' compensation claims. The fear of retaliation can be greatest for vulnerable, low-wage workers, particularly those working on a contingent basis, with limited English language skills, or without protection from a union contract. Beyond employer retaliation, those workers brave enough to report OHS problems to management or a public agency have paid a heavy toll, including strained relations with family members and former co-workers, financial struggles, and extreme emotional trauma.¹⁸

All states have some form of whistleblower protection law, though they vary widely in their scope and implementation.¹⁹ A state law's narrow coverage or weak remedies can discourage workers from reporting OHS hazards when they fear retaliation. For instance, state laws vary with respect to the back pay and benefits that whistleblowers can recover if an employer illegally retaliates. When state statutes establish a system that relies heavily or exclusively on overburdened government agencies to act as the gatekeepers for whistleblower claims, poor

implementation can also be a huge discouragement.²⁰ Across the country, agencies responsible for reviewing whistleblower complaints have significant backlogs. Workers can look to the protections afforded by more than 20 federal whistleblower laws, though Fed-OSHA is struggling to manage the caseload that comes with such broad jurisdiction.²¹

As the eyes and ears on the ground, workers are the experts in identifying workplace hazards and recommending fixes before injury or illness occurs. This whistleblowing role is critical as OHS agencies' budgets dwindle, since fewer inspectors, combined with weak penalty provisions in the law, make it less likely that employers who break the law will be punished severely enough to discourage them from breaking the law in the future.

SOLUTION



Every state, whether operating under a state plan or Fed-OSHA's authority, can improve its whistleblower protection laws and make management changes to ensure improved enforcement of both new and existing laws. Strong whistleblower protection laws must shield workers against employer retaliation and encourage them to identify and report OHS hazards. Such laws are necessary to counter the disincentives that potential whistleblowers face. Society has a strong interest in rooting out hazardous workplaces because of the costs they impose on public health and safety.

A strong state whistleblower protection law should have five characteristics:

■ Comprehensive coverage

The law should cover both public and private workers, including those in traditional employment relationships as well as those working on a contingent or temporary basis. The law’s definition of “employer” should include both host employers and staffing agencies that provide temporary labor. Activities protected by the law should include filing a workers’ compensation claim for an occupational injury or illness, as well as identifying and reporting OHS issues, including reporting injuries and illnesses to the employer. Oral complaints should be sufficient to establish coverage under the whistleblower protection law.

■ Simplified process for exercising whistleblower rights

To be covered, a whistleblower should only be required to demonstrate that he or she had a “good faith,” or sincere, belief that the company’s actions or workplace conditions violated a law or regulation or were otherwise inconsistent with an important public policy promoted by an existing law or regulation.²² Workers cannot be expected to have a sophisticated or exhaustive understanding of relevant law, so they should have the right to be protected from retaliation even if the problem they reported turns out not to be a violation of the law. Whistleblowers should be granted flexibility in how they exercise their rights, so that they are free to report OHS hazards, as appropriate, to a supervisor, a government official, or the media.²³

■ Strong safeguards against employer retaliation

The law should prohibit employers from taking any form of retaliation, including outright dismissal, suspension, demotion, adverse changes in work schedules or job tasks, reductions in compensation or elimination of benefits, nega-



tive reviews or documentation in the worker’s personnel file, or pitting worker against worker. To give the prohibition teeth, the law should create a private right of action that empowers workers who have been retaliated against to sue their employers in court. The law should allow workers one year (or more) to bring a claim, starting from the day when the worker acquired actual knowledge of the retaliatory action. It should define a successful claim as one in which a worker is able to establish by a “preponderance of the evidence” that (1) he or she engaged in a protected whistleblower action, (2) the employer knew about the protected whistleblower action, (3) the employer took some prohibited retaliatory action against the worker, and (4) the protected whistleblower action was a “contributing cause” of the prohibited retaliatory action (as opposed to a “but-for cause,” which makes it too easy for employers to defend prohibited retaliatory actions as the result of other factors, unrelated to the worker’s whistleblowing activity). This private right of action should serve as a backup to the existing administrative process for resolving whistleblower retaliation claims, whether pursued by Fed-OSHA or state-plan OHS agencies. Administrative processes

are typically underfunded and fail to provide effective safeguards for whistleblowers who have experienced retaliation.

■ **Powerful remedies**

The court hearing the case should have the authority to “make whole” a worker who was retaliated against for exercising his or her protected whistleblower rights. The remedies available should include restoration to the worker’s former position with back wages plus interest, reinstatement of seniority or other advanced employment status, the reward of any other lost “fringe benefits” associated with his or her employment, and the removal from a worker’s personnel file of any negative reviews or documentation related to a retaliatory action. The court should compensate workers who win their cases for all reasonable legal costs, and the court should have the authority to award punitive damages in cases involving particularly egregious conduct by the employer. The law should require the relevant state agency to maintain a publicly available database of all successful civil actions brought by workers who were retaliated against for exercising their protected whistleblower rights, including the employer involved, a brief description of the case, and details on any resulting penalties or orders awarded by the court. The law should specifically authorize the judge to order preliminary reinstatement of a worker to his or her former position, along with wages and applicable benefits, if the judge reviewing the worker’s retaliation claim makes a preliminary determination that the claim is not frivolous.²⁴ One of the disadvantages of relying on a private right of action to provide workers who experience retaliation with some measure of justice is that resolution of these claims can take a long time, and many workers simply cannot afford the delay. Preliminary reinstatement can go a long way toward eliminating the burden of delay that many whistleblowers face.

■ **Effective notice of whistleblower rights**

The law should require employers to clearly explain these rights in a language that workers understand by means of a poster that is prominently displayed in the workplace and a written pamphlet to be distributed to workers at the time of hire and once per year thereafter. Employers should be required to make the poster and pamphlet notifications available to workers employed directly by the company and to contingent and temporary workers.

CHALLENGES

Two important aspects of a strong whistleblower protection law—the right of workers to sue their employers in court if they experience retaliation and the powerful remedies available in successful suits—are likely to be the most contentious. Advocates pushing for a law that includes these provisions will likely face a fierce backlash from business groups and their political allies, particularly in more conservative states. A successful campaign to enact a strong whistleblower protection law will likely require a lot of time and effort, but it has the potential to significantly improve OHS protections for workers.

Business groups claim that strong whistleblower protection laws undermine their ability to manage their employees effectively. They claim that disgruntled workers abuse the laws’ protections, enabling those workers to make false accusations either to antagonize their employers or to avoid doing work. Businesses also fear that even well-meaning workers will exercise their whistleblower rights too frequently, leading to workplace disruptions and decreased productivity.

To respond to these arguments, advocates can point out that the power to address these concerns resides with the employer. Businesses can avoid any problems by providing their workers with effective notice on how the whistleblower

protection law works—which the law should instruct them to do—and by cultivating a law-abiding spirit within the company that promotes the early detection and prompt correction of all OHS hazards. These efforts will not only preserve workplace harmony; they will also benefit the company’s bottom line by avoiding the costly fines, litigation, and negative publicity that result when unaddressed hazards are discovered during inspections or following serious accidents and disasters.

The law would leverage the power of state civil courts to screen out frivolous whistleblower claims. Civil courts would ensure that whistleblowers meet the burden of proving the four elements of a retaliation claim, as described above. Employers would also have the opportunity to rebut the claim by proving that they would have taken the same allegedly retaliatory action regardless of the worker’s whistleblowing activity.

EXAMPLES

Every state has some form of whistleblower protection law, although they vary considerably in their coverage and the safeguards they provide.²⁵

As one of the most comprehensive state whistleblower protection laws, New Jersey’s Conscientious Employee Protection Act (CEPA) provides a great model for activists.²⁶ Though the law extends to all forms of potential workplace wrongdoing—including any “activity, policy or practice of the employer . . . that . . . is in violation of a law, or a rule or regulation . . . or [that] is fraudulent or criminal”—it has been used in several cases to protect workers who reported OHS violations. CEPA has several

strengths: public- and private-sector workers are covered; workers who have been the subject of a prohibited retaliatory action are empowered to sue the employer; workers have up to one year to initiate this lawsuit; workers need only show that the protected whistleblower action was a contributing cause of the employer’s prohibited retaliatory action; workers who succeed in their retaliation lawsuit can obtain powerful remedies, including restoration to their former position with back wages, reinstatement of seniority or other advanced employment status, the reward of any other lost “fringe benefits,” and reasonable litigation costs; and, employers must educate workers about their whistleblower rights.

CEPA has a few small weaknesses. Workers must report wrongdoing to their employer first—with limited exceptions—even though there might be several circumstances in which an employee would be better off reporting to an outside party first. The law does not provide for preliminary reinstatement of workers while their whistleblower retaliation claims are pending in court. Also, CEPA does not provide for a public advocate to help workers bring their whistleblowing claims in court.

One difference between CEPA and the law recommended above is that CEPA employs a “reasonableness” standard by requiring that workers have a reasonable belief that the employer’s activity, policy, or practice constitutes a covered form of workplace wrongdoing. As noted above, the recommended law employs a “good faith” standard for workers to trigger their whistleblower rights, although some advocates may find that CEPA’s “reasonableness” standard fits their circumstances better.

Workers' Right to Refuse Dangerous Work: Empowering Workers to Demand a Safe and Healthy Workplace

PROBLEM

Too often, when workers encounter a dangerous work situation, they have a tough choice to make: They can either do work they know to be dangerous or risk losing their job. It takes a strong sense of job security for a worker to ask an employer to fix a dangerous working condition. Especially in low-wage industries, areas with high unemployment, or worksites with a weak health and safety culture, workers who ask their employers to fix hazards often feel that they are putting themselves at risk of being fired or suffering other forms of retaliation. To make matters worse, workers know that any dangerous assignment they refuse will likely be passed on to a fellow worker instead.

Fed-OSHA regulations provide a limited right to refuse dangerous work. Workers are not covered unless they have a “reasonable” belief that (1) the working conditions pose a real danger of death or serious injury, and (2) there is no time to get dangerous conditions fixed by calling in a Fed-OSHA inspector. These conditions are nearly impossible to satisfy, so the regulations provide little meaningful protection. Very few states have right-to-refuse laws, and the laws that exist could be strengthened to ensure a meaningful right for workers to refuse dangerous work.

SOLUTION



Legislatures in all states—both state-plan and Fed-OSHA states—can adopt a law that protects workers’ right to refuse dangerous assignments or tasks until the identified hazards

have been corrected. Ultimately, the law would give workers the power to compel their employers to fix dangerous conditions that could cause injury, illness, or death. Unions can also establish right-to-refuse procedures through collective bargaining agreements, although statewide protections for all workers are a more protective solution.

The central issue for advocates in campaigning for a right-to-refuse law is how to define when a worker is protected in exercising the right. If the language is too broad, then it will encounter vigorous opposition from business groups who will complain that the law could be too easily abused by workers making false or weak claims. If the language is too narrow, then it may be too difficult for workers to exercise their right to refuse and the law would not provide any meaningful protections. The two most common standards are a “good faith” standard and a “reasonableness” standard.²⁷ The “good faith” standard is arguably easier for workers to satisfy than the “reasonableness” standard and would therefore be likely to offer greater protections to workers.

Advocates should consider pushing for a law that requires a worker to have a “good faith,” or sincere, belief that a task or assignment violates a law, standard, regulation, or “clear mandate of public policy” (including those related to OHS matters), or otherwise amounts to a criminal act. This language would empower workers to refuse to work in many dangerous situations while also providing a clear legal standard that will help assuage employers’ concerns about potential abuse by disgruntled employees.

Some recognized occupational hazards do not technically violate laws, standards, regulations, or policies, so a worker would not have a protected right to refuse work based on these hazards. For example, few states have clear standards to adequately protect workers while they are working in excessive heat. Without such a standard, a worker is left to argue that such conditions violate a clear mandate of public policy, which may be a difficult point to prove. Nonetheless, the suggested language is arguably the broadest and most flexible language that is also politically viable in most states.

A strong right-to-refuse law will include other key elements:

■ **Broad coverage**

State right-to-refuse laws should cover all workers. The law should cover both public- and private-sector workers, including contingent and temporary workers as well as workers in a traditional employer-employee relationship.

■ **Effective notice**

The law should require employers to provide workers with effective notification of their right to refuse dangerous work, exactly as provided for in the recommended state whistleblower protection law described above (i.e., through a prominently displayed poster and written pamphlets distributed at the time of hire and every year).

■ **A “private right of action”**

The law should authorize workers to sue their employers in court and to seek a wide variety of damages if they experience retaliation for exercising their right to refuse covered work tasks.

* * *

In workplaces with joint labor-management health and safety committees, the committees can play a critical role in disputes about a work-

er’s right to refuse dangerous work. For example, Ontario’s right-to-refuse law only requires that the worker have reason to believe that a particular task or assignment is dangerous and then relies on some kind of independent worker representative or an established health and safety committee to investigate and filter out any potentially invalid claims.²⁸ This approach has the advantage of allowing workers to bring a wider range of claims to trigger their right to refuse—even those that do not technically violate laws, standards, regulations, or policies. Relying on a third party to help initially address workers’ claims would help to ensure that the law is not abused, which would make the proposed law more politically viable.

The other advantage of a right-to-refuse law that relies on health and safety committees for sifting out valid claims is that the law can also establish a clear process for resolving those claims in a way that both addresses the dangerous conditions and minimizes disruption of the workplace. For example, similar to the Ontario law, a state right-to-refuse law could mandate the following process:

■ **Internal investigation**

After receiving notice from a worker about a hazard, the law should require the employer or supervisor to investigate the allegedly hazardous conditions in cooperation with a member of the health and safety committee. Based upon this investigation, if the employer agrees that a hazard exists, the employer must consult with the worker and the health and safety committee member on the appropriate ways to correct the situation. Alternatively, the employer must explain why the conditions are not actually hazardous.

■ **External review**

If the reporting worker does not accept the employer’s explanation that the workplace

conditions do not pose a hazard, or if the reporting worker does not agree that the employer's actions to fix the hazard are adequate, then he or she should report the situation to the appropriate OHS agency. In state-plan states, the law should require the state-plan OHS agency official to consult with both the reporting worker and the health and safety committee involved as part of the investigation. The worker may continue to refuse the dangerous work task until the government inspector has determined that conditions are safe following an investigation of the situation.

■ **Documentation**

The law should require the employer to keep a written record of the event, explain how any reported OHS concerns were addressed, and provide a copy to the worker who brought the hazard to the employer's attention.

■ **Maintenance of benefits**

The law should specifically require the employer to maintain the reporting worker's normal compensation rate at all times while the worker

is exercising his or her right to refuse dangerous work. The employer may give the worker an alternative work assignment while the situation is being resolved.

■ **Information sharing**

Whenever a worker exercises his or her right to refuse a dangerous work task, the law should require the employer to inform any other workers of the reported dangerous conditions before assigning that task to them. The law should authorize the other workers to independently assert their own right to refuse the task on the basis of the reported dangerous conditions.

CHALLENGES

Business groups will likely charge that a strong state right-to-refuse law would undermine employers' ability to effectively manage their workforces. Specifically, they might argue that the law could encourage workers to abuse the law's protections in order to harass their bosses or shirk their assigned duties. They might also contend that even appropriate uses of the



right to refuse dangerous work could become a needless distraction, resulting in decreased productivity.

Advocates can respond to these arguments in several ways. They can point out that the fundamental reason for the right-to-refuse law is to ensure that hazards are identified and fixed before harm occurs. As a result, its provisions could actually promote productivity for many businesses and eliminate costs associated with injuries, illnesses, and “close call” incidents. Advocates can also explain that the procedures for exercising the right to refuse dangerous work are designed to discourage abuse and to promote a cooperative and productive relationship between employers and workers. Under a law with the characteristics described above, workers would need to have a “good faith” belief that undertaking the task or assignment would violate law, standard, regulation, or policy. Tying the workers’ right to laws, regulations, or policies will give employers an objective tool for denying potentially abusive claims, and encourage workers to exercise this right only when it is appropriate. Similarly, a law that relies on an independent third party, such as a joint labor-management health and safety committee, to screen cases will help filter out potential misuse of the law’s protections.

A study of Ontario’s strong right-to-refuse law suggests that business groups’ concerns about abuse and disruption are misplaced. Researchers found no evidence that workers used their right to refuse dangerous work to harass their employers, but they did find that workers made more frequent use of the right in workplaces with poor labor relations.²⁹ These results underscore the importance of ensuring that workers have a properly balanced power relationship with their employers, which a strong right-to-refuse law can help to promote.

Business groups may also argue that states would be preempted from adopting a strong

right-to-refuse law, because Fed-OSHA regulations establish a limited right to refuse dangerous work. This argument is relevant in states without Fed-OSHA-approved state plans, but it is not a strong argument. Advocates can respond by noting that according to the U.S. Supreme Court, only federal “health and safety standards” preempt state laws covering similar issues (see the How to Use this Manual section, above). Advocates can make the case that Fed-OSHA’s right-to-refuse regulation is not a “health and safety standard” as that term is defined in the OSH Act because it is not aimed at correcting a particular hazard or risk. Thus, states without Fed-OSHA-approved state plans, like their state-plan neighbors, can adopt strong right-to-refuse laws.

EXAMPLES

New Jersey’s Conscientious Employee Protection Act (CEPA) provides a good model for advocates that want to campaign for a strong right-to-refuse law that does not rely on health and safety committees. Pushing for a law that establishes health and safety committees may be politically impossible in some states, so advocates may prefer to push for a right-to-refuse law based on CEPA, which can provide effective protections for workers on its own. Alternatively, advocates may prefer to campaign for a right-to-refuse law based on Ontario’s. The disadvantage of this approach is that, in states that do not require health and safety committees, advocates would have to push for a strong law on health and safety committees, along the lines described above, first or simultaneously with their efforts to push for a strong right-to-refuse law. Advocates may find this extra challenge to be worth the effort, since an Ontario-like right-to-refuse law would arguably provide broader protections for workers, and it could include provisions that clearly establish the process for workers to exercise their right to refuse dangerous work, as explained above.

Citizen Suits: Empowering Workers to Sue Employers over Hazards

PROBLEM

Unlike federal environmental laws, many of which have so-called “citizen suit” provisions, the nation’s OHS laws do not allow workers to sue their employers in court for failing to comply with health and safety standards.³⁰ OHS agencies’ resource constraints are the root of the problem, but a budgetary fix is unlikely. With approximately 9 million worksites in the United States and new health and safety challenges arising constantly, OHS agencies simply do not employ enough inspectors to keep a close watch on employers’ compliance. Fed-OSHA employs approximately 1,000 inspectors and supervisors.³¹ State-plan states add perhaps 1,200 more inspectors to the total. With a combined inspection workforce that is rivalled in number by some suburban high schools, it is no wonder that major workplace disasters are often followed by media reports that the employer had rarely, if ever, seen an OHS inspector.³²

AFL-CIO calculates that it would take Fed-OSHA and state-plan OHS agencies anywhere from 30 to nearly 300 years to inspect every worksite in the United States, based on the number of worksite in each state and the number of inspections that the state’s inspectors typically conduct in a year.³³ At that rate, the average worker might as well assume that she will never see an OHS inspector. So what is she to do when her employer fails to comply with the basic rules set out by state or federal OHS standards? To take preventative action before she or a co-worker is injured, the best course of action is to file a complaint with an OHS agency.³⁴ If the complaint alleges an OHS violation with sufficient specificity, the agency will dispatch an inspector to the worksite to investi-

gate. But even here, agency resources constrain responses. Fed-OSHA has adopted a policy stating that these inspections will only focus on the alleged hazard and whatever clearly visible other hazards an inspector comes across in the course of investigating the complaint. It is rare that an inspection instigated by a complaint will result in a “wall to wall” approach and identify hazards that are not immediately visible.

SOLUTION



State legislatures can empower workers by giving them the power to file lawsuits demanding compliance with OHS laws, similar to the right to file citizen suits on violations of environmental laws. State and federal environmental agencies face an imbalance between their enforcement resources and the size of the regulated community that’s comparable to OHS agencies’ shortfalls. The solution in the environmental arena, as it should be in the OHS context, was to give concerned citizens the power to enforce environmental laws. “Citizen suit”



provisions in certain statutes essentially deputize the entire U.S. population to help enforce the law.

Legislators in state-plan states could enact legislation that incorporates the citizen suit into their state-law programs. The basic contours of the statute could parallel existing environmental citizen suit provisions, giving any person the power to file suit against any other person or entity that violates OHS laws. This “private right of action” would be available after the person who intends to file the lawsuit has provided the employer and the state-plan OHS agency a “notice of intent to sue” that identifies the alleged violations. Upon receipt of the notice, the state-plan OHS agency should treat it as it would a formal complaint. The notice gives the employer an opportunity to correct the problem or—if it fails to do so—gives the state-plan OHS agency the opportunity to open an investigation and issue citations. The purpose of requiring potential citizen suit plaintiffs to file a notice of intent to sue is to reduce burdens on the court system.

In complex environmental cases, companies faced with a potential citizen suit often urge the environmental agency to file a suit to forestall the citizen suit, on the assumption that the agency might settle the case on terms more favorable to them than the private lawsuit would. The same could be expected of employers faced with a potential OHS citizen suit. To prevent sweetheart deals that leave workers at risk, OHS citizen suit laws should clarify that a person who files a notice of intent to sue will be presumptively included in the inspection as a worker representative and will be allowed to participate in settlement negotiations and intervene in litigation if the employer contests any citation or abatement order.

Courts that hear environmental citizen suits have struggled with the issue of “standing,” a constitutional constraint on courts’ authority to hear particular cases that is intended to ensure that only parties with a legitimate interest in the out-

come of a lawsuit can initiate it. Any legislature that adopts an OHS citizen suit statute should clarify that the intended beneficiaries who have standing to sue include not only workers who fit longstanding definitions of “employees,” but also independent contractors and temporary workers supplied by staffing firms. Legislatures should also grant standing to third-party representatives such as unions, worker centers, and other community-based organizations with close ties to workers.

A final important piece of the puzzle is to ensure that workers and their representatives can afford to bring these suits. In other lawsuits, judges and juries can require those who lose the case to pay large sums of money in damages, which can be used to pay for the winning side’s legal costs. These damages would not be available in citizen suits, but the plaintiffs need a way to recoup the costs of bringing a case. A state law allowing OHS citizen suits should include a provision that awards reasonable attorney’s fees to individuals or organizations that initiate successful citizen suits or citizen suit-based inspections. That provision could be modeled on the federal Equal Access to Justice Act, which ensures that a party that is successful in certain kinds of litigation, including many citizen suits, can recoup reasonable costs of bringing the case in federal court.

CHALLENGES

Empowering the public to bring citizen suits to enforce OHS laws would be such a revolutionary change to the way those laws are enforced and to the power relationship between workers and employers that advocates can expect fierce opposition to any campaign aimed at winning a citizen suit law at the state level. Advocates have mounted such campaigns in the past and failed—indeed, citizen suits were part of the debate in the lead-up to passage of the OSHA Act in 1970. A state-level campaign to establish



OHS citizen suits may be worth pursuing because it offers a good narrative about the need to empower workers as a solution to problems arising from government austerity measures.

The employer community's main arguments opposing the OHS citizen suit idea will likely center on courts' crowded dockets. State legislators often work to cut down on the number of lawsuits filed by private plaintiffs, so making every worker a potential litigant, without requiring evidence of physical harm, may be contrary to their goals of reducing litigation. But advocates could counter by explaining the plaintiffs' incentives in citizen suits do not encourage excessive litigation. The remedies will often be injunctive—that is, a judge will require an employer to take or stop a particular action—so no lawyers will be winning huge pay days and this new field of law is unlikely to attract the attention of attorneys looking to pad their purses. Many cases will settle out of court since the standards at issue have been enforced by government agencies for years and few questions about applicability and enforceability remain. The proposed requirement of a notice of intent to sue will also ensure that most cases are resolved administratively.

For workers, the biggest challenge with citizen suits will be dealing with retaliation. As noted above, the anti-retaliation provisions in state and federal whistleblower laws are inconsistent and rarely give workers sufficient protection. Workers need assurances that filing or providing support in a citizen suit will not endanger their prospects for continued or future employment. A strong whistleblower protection law would be an essential companion to a citizen suit law to enforce OHS standards.

EXAMPLES

The federal Clean Air Act (CAA) and Clean Water Act (CWA) provide the best examples of how a citizen suit provision can strengthen a public health statute.³⁵ Like OHS agencies, the Environmental Protection Agency and its state agency partners have resource constraints that make it difficult to monitor the thousands of permits issued to businesses that pollute air and water. Environmental advocacy groups, however, have used the citizen suit provisions in the CAA and CWA to enforce the pollution limits set out in permits.

Chapter 2: Making Sure Crime Doesn't Pay

Fed-OSHA and its state-plan partners spend a majority of their resources on enforcement activities. In a typical year, they will conduct roughly 100,000 worksite inspections, and inspectors find serious hazards in a majority of cases. The consequences for employers who put workers in harm's way need to fit the gravity of the situation. Too often, employers get away with what amounts to little more than a slap on the wrist for sending workers into unsafe trenches or oxygen-depleted confined spaces, or for using old machinery without proper guards for protecting against unexpected start-ups. Significant fines and the threat of extended time in prison would serve

two functions: penalizing employers who are caught endangering workers, and deterring other employers from making similar bad choices about worker protections.

In this section, we suggest ways to strengthen the penalties that can be imposed on employers who violate OHS laws and describe a change to administrative procedures that would ensure employers start fixing dangerous conditions as soon as OHS agency inspectors issue citations. We conclude the section with a list of government databases that workers and their advocates can use to target employers or local industries that deserve shaming for their failure to provide safe and healthy workplaces.



Fix It First: Closing the Loophole that Allows Employers to Avoid Fixing Health and Safety Hazards

PROBLEM

In all but two states, when an employer receives a citation for failing to comply with OHS laws, the agency that uncovered the violation lacks authority to force the employer to fix the problem immediately unless workers face an imminent danger, a shortcoming in the law that leaves workers exposed to dangerous conditions. Experts often refer to this as the “abatement during appeals” problem. When OHS agencies issue citations, the law requires that they include an abatement order that sets a reasonable date by which the employer must fix the cited problem. But because of a loophole in the OSH Act and most state laws, the employer can avoid fixing the problem by simply filing an appeal of the citation or the proposed abatement date. The appeals process can last months or even years, and the longer it takes, the more likely it is that the unfixed problem will lead to injury or death. In 2009, for example, a construction worker died after falling through an improperly guarded floor hole at a Connecticut casino. While the company was contesting Fed-OSHA’s citation, another worker fell through a similarly improperly guarded hole and was permanently disabled. According to Fed-OSHA, there were 33 contested cases between 1999 and 2009 in which another worker died at the same worksite while the employers fought the citation.³⁶

Agencies that want the most serious hazards to be fixed right away are forced to bargain with employers, quickly settling for sharply reduced penalties in exchange for faster abatement.³⁷ The case against Tesoro Corporation following a comprehensive inspection of its Anacortes, Washington oil refinery provides a striking

example. In 2008, before Washington enacted a law that closed the loophole, the state-plan OHS agency found 17 violations, many of which implicated poor management of “process safety,” involving highly hazardous chemicals that have the potential to cause a catastrophic incident. When Tesoro challenged the citations, the agency ended up reducing the proposed penalty from \$85,700 to \$12,250 and withdrawing 14 of the cited violations in order to persuade the company to drop its appeal, fix the hazards, and submit to an independent audit.³⁸

This loophole is a growing problem. Fed-OSHA enforcement data show that employers are challenging citations at an increasing rate. From 2005 to 2008, employers appealed 11 percent of state and federal safety citations, and over the next four years, that rate doubled to 22 percent. In 2011 alone, employers contested more than 33 percent of citations.³⁹ Some industries are notorious for routinely filing appeals. From 2000 to 2010, oil refineries contested 53 percent of all safety violations, and the average contested case took 20 months to resolve.⁴⁰ In all these cases, the employer may forestall fixing the hazard until the appeal is resolved, leaving workers exposed to hazards that OHS agency officials have determined violate the law.

SOLUTION



State-plan jurisdictions can ensure that workers are better protected by adopting legislation that requires employers to fix serious hazards by the deadline stated in the abatement order, whether or not they choose to appeal the underlying citation. Mandating a quick

fix ensures immediate protection for workers and puts employers and enforcement officials on more equal footing in settlement negotiations. When employers are already required to fix problems right away, they cannot use their workers' safety as a high-stakes bargaining chip to demand penalty reductions. An effective campaign would emphasize that the issue is about scofflaw companies that are using the appeals process to "game the system" at workers' expense, not employers raising legitimate disputes over inspection findings. Closing this loophole in Fed-OSHA states would require action by Congress.

Since employers sometimes have genuine disputes about the existence of violative conditions, these laws should include an expedited process through which an employer could object to the abatement order. This would be a process separate from the normal appeals procedures in which the employer challenges the underlying citation. The laws should address five issues related to the expedited process for appealing abatement orders:

■ **Issues for consideration**

The expedited process should give the employer the opportunity to raise legitimate questions about the reasonableness of the abatement deadline. It should also give the employer the opportunity to challenge the existence of a violation, since the absence of a violation would negate the need for abatement. Since the expedited process focuses on the abatement order—not the underlying citation—challenges to the characterization of a violation (serious versus willful, for example) and challenges to proposed penalties should not be addressed.

■ **Remedies**

The expedited process will result in a limited remedy for the employer. If the official who hears the challenge agrees with the employer,

the official should only have the authority to grant a stay of the abatement order. Thus, the employer would be allowed to postpone fixing the alleged hazards until its appeal of the underlying citation is resolved.

■ **The criteria for deciding the challenge**

The employer should bear the burden of proving two points to obtain a stay of the abatement order. First, the employer must demonstrate a substantial likelihood of success on the contested issues. In other words, the employer must prove that it is likely to win when it contests the period of abatement or existence of a violation in the actual appeal. Second, the employer must show that a stay would not adversely affect workers' health or safety.

■ **Workers' rights to participate**

The law should require that employees and their representatives be notified and allowed to participate in the abatement hearing, in case they want to argue against a stay. The employer or any affected employees that were parties to the hearing should have the right to appeal the decision to grant or deny the stay.

■ **Timelines**

The hearing should be scheduled soon after an employer files the motion for a stay of abatement (e.g., within 15 days), and the decision on whether to grant the stay should be made quickly as well (e.g., within 15 days of the hearing). Throughout this process, the period of time given by the OHS agency to fix the hazard would remain in place (i.e., the clock would continue to tick on the abatement order).

CHALLENGES

In 2013, California lawmakers attempted to close the abatement loophole and ran into challenges that advocates can expect to see in other states. One of the main arguments raised

by opponents of the bill was that they would be denied “due process” if they were required to fix hazards before having the opportunity to prove through the appeals process that Cal/OSHA’s citation was invalid or that no violation actually occurred.⁴¹

But this argument ignores all the procedural protections for employers that would be built into the new system. Employers would have the chance to argue for a stay at a promptly scheduled hearing, and if it appeared that their arguments against the citation or the abatement requirement were sound, and workers wouldn’t be put in danger, they would likely succeed. Even if a stay request were denied, the employer would still have the opportunity to appeal that decision to a higher reviewing body.

The California legislature ultimately passed the bill, but the Governor vetoed it, arguing that the creation of a new, separate hearing process for deciding stay requests would be unnecessarily costly and duplicative. The experiences of states that already require abatement during appeal, however, suggest that separate hearings will not be too burdensome or costly: In Washington, employers request a stay of abatement less than 2 percent of the time, and only 10 percent of those cases actually go into the expedited hearing process. An agency official in Oregon said that the number of stay requests he received over 23 years could be “counted on one hand.” Advocates can also note that, far from being too costly, an abatement law would bring the state more revenue, because employers would not be able to demand penalty reductions in exchange for fixing hazards promptly.

The governor of California claimed the problem of unabated hazards could be solved merely by

expediting the existing appeals process and/or making sure that appeals of serious violations are put at the front of the line. But that approach would be inadequate. Employers would continue to obtain automatic stays by filing appeals, which could delay the fixing of hazards for months even with an expedited process. Just as important, government promises to speed up the process may be unreliable. Even if delays are reduced at first, changes in department budgets and staffing can result in growing backlogs of cases.

EXAMPLES

Advocates can look to a number of different models in designing a bill to close this loophole. Two pieces of federal legislation are particularly well developed and offer the strongest protections for workers. The Protecting America’s Workers Act (PAWA, introduced in Congress in 2009, 2011, and 2013) and the Robert C. Byrd Mine and Workplace Safety and Health Act (introduced in Congress in 2010, 2011, 2012, and 2013) are two bills that would have closed the abatement loophole in the OSH Act, thereby ensuring quick fixes in every state.⁴² These bills formed the basis for the solution proposed above. The relevant language is nearly identical in both bills.

Mine workers, whose health and safety is policed by the Mine Safety and Health Administration (MSHA) instead of Fed-OSHA, benefit from a statute that requires their employers to abate hazards by the time stated in the citation, regardless of any appeals.⁴³ Under the Mine Safety and Health Act of 1977, employers who want to challenge the citation or the deadline for fixing the hazard are entitled to an expedited hearing.⁴⁴

Examples of Existing and Proposed State Laws that Require Abatement during Appeals

- **Oregon:** Since the inception of Oregon OSHA in 1973, its statute has required employers to correct serious violations as they are appealing the citations. If they choose to challenge the abatement deadline, a hearing on that issue is conducted “as soon as possible.” (ORS 654.078(5)-(6)) Employers complained loudly about the policy at first, but they quickly adapted once it was put into place.
- **Washington:** In 2011, the state enacted a law requiring employers to correct hazards even if they choose to appeal the citations. Compared to the solution proposed above, this law sets a more lenient standard for granting stays: Stays are granted unless the evidence suggests there is a “substantial probability” of death or serious harm to workers, and if employers appeal, they can obtain a stay unless it is “more likely than not” that it would result in death or serious harm. Also, employers who have requested stays do not have to abate the hazard while their requests are being considered, which could take up to 120 working days (almost six months) from the issuance of the citation. (RCW 49.17.140)
- **California:** In 2013, lawmakers passed a strong bill that blended elements of the PAWA bill (the criteria for granting stays) and Washington’s law (allowing the state OHS agency to postpone the requirement to fix hazards while the employer’s request for a stay is pending), but, as noted above, the governor vetoed it. A similar bill has been introduced in 2014, giving the agency discretion to grant a stay as long as it will not adversely affect worker health and safety. (AB 1634, 2013-2014 Reg. Sess. (Cal. 2014))
- **Tennessee:** In February 2014, lawmakers introduced a bill that would require immediate fixes only for willful, repeat, and failure-to-abate violations. In all other respects, the bill closely follows California’s approach in 2013. (HB 2017, 108th Gen. Assembly, Reg. Sess. (Tenn. 2006))

Expanded Civil Penalties: Making It Expensive to Endanger Workers

PROBLEM

Maximum civil penalties for OHS violations are far too low to effectively deter employers from breaking workplace health and safety laws. In states covered by Fed-OSHA, serious violations (causing a substantial probability of death or serious physical harm) carry a maximum penalty of just \$7,000, and penalties for willful and repeat violations are capped at a mere \$70,000 (with a minimum of \$5,000 for willful violations). Such penalties offer little deterrent effect. Moreover, because the penalty amounts are not indexed for inflation and have not been updated since 1990, they effectively become lower each year (see Figure 1). If the penalty amounts had been indexed for inflation, they would be 80 percent greater than what they are now (as of 2014). These penalty amounts, which are largely mirrored in the state-plan programs, are embarrassingly low, especially when compared to penalties for actions that threaten the environment or wild animals. For example, the EPA can impose a penalty of \$25,000 per day for some violations of the Clean Air Act, and the maximum penalty for a single violation of the South Pacific Tuna Act is \$350,000.

In practice, most penalties never even approach the meager maximum permitted under the law. The OSH Act requires Fed-OSHA to consider the employer's size, good faith, and history of violations in determining the appropriate penalty amount. Over the years, the "consider" requirement has morphed into written policies that require inspectors to apply significant penalty reductions based on these factors in virtually all cases. For example, Fed-OSHA

starts with a penalty based on the gravity of the violation, then routinely reduces this penalty by 20, 40, or 60 percent for the employer's size, by another 15, 25, or 35 percent if the employer has documentation of an OHS management system, and by another 10 percent if the employer has had no citations in the last few years. For most violations, Fed-OSHA also reduces the proposed penalty by 15 percent if the employer fixes the hazard during the inspection or within the next 24 hours. Significantly, agency officials apply these reductions before even issuing citations, so the already-reduced penalties attached to citations become the baseline for settlement negotiations between the agency and the employer. During these negotiations, penalties are often further reduced to a mere fraction of the amount originally proposed.

Between July 2007 and June 2009, 98 percent of employers cited by Fed-OSHA received penalty reductions, and the Office of Inspector General concluded that \$127 million in reductions (about one-third of the total) may have been inappropriately granted.

Many state programs have an even worse track record. A number of states automatically reduce their proposed penalties just because the employer was "cooperative," without any further justification. The average penalty for a serious violation under the state plans is a mere \$1,011, compared to \$1,895 in Fed-OSHA jurisdictions; the average in South Carolina is just \$538. For repeat violations, the average state-plan penalty is \$2,412, compared to \$6,272 under Fed-OSHA (both a far cry from the \$70,000 maximum).

SOLUTION: UPDATE CIVIL PENALTY AMOUNTS



Legislators in state-plan states should enact laws that strengthen the penalizing and deterrent effects of OHS agencies' civil penalties.⁴⁵ The updated laws should address four issues:

■ Economic “benefits” of non-compliance

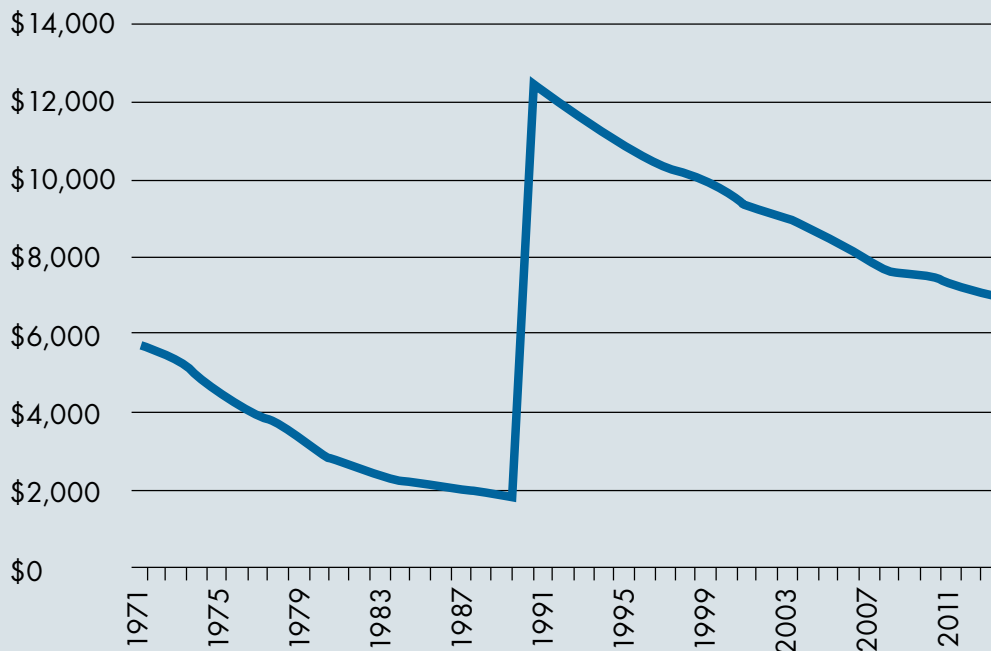
Legislators should set penalties so that employers cannot simply absorb them as if they were merely a cost of doing business. Effective deterrence would require that the imposed penalty at least recapture the amount of money that the employer “saved” by failing to comply, and take an additional chunk out of its profits—large

enough to put it in a significantly worse position than employers who complied.

■ Enhanced penalties for violations that cause or contribute to a death or serious bodily harm

When an employer's failure to abide by the law results in more than increasing the risk of injury—when it actually results in injury or death—enhanced penalties are appropriate. Legislators could mandate penalty ranges of \$20,000 to \$50,000 per serious violation and \$50,000 to \$250,000 per willful or repeat violation for violations that result in a worker's death. Those ranges are appropriate for violations that lead to serious bodily harm as well, since whether workers or killed or “simply” injured is often a matter of chance. More ambitious ranges or even flat mandatory penalties without a range might be feasible in some states.

Figure 1: Maximum Penalty OSH Act Serious Violation Adjusted for Inflation (2013 dollars)



*Note: Congress amended the OSH Act in 1990, increasing the maximum penalty for a serious violation from \$1,000 to \$7,000.

■ Inflation

All federal public health agencies except Fed-OSHA update their civil penalties to account for inflation, making automatic adjustments based on the Consumer Price Index once every four years.⁴⁶ Just as Congress should amend the law to cover Fed-OSHA, state legislatures could adopt a similar statute to cover state-plan agencies.

■ Repeat offenders

The mandatory minimum penalty for willful violations should be extended to repeat violations, to ensure chronic violators receive more than just a slap on the wrist.

SOLUTION: MANDATORY MINIMUM PENALTIES FOR CERTAIN PERSISTENT HAZARDS



Some specific and deadly OHS violations recur with disturbing regularity, despite the obvious nature of the hazard and the existence of clear safety standards or well-known methods of mitigating the hazard. These violations, described in detail in the box below, are likely to lead to injuries and fatalities by exposure to poison gases in a confined space, cave-ins of unsupported holes or trenches that trap the people digging them, crushing or suffocation in a grain storage bin or silo, and mangling or crushing by a machine that was not guarded.

States should adopt special mandatory minimum penalties to deter these violations. Given the nature of the hazards and the obvious and simple prevention measures available, mandatory minimum penalties should be set at three-quarters of the relevant maximum penalty for the violation at issue (i.e., serious, willful, repeat). Whether the violations are discovered during a routine inspection or in the aftermath of a fatality or serious injury, they should be

subject to the new mandatory minimums. These minimums would send a clear message to employers that they will pay a substantial amount if they continue to disregard these well-known hazards.

Advocates may want to consider other hazards that warrant mandatory minimum penalties. High-profile fatalities or catastrophes may provoke sufficient public outrage that legislators will become inclined to enact mandatory minimums for violations like the ones that caused those events.

SOLUTION: IMPROVE PENALTY CALCULATIONS AND ELIMINATE UNWARRANTED REDUCTIONS



Legislators can further strengthen civil penalties by putting constraints on OHS agencies' penalty-adjustment policies. As noted above, OHS agencies must consider an employer's size, history of compliance, and "good faith" before proposing penalties. A law increasing the maximum available penalties may not have any real impact if state-plan OHS agencies continue routinely to reduce penalties by significant amounts for such reasons.

One approach to improving penalty calculations is to discontinue the use of reductions that have essentially become entitlements. OHS officials apply some reductions to virtually every citation thus undercutting any meaningful incentive for employers to improve their safety practices. Advocates could directly lobby their state-plan OHS agencies to stop this practice. However, the best way to ensure that these changes become permanent would be to convince the state legislature to prohibit such unwarranted reductions by law.

The most powerful change that state-plan states could make would be to eliminate the require-

Examples of Violations for which Mandatory Minimum Fines Are Warranted

Confined Spaces: Confined spaces, such as manholes, cargo tanks, sewer lines, and pipes, can be especially dangerous places to work. These enclosed areas can often contain poisonous gases and not enough oxygen. Employers are required to train workers who are expected to enter a confined space and provide them with a monitoring device to test for gases while they are inside of it. If the atmosphere in the confined space is hazardous, it must be ventilated or otherwise purged to ensure it is not dangerous before a worker can enter the space. When a worker enters a confined space, another trained individual must remain outside the confined space to keep an eye on the worker. Confined spaces can be unpredictable, and someone needs to be able to begin appropriate rescue procedures if the worker inside the space shows signs of being overcome by poison gases. The employer must ensure that training for rescue procedures is conducted and the equipment necessary for a safe rescue is available. An OSHA regulation designed to save the lives of workers who have to enter confined spaces has been on the books since 1993. (29 CFR 1910.146)

Trenching: Working inside a deep dirt hole that is not properly secured can be deadly. If the soil caves in, a worker can be buried alive, or suffocate while others attempt a rescue. Employers are required to take a number of steps before any worker is allowed to enter a trench that is more than five feet deep. When a worker is supposed to enter a trench, an individual designated by the employer who has received special training must examine the trench's condition. It must be inspected daily, or whenever conditions change in the trench or in the surrounding area. Depending on the trench depth, the specially trained individual will also determine whether the trench needs to be made with a particular design or reinforced with special barriers to prevent a cave-in. Employers are also required to ensure that workers have a way to safely enter and exit the trench, such as ladder or ramp. An OSHA regulation designed to save the lives of workers from trench collapses has been on the books since 1989. (29 CFR 1926.650 – 1926.652)

Grain handling: Grain silos (tall and skinny) and grain bins (round and squat) are often part of the scenery in farming communities. These structures can hold hundreds of thousands of bushels of corn, wheat, rice, soybeans, and other dried crops. When workers are required to enter them without the proper equipment and training, the silos and bins can be deadly. The grain can behave like quicksand, pulling a worker in to die from suffocation. Employers are required to provide workers with a body harness and lifeline that is fastened before the worker enters the grain bin. Another trained individual must be stationed outside the structure and must keep the worker in constant sight. Toxic gases can also accumulate in grain bins and silos. Employers are required to provide the appropriate equipment to allow workers to test the air inside the bin for enough oxygen. An OSHA regulation designed to save the lives of workers who enter grain storage structures has been on the books since 1987. (29 CFR 1910.272)

Safety guards: Many pieces of machinery—from saws at lumberyards and punch presses in manufacturing, to meat slicers, mortar mixers, and industrial garbage compactors—have guarding systems that prevent workers from being struck by or caught in the equipment. Some guards create a barrier between the moving parts and the user, while others use light sensors, tripping devices, or other electronics to prevent the machinery from operating until a worker's hands or other body parts are out of the danger zone. Employers are responsible for ensuring that all machines and tools are equipped with effective guarding systems and that those systems are maintained. Machine guarding is one of the oldest safety practices put in place to protect workers' limbs and lives. Fed-OSHA's standards on guarding systems date back to 1970. (OSHA 29 CFR 1910.212)



ment that OHS agencies consider the size, history, and good-faith penalty-reduction factors. If it is not possible to convince a state legislature to establish mandatory minimum penalties for particular violations or to increase statutory maximum penalties across the board, eliminating the penalty reduction factors would ensure that current maximum penalties attach to all cited violations, effectively increasing penalties. As inflation has eroded the real cost of penalties and agency budget cuts make it less likely that inspection histories provide any meaningful insight into a company's OHS record, the penalty reduction factors have become less justifiable.

More targeted reforms may be easier to push through a legislature. One fix would be to prohibit agencies from applying the maximum allowed reduction for employer size when the employer has a history of serious violations. Another fix would be to eliminate reductions that reward the employer for doing what it should already be required to do—bring its operations into compliance with the law. For example, states could abandon reductions for “cooperating” with the agency, and for quickly fixing hazards.⁴⁷ After all, drivers cannot get a reduced fine on a speeding ticket by politely promising the officer that they will pay their ticket within

the allowed time period and observe the speed limit henceforth.

An even more limited approach to improving penalty calculations is to ensure that all state-plan OHS agencies have adopted the most recent Fed-OSHA penalty-reduction policies. In October 2010, Fed-OSHA improved its policies for calculating and adjusting penalties. Since the changes were put into effect, the average Fed-OSHA penalty has more than doubled, although penalty amounts remain far below the statutory maximums. State legislators could instruct state-plan OHS agencies to adopt the same policies as Fed-OSHA, which include:

- **Higher gravity-based penalties for serious violations**

For each violation, Fed-OSHA selects a baseline penalty from which other reductions are applied. Known as the “gravity-based penalty,” it is tied to the severity of the hazard involved and the probability that an injury or illness will result. The gravity-based penalty is only set at the statutory maximum in limited cases where there is a heightened probability of injury from a high-severity hazard. Fed-OSHA's new penalty policy increased the gravity-based penalties for all other serious violations. For example, the gravity-based penalty for the lowest-gravity serious violation is now \$3,000 instead of \$1,500.

- **An extended look-back period for prior violations**

Limited agency resources mean that employers do not often see OHS inspectors, so if agencies consider an employer's history over too short a period of time, the data will be sparse and misleading. Fed-OSHA now looks for violations over the past five years (the old look-back period was three years).

■ Limited penalty reductions for medium-sized employers

Fed-OSHA does not allow size-based penalty reductions for employers with more than 250 employees. The 2010 penalty policy also limited reductions for employers with 26-250 employees, allowing no more than a 30-percent reduction.

■ Serial, rather than summed, reductions

Fed-OSHA now applies the size, history, and good faith reductions one after another, rather than summing the percentages together and reducing the gravity-based penalty by the total percentage. As a result, the cumulative effect of the reductions is diminished.

Although Fed-OSHA recommended that states adopt similar reforms to their penalty calculation policies, only two states (Nevada and Wyoming) have done so as of this writing.

Advocates should argue that the states that have not adopted these administrative changes do not have a program that is “at least as effective” as Fed-OSHA, a requirement established by the OSH Act.⁴⁸ Advocates could press this point and urge state policymakers to match or exceed Fed-OSHA’s policies.

CHALLENGES

If history is any guide, the business community will strongly resist any effort to increase fines, framing the issue as one of severe government overreach. They will likely argue that the new penalty ranges and mandatory minimums will strain already struggling businesses, require them to cut jobs, and prevent economic growth. Advocates can counter this rhetoric by focusing on the high rate of workplace injuries and fatalities that have gone undeterred by existing penalties and on the massive disparity between outdated OSH Act penalties and the much more



severe penalties available for environmental and financial violations.

Mandatory minimums for particular kinds of hazards are likely to be especially controversial, with some industries claiming to have been unfairly targeted for high penalties. In deciding which hazards are appropriate for mandatory minimums, advocates should select ones that will resonate with the public and policymakers. Even the business community should be able to agree that certain kinds of violations are so obviously dangerous that only truly bad actors would allow them to occur, and that the only response that stands a chance of deterring bad actors would be the guarantee of a severe penalty in every case.

Advocates may also face strong opposition from the state agencies themselves. Most of the state-plan states objected when Fed-OSHA recommended in 2010 that they adopt the new methods for calculating penalties. They disagreed with the wisdom of increasing civil penalties, arguing that it would lead employers to challenge citations and penalties much more frequently.⁴⁹ But that argument, taken to its logical conclusion, suggests that civil penalties must be kept so low that employers find them virtually unobjectionable—not worth contesting, and by the same token, not high enough to deter future violations. Avoiding lengthy legal challenges is no excuse for maintaining inadequate penalties. Instead, states should consider ways to reform their appeals process to prevent employers from wasting state resources on frivolous challenges and ensure that legitimate challenges are heard and resolved promptly.

Small business associations and OHS agencies may complain that even modestly increasing penalty amounts will adversely impact small employers, since large businesses are better able to absorb even the highest amounts. But employers do not have a license to ignore worker safety standards just because they are “small,” and penalty amounts are so low that they fail to deter some small businesses from violating the law. A worker who may be killed on the job does not care if his employer is a small business or a Fortune 500 company.

EXAMPLES

Several states have set mandatory minimum penalties for violations that cause or contribute to a worker’s death. For example, Virginia’s OHS program does not permit any penalty reductions for such violations; instead, it automatically assesses the maximum allowable penalty in all cases: \$7,000 for a serious violation and \$70,000 for a willful or repeat violation.⁵⁰ In 2010, the Minnesota legislature adopted a law that set minimum non-negotiable penalties for fatality cases: \$25,000 for a serious violation and \$50,000 for a willful or repeat violation.⁵¹ Minnesota also has a mandatory minimum penalty of \$25,000 for all willful violations by employers with more than 50 employees.⁵²

Some states already impose mandatory minimum penalties for violations related to certain kinds of hazards. For instance, California applies a \$140,000 penalty, which is not subject to any adjustment, for serious or willful repeat violations of any crane standard.⁵³

Expanded Criminal Liability: Treating Egregious Workplace Deaths, Injuries, and Violations Like the Crimes They Are

PROBLEM

OHS agencies' enforcement cases almost never lead to criminal charges, even though many cases exhibit the basic characteristics that, in any other setting, would be considered criminal acts. If you run down a child while driving drunk, you are prosecuted in a criminal court. The consequences should be no less severe when a boss sends a worker to the edge of a rooftop without a harness. An average of 40 workers are killed each year after falling from residential roofs, despite how easily preventable such incidents are. Fatal falls and many other workplace deaths are no different from the cases of reckless homicide or involuntary manslaughter that fill local courts' dockets—the only distinction is that they occur on the job.

The prospect of criminal liability can have a uniquely powerful deterrent effect against employers who put their workers at risk. No company wants to face the stigma of criminal investigation and prosecution (which is often more damaging than the fines), and nothing scares individual bad actors like the thought of time in prison. But so far, employers have had little reason to worry: Prosecutors seldom pursue criminal penalties for OHS misconduct, except perhaps in the most extreme cases.

Such prosecutions are so rare that the Department of Justice, which handles criminal cases for the federal OHS agencies, sent shockwaves through the legal world when it announced it was opening investigations into the disasters at Massey's Upper Big Branch mine and BP's Gulf spill drilling site. Both cases offered copious evidence of systemic corporate dysfunction and a

degree of callousness toward worker safety that all but demanded ambitious criminal charges against the companies and several mid-level managers. But it remains to be seen whether prosecutors will be able to pursue indictments against the high-level managers and executives who drove their companies to catastrophe, since the dearth of previous criminal cases under the federal OHS statutes leaves many legal issues unclear. The fact that it takes this kind of massive tragedy to pique the Justice Department's interest in prosecuting employers following worker deaths underscores the various legal obstacles that make it difficult to pursue criminal penalties:

■ High bar to filing charges

Under the OSH Act and most state plans, prosecutors may only file criminal charges for violations classified as "willful," and only in cases in which the willful violation led to a worker's death. A willful classification requires prosecutors to produce a great deal of evidence to show that the employer acted either with intentional disregard of the requirements of the law or with plain indifference to employee safety.

■ Inadequate prison terms and fines

The OSH Act and most state-plan OHS laws only allow judges and juries to impose a maximum prison term of just six months for a first conviction, or one year for additional convictions. In most state-plan states, the crimes are deemed misdemeanors, with felony convictions barred by the law. In addition, the maximum fines available under state-plan OHS laws are often trivial and out of date. In 1984, Congress

standardized OSH Act fines to be in line with penalties for other federal offenses, resulting in maximum fines of up to \$250,000 for individuals and \$500,000 for organizations.⁵⁴ But many state-plan OHS laws still reflect the original limits specified in the 1970 OSH Act: \$10,000 for a first conviction and \$20,000 for subsequent ones.

■ Legal hurdles to prosecuting corporations for manslaughter

A criminal prosecution for manslaughter (the unintentional killing of a person resulting from recklessness or criminal negligence) carries the moral condemnation of the community and can permanently damage a company's reputation and financial standing, all of which offer additional deterrence value. Often, when a worker dies on the job, the corporation itself deserves to be criminally prosecuted for manslaughter, apart from any charges brought against its individual executives or managers.⁵⁵ Many workplace deaths are the result of underlying corporate policies and practices that put profit over protection and create conditions of unacceptable risk—for example, relentless demands for faster and cheaper work, poor training and supervision, and “siloed” management structures that spread decision-making authority so thin among multiple actors that no one is accountable. But the existing framework of criminal law makes such prosecution exceedingly difficult. Courts in some jurisdictions are still hesitant to conclude that corporations can be held liable under manslaughter statutes. More importantly, restrictive ideas of legal causation may prevent courts from finding the necessary link between the corporation's misconduct and the sequence of events that directly resulted in the death.⁵⁶ Corporate prosecutions tend to be skewed toward small businesses, where chains of authority are easier to identify.⁵⁷

SOLUTION: EXPAND THE SCOPE OF CRIMINAL LIABILITY AND SET STEEPER PENALTIES



State legislatures in state-plan states should update their OHS laws to strengthen criminal sanctions in three ways. First, criminal penalties should be available to prosecutors not only for hard-to-prove willful violations in fatality cases, but also for knowing and negligent violations in cases where the violation has the potential to cause death or serious injury. Most OSH Act violations classified as “serious” would be eligible for criminal prosecution under the knowing-or-negligent standard. To establish a serious violation of the law, Fed-OSHA bears the burden of proving that an employer either knew or could have known, with the exercise of reasonable diligence, of the physical circumstances that violate the Act. This standard tracks the well-established concept of negligence in criminal law, which requires prosecutors to show that the defendant failed to take the level of care that a reasonably prudent person would take in the same circumstances. Second, the strongest criminal penalties should be available not just when the violation causes a death, but also when it causes serious bodily harm. Such misconduct should be deemed a felony, not a misdemeanor, to reflect the seriousness of the offense. Third, the maximum prison terms and criminal fines available for OHS violations must be substantially increased to effectively deter bad actors and send prosecutors the message that these cases are worth pursuing.

State legislators could accomplish these three goals by establishing a criminal penalty structure with the following elements:⁵⁸

Criminal Sanctions Outside the OHS World

In contrast to OHS laws' "willful" trigger for criminal liability, many environmental statutes extend criminal liability to "knowing" violations of the law that put a person in imminent danger of death or serious harm. In that context, a "knowing" violation is one in which the defendant was aware of the facts that constitute the violation—a conscious and informed action, as opposed to an accident or mistake—regardless of whether the defendant knew that the action was actually against the law.

Maximum sentences under OHS laws pale in comparison to other laws that provide for 15-to-30-year maximum sentences—even where no one directly lost his or her life—for mail fraud, counterfeiting, and violations of certain environmental protection laws. Shipping illegally-obtained fish or plants across state lines can land someone in prison for five years—ten times the maximum prison term for a willful OHS violation that kills a human being. (Lacey Act, 16 U.S.C. § 3373(d)(1))

■ **Knowing or willful violations that cause or contribute to death or serious bodily harm**

A felony conviction should be possible under these circumstances, and the maximum prison term should be 10 years if a worker dies or 5 years in the case of a worker suffering serious bodily harm. Fines should also be on the table, with a maximum of \$250,000 per violation for individuals. For organizations (including corporations), the maximum fines should be much greater: up to \$1.5 million for the first conviction; between \$500,000 and \$2.5 million per violation if the organization had a previous conviction for a knowing or negligent violation that didn't result in death or serious harm; and between \$1 million and \$3.5 million per violation if it's the organization's second conviction for the same crime in seven years.

■ **Negligent or knowing violations with the potential to cause death or serious injury**

A misdemeanor conviction should be possible in these cases, and the maximum prison term should be six months. Individuals should be

subject to criminal fines of up to \$5,000 per violation. Organizations should be liable for criminal fines of up to \$10,000 per violation.

■ **Repeat violations with the potential to cause death or serious injury**

A misdemeanor conviction should be possible here, and the maximum prison term should be one year. Individuals should be subject to criminal fines of up to \$100,000 per violation. Organizations should be liable for criminal fines of up to \$200,000 per violation.

■ **Knowingly making false statements in documents submitted to an OHS agency, or interfering with a fatality investigation**

A felony conviction should be possible for these violations, and the maximum prison term should be five years. Individuals should be subject to criminal fines of up to \$250,000. Organizations should be liable for criminal fines of up to \$500,000.

SOLUTION: CORPORATE MANSLAUGHTER LAWS



State legislators in every state could establish a “corporate manslaughter law,” which would make it significantly easier to hold corporations criminally liable for the deaths of their workers. Governments abroad are increasingly adopting such laws, and they have begun to receive some attention in the United States, as well.

While the laws vary in their design, an effective proposal should include at least the following essential elements:⁵⁹

■ Definition of the offense

Liability should result whenever a corporation knowingly, recklessly, or negligently causes a death through the conditions that it creates or tolerates. One critical design choice will be how high up the corporate ladder the jury must look to find illegal conduct that can be attributed to the corporation. The law should focus on the conduct of owners and management officials (with responsibilities across the organization or within the particular business unit), but it could also include the conduct of supervisors, perhaps for a lesser-degree offense.

■ Evidence

Because corporate misconduct takes many forms, the law should permit consideration of a broad range of evidence. First, juries should examine the knowledge and conduct of individual actors who had a duty to communicate information to others in the company. A particularly innovative approach would also consider the “collective knowledge” of the corporation, to account for the diffuse nature of information and authority in modern corporations. Second, prior violations of OHS regulations could be introduced to show the organization had

been made aware of its dangerous conditions. Third, the law should explicitly allow evidence of “corporate culture” to be introduced—foreign jurisdictions have defined this term to include the corporation’s attitudes, policies, systems, and accepted practices.

■ Forms of punishment

The law should authorize not only heavy fines (millions of dollars per death), but also a set of flexible probationary orders that could be tailored to address fundamental deficiencies in the corporation’s management. Courts could require corporations to submit to judicially supervised restructuring, to institute an effective OHS program with meaningful worker involvement, or to fund independent OHS research on a subject related to the corporation’s misconduct.

Typically, corporate manslaughter laws cover not only employee deaths, but also the deaths of consumers and members of the general public caused by corporations. So, advocates should be able to garner additional support for such a campaign from environmental, consumer, social justice, and other public interest groups.

CHALLENGES

The business community is sure to argue that increasing criminal penalties would “over-deter” corporate action, chilling legitimate business conduct and increasing the costs of doing business, to the point of destroying industries or forcing their relocation. Criminal sanctions, they would say, impose a lasting stigma that companies are unable to shake off—and excessive fines end up punishing people who did nothing wrong, including shareholders who lose the value of their stock, employees who might be laid off, and consumers who have to pay higher prices.

Advocates can counter these specious economic arguments by emphasizing that criminal penalties would only apply to employers that are truly blameworthy—those that have clearly violated legal and moral boundaries. Indeed, prosecutors will have to satisfy the most rigorous standard of proof (“beyond a reasonable doubt”) in order to obtain a conviction, which helps to ensure that criminal liability will be imposed fairly and accurately.

Any resulting stigma is not an unfortunate by-product to be avoided, but rather an intended consequence of criminal punishment, showing society’s intense disapproval. If employers become overly cautious about OHS, so much the better—it would serve as a much-needed counterweight to their strong profit incentives to cut corners. The potential for extreme losses will pressure shareholders to monitor corporate practices and demand improvements, and consumer price increases will be limited by the employer’s need to remain competitive.⁶⁰

With respect to corporate manslaughter laws, one of the biggest challenges may come after such a law is adopted: It will be necessary to ensure that prosecutors aggressively take advantage of the law’s new possibilities. Most prosecutions under corporate manslaughter laws in other countries still target relatively small companies, convictions have been rare, and the resulting fines are still small.⁶¹ To avoid those problems in the United States, workers’ advocates will need to push for thorough fatality investigations that can facilitate corporate manslaughter prosecutions by, for instance, encouraging greater scrutiny of “corporate culture” (see recommendations later in this manual).

EXAMPLES: BROADER CRIMINAL LIABILITY AND STEEPER PENALTIES

Among state-plan states, California has the broadest framework for criminal penalties: It

extends misdemeanor liability to knowing and negligent violations of OHS standards, provides for high corporate fines, and permits up to four years in prison for repeat willful violations. Other noteworthy state-plan states include Arizona (also criminalizes knowing violations), Minnesota (permits criminal penalties for any willful or repeat violation, regardless of whether an employee died), Puerto Rico (permits prison sentences of up to four-and-a-half years for a second conviction), and Michigan (prison sentences of up to three years for a second conviction).

In 2006, an Indiana state lawmaker introduced a widely discussed bill that would have authorized, among other things, a set of new criminal penalties against managers, corporate officers, and members of boards of directors who violate OHS rules—not as ambitious as the penalty framework proposed above, but nevertheless very significant. Under the bill, reckless, knowing, and intentional violations resulting in serious bodily injury would be misdemeanors, punishable by up to one year in prison. Violations resulting in death would be felonies, punishable by imprisonment up to three years (for reckless violations) or eight years (for knowing or intentional violations).⁶²

EXAMPLES: CORPORATE MANSLAUGHTER LAWS

The United Kingdom adopted a new system in 2007 for corporate manslaughter that shares many of the features discussed above, although several of its standards are harder to satisfy: Unlike the model law given above, the United Kingdom law (1) requires a “gross breach” (conduct more extreme than ordinary negligence) and (2) requires the involvement of “senior management.”⁶³ As of early 2014, prosecutors had obtained only five convictions under the law. However, use of the law may be accelerat-

ing: Corporate manslaughter cases increased by 40 percent from 2011 to 2012, and the last four convictions all occurred within the past two years.⁶⁴ Similar reforms have recently been adopted in Canada and in the Australian Capital Territory.⁶⁵

The 2006 Indiana bill mentioned above would also have authorized charges of corporate manslaughter against organizations for reckless,

knowing, and intentional violations of workplace OHS rules. However, it did not allow for the use of new kinds of evidence (such as evidence of corporate culture or collective knowledge), and it did not provide for new forms of corporate punishment.⁶⁶ The bill has been re-introduced several times (most recently in 2012) but so far has not made it past committee.

Killed on the Job: A Criminal Act

On July 28, 2010, the lives of Catherine Rylatt and her family changed forever. That was the day her nephew, Alex Pacas, was buried alive in a grain storage bin in rural Illinois. Alex, 19, had taken a summer job with his friends Wyatt Whitebread, 14, Chris Lawton, 15, and Will Piper, 20 at a corn storage facility run by Haasbach LLC in Mt. Carroll, Illinois. The boys did various tasks around the facility, including entering the massive grain storage bins to break up large chunks of rotten corn so that it could flow freely toward the mechanisms that transfer corn out of the bins. The most dangerous way to do this, often called “walking down the grain,” involves climbing atop the grain while equipment is running and the grain is moving. Fed-OSHA regulations prohibit walking down the grain because the practice is so dangerous. Regulations also require employers to provide workers with special training and equipment before entering grain storage bins.

Alex and the other boys had received just five minutes of “instruction” before beginning their jobs and were never informed about the safety harnesses and lifelines that sat dusty in a storage shed a few yards away from the scene. Not long after they began walking down the grain, three of the boys felt the corn give way beneath them. As Wyatt sank below the surface, Alex tried to save him, only to be pulled under himself. With his last breaths before the corn filled his lungs, Alex recited the Lord’s Prayer and told his friends about his wish to see his brothers graduate high school.

Fed-OSHA investigators cited Haasbach for a dozen willful violations that led directly to the boys’ deaths, yet the Department of Justice declined to file criminal charges. Alex’s aunt, like many other family members who lose loved ones to workplace tragedies, was shocked to learn that Fed-OSHA’s approach to enforcement is, in essence, “an administrative process—it is not about the victims.”

Thousands of other children take on part-time farming jobs every year, working for employers who often treat them as if they have knowledge and maturity beyond their years. Safety is not always the first order of business, and enforcement agencies that fail to take strong actions against employers who violate the law only exacerbate the problem. “A stronger message” notes Rylatt, “would be sent by actions from the criminal justice system.”

Shaming Scofflaw Employers and Industries: Using Government Data Effectively

PROBLEM

Convincing legislators to strengthen civil and criminal penalties is difficult work, and it generally requires sustained advocacy over long periods of time. For that reason, it is useful for advocates to also use short-term tactics to penalize employers who put workers at risk. Because many companies go to great lengths to cultivate a positive public image, the effective use of “shaming”—bringing attention to businesses’ acts of wrongdoing—can push companies to improve their practices and fulfill their legal duty to provide a safe and healthy workplace. Public pressure through shaming is especially important because the weak enforcement tools available to OHS agencies have insufficient deterrent effect on their own. Educating the public and policymakers about the worker safety and health records of particular companies (or even entire industries, such as construction or agriculture) can also help bring needed attention to more general worker health and safety problems, thus spurring needed reforms.

Information about the health and safety records of employers and dangerous industries can help advocates pressure employers to improve, and can strengthen campaigns for stronger worker protection laws. Too often, however, available OHS data are difficult to find, are of questionable accuracy or reliability, or are presented in ways that make them difficult to use effectively. As a result, these data often are under-utilized by advocates, the media, and policymakers for informing and influencing policy debates to strengthen OHS protections.

SOLUTION



Workers’ advocates can enhance their shaming campaign efforts by familiarizing themselves with available government data sources and by understanding those sources’ strengths and weaknesses. Statistics from the data sources can then help advocates convince policymakers, the media, and allied advocacy organizations to address workplace health and safety issues.

Available OHS data sources include:

- **The Bureau of Labor Statistics (BLS) Census of Fatal Occupational Injuries (CFOI)**⁶⁷

The annual CFOI compiles a range of data on all fatal work-related injuries, including demographic data in aggregate form on the victims (e.g., the percentage of victims in each gender, age range, and occupational category). The CFOI also provides aggregate information on the industries involved, nature of the injuries (e.g., fall from height, struck by equipment, and asphyxiation). BLS presents some of the data in charts and graphs to help users identify trends in specific industries and occupations. Some of the data can be queried to allow users to customize reports to support their campaigns. BLS fails to make the companies’ and victims’ names available, even though the agency has that information, and even though it is a matter of public record. Another problem is that the CFOI fails to include data on deaths from work-related diseases.

■ **BLS Survey of Occupational Illness and Injury (SOII)**⁶⁸

The SOII attempts to provide an annual estimate of injury and illness cases and rates by industry classification codes. The SOII data are not an actual count, though, since the vast majority of employers are not required to submit their injury and illness records to BLS or OHS agencies. Instead, the SOII estimate is generated by a sample of employer-provided injury and illness records. BLS's annual SOII report provides the estimated number of cases, nature of the injuries (e.g., burns and amputations), severity (based on days of restricted duty or lost time), and demographics on the injured or ill workers (e.g., gender and age range), as well as injury and illnesses rates to assist with comparisons between industries. As with the CFOI, the SOII can only be used to identify industry-wide and occupation-based trends. In addition to these limitations, well-conducted studies on the validity of SOII reveal that it undercounts injury and illness records by as much as 25 to 68 percent.⁶⁹ This is mainly because BLS gets its information from only a sample of employers, and relies on those employers to truthfully self-report on the injuries their workers experience.

■ **Fed-OSHA Reports of Fatalities and Catastrophes**⁷⁰

During the Obama Administration, Fed-OSHA began posting on its website initial reports of fatalities in which OHS agencies intend to conduct post-fatality inspections. The weekly reports (and annual summaries) give the date of the incident, name of the employer, location of the incident (city and state), and nature of the fatal injury. As presented on Fed-OSHA's website, the data are neither searchable nor sortable. Not all fatal work-related injuries are investigated; in fact, the majority are not. Even with its limitations, the weekly reports of fatalities and annual summaries include information that advocates may



find useful for shaming campaigns. Groups may want to join forces to push OHS agencies to disclose more complete fatality information.

■ **MSHA Accident Reports, “Fatalgrams,” Investigation Reports, and Enforcement Data**⁷¹

Within a week of a fatal injury involving a mine worker, the Mine Safety and Health Administration (MSHA) posts an initial report of a fatality on its website. The notice includes information about the mine site; employer and controlling company; and the worker's name, age, occupation, and years of experience. Information on other serious non-fatal and non-injury incidents—for example, explosions, unintended rock falls, and amputations—is also available on MSHA's website. MSHA's data retrieval system gives the public access to mine-specific data on each inspection conducted, including the violation cited, a hyperlink to the specific regulation at issue in the violation, the penalty assessed, and the disposition (or result) of the case. The system, however, is not designed to search records by other factors, such as the type or severity of the violation. Nevertheless,

the volume and specificity of the enforcement data made available to the public could be a model for other OHS agencies. Even advocates in “non-mining” localities may find these data sources useful, since they cover workers at stone quarries, which exist in nearly every county in the United States.

■ **Washington State Summary of Workplace Fatalities and Hospitalizations**⁷²

Similar to the Fed-OSHA Reports on fatalities and catastrophes, the State of Washington’s OHS program posts a report called “Fatalities Summaries,” which provides basic information about deaths resulting from workplace injuries and illnesses in the state. Both the fatalities and the hospitalizations summaries include information about the company involved and a general description of the incident. The hospitalizations summaries are searchable by industry and incident type. The summaries have the same general strengths and weaknesses as the Fed-OSHA reports. As the website warns, the summaries do not present a complete list of all work-related fatalities and hospitalizations that have occurred in the state, and as such these data systematically understate the extent of many of Washington’s workplace hazards.

■ **Tennessee Work Related Fatality Investigations**⁷³

On its website, Tennessee OSHA provides narratives for all of the fatality investigations it has conducted. (The agency updates the list annually, although resource constraints have delayed the posting of narratives for 2013 fatalities.) Each narrative provides a brief description of the incident, some basic details about the worker killed, and citations that Tennessee OSHA issued as a result of the investigation. Significantly, the narratives leave the employer unidentified. Another weakness of this source is

that the investigation records are not presented as a searchable database.

■ **Wyoming Fatal Accident Alerts**⁷⁴

The Wyoming Department of Workforce Services (DWS) posts alerts with brief summaries of on-the-job deaths and what the agency found while investigating these incidents. Like Tennessee OSHA, DWS posts incident descriptions without naming employers and does not have a searchable database. In addition, it has not posted new items since 2012. The DWS narratives list “Significant Factors” and “Recommendations” that can help other employers improve workplace safety.

■ **Fed-OSHA’s Severe Violator Enforcement Program (SVEP)**⁷⁵

Beginning in 2010, Fed-OSHA began to designate some particularly recalcitrant employers as “severe violators.” The agency’s criteria set a very high bar for an employer to receive the “severe violator” designation, such as repeat violations for certain standards and violations classified as willful. Fed-OSHA posts quarterly the names of the companies that have been designated “severe violators” and any enforcement actions against them.⁷⁶ Fed-OSHA has also directed state-plan states to create SVEP-like programs. To date, 17 of the 27 state-plan states have adopted programs identical or similar to Fed-OSHA’s SVEP.⁷⁷

■ **Fed-OSHA’s Occupational Safety and Health Information System (OIS)**⁷⁸

OIS is a tool that allows the public to search the enforcement histories of companies that have been subject to an OHS agency inspection. The search results provide information about each individual inspection, including the employer involved, the regulation violated, and any resulting citations and penalties. For inspections conducted by Fed-OSHA, the search results also

provide a hyperlink for each citation to the text of the health or safety standard that was violated. While advocates can use the OIS records data for shaming scofflaw employers, they have important limitations. OIS does not allow users to search or sort key data points—such as types of violations or penalty amounts—and that makes it difficult to draw broader conclusions about trends in workplace hazards. It does not provide information on whether the company has multiple worksites or is part of a larger corporate entity or conglomerate. The data can also be unreliable if the name of the company in the database is even slightly different than the name used by the individual doing the search (e.g., U.S. Steel Company instead of US Steel, Inc.).

■ **Department of Labor (DOL) Enforcement Database**⁷⁹

The DOL Enforcement Database pulls data from Fed-OSHA and MSHA data systems, as well as other U.S. Department of Labor enforcement agencies. It is organized and presented in a different format than Fed-OSHA's and MSHA's individual databases, and has more options to search and download the data.

Advocates may want to explore other data sources in their state—such as online business records databases maintained by state records offices—which might provide additional information on the health and safety histories of individual firms.

Where appropriate, advocates should consider employing shaming campaigns that make effective use of OHS data. Depending on how they are used, these data sources can help illustrate the extent of inexcusable workplace hazards and provide concrete instances of how particular hazards have harmed workers. These sources can add persuasive force to advocates' campaigns for tough enforcement actions against a scofflaw employer or for stronger

worker protection laws or standards, or for policies that bar purchasing or contracting with employers that have shameful records.

CHALLENGES

Business groups have argued shaming campaigns unfairly stigmatize companies and industries. They say the campaigns inhibit their ability to conduct business and, as a result, harm the economy. In particular, they argue that such campaigns improperly lead people to conclude that particular companies or industries do not adequately protect the health and safety of their workers, and they will insist they are not at fault. Many companies are quick to blame workers for their injuries, assert that “accidents happen,” and continue to do so long after the incident.

Without allowing the power of their messaging about injured workers to be undercut by debating such criticisms, advocates can respond by pointing out that employers themselves are well-positioned to avoid such risks by maintaining safe workplaces and by properly educating others about their worker health and safety records, if indeed their records can withstand scrutiny.

Separately, because of the limitations noted above, groups may encounter policymakers and reporters who don't regard injury rates of a firm or industry as being particularly high. Advocates may face challenges in explaining the limitations of the data, such as its reliance on self-reported injury-and-illness rates given by employers, and the fact that most workplaces never get a Fed-OSHA inspection. Some advocates may find that injury or illness records might actually undercut advocacy efforts, since these data understate injury rates. In any event, advocates should refer to the limitations in available OHS data as part of their efforts to push OHS agencies to disclose more information about worker

fatalities, such as the victims' names, along with a link to the related inspection records and resulting citations. In addition, advocates can focus not just on the data, but on the stories underlying the data—stories of individual workers hurt and killed on the job.

EXAMPLES

Several advocacy organizations and investigative journalists are already making effective use of existing OHS data sources to shame scofflaw employers or bring attention to particular hazards in inadequately regulated industries.

For example, members of the *Fe y Justicia* Worker Center have been engaged in a multi-year effort to address wage theft in the Houston, Texas. They recognize that some employers' labor-law abuses not only involved wage and hour violations, but also workplace health and safety hazards. The worker center reviewed Fed-OSHA's list of "Severe Violators" and identified at least one company with an egregious record of repeat violations that also had a record of wage theft. Worse still, the firm had a longstanding contract with the city of Houston for excavation projects and was receiving an average payment of \$1 million per month. The worker center collaborated with a local television reporter to expose the misdeeds. The worker center will be using this case, along with

others, in its efforts to get Houston to adopt a responsible-contractor ordinance.

United Support & Memorial for Workplace Fatalities (USMWF), a group of family members whose loved ones have suffered fatal work-related injuries, use OHS agency data in their advocacy activities. Fed-OSHA's OIS database provides information on whether post-fatality inspections resulted in any violations and the monetary penalties assessed with them. In some cases, the penalties paid have been as low as \$1,500. USMWF uses this information to shame OHS agencies for penalties reductions, and to fight, for example, for changes to raise the penalty maximums.

Investigative journalists, nurses, and other patient-care professionals have used BLS's SOII data to draw attention to the high rates of musculoskeletal injuries among health care professionals. These data have aided the push for state-based "safe patient handling" programs to ensure that nurses and other health care professionals have the appropriate tools, procedures, and training to lift and move patients safely. Nine states—California, Illinois, Maryland, Minnesota, Missouri, New Jersey, Rhode Island, Texas, and Washington—now require that health care facilities have comprehensive programs to ensure safe patient handling.⁸⁰

Chapter 3: **Strengthening Institutions**

In this section, we discuss how states can institutionalize the structures and procedures necessary to effectively pursue criminal cases against employers who violate OHS standards and to improve occupational fatality investigations. We also describe how government contracting procedures and local oversight of building codes are

underutilized means of protecting workers. We conclude with a recommendation that state-plan states conduct independent audits of their OHS agencies' work, which may provide advocates and state legislators with valuable information about how to improve the agencies' functioning.



Systematic Criminal Enforcement: Ensuring that Police and Prosecutors Prioritize Workplace Health and Safety

PROBLEM

Aside from the legal hurdles and inadequate penalties that make it difficult to hold employers criminally responsible for OHS incidents (addressed above), states lack the infrastructure to ensure that such cases are properly pursued. Workplace tragedies typically fall through the cracks of a criminal enforcement system that is preoccupied with guns and drugs. At an institutional level, prosecutors and law enforcement are not adequately engaged in the investigation of workplace fatalities and serious injuries. They generally lack both the training and the incentive to identify evidence that could suggest criminal wrongdoing by an employer. Instead, they too often view these potential crimes as blameless “accidents” and cede the investigation to the OHS agency.

The investigative follow-up to 23-year-old Erik Deighton’s death exemplifies the disregard that law enforcement officials often show for occupational fatalities. Deighton was crushed inside a plastic molding machine when it cycled on while he was attempting to clear an obstruction. Any number of employer failures may have contributed directly to this incident—hazardous work methods, a lack of safety training, or a lack of safeguards that guarantee the machine will not turn on while being serviced—many of which could rise to the level of criminal culpability. The response of local law enforcement, however, was sadly typical: After conducting a preliminary investigation and finding no evidence of a traditional “crime,” the police concluded that it fell under the jurisdiction of the state OHS agency.

“We’re done with it,” said the police captain. “It’s an unfortunate accident.”⁸¹

Incident investigations by agency inspectors typically lack the rigor and quality of a criminal investigation conducted by police and prosecutors, in terms of gathering evidence and interviewing witnesses. Also, OHS agency investigations tend to focus too narrowly on finding technical violations of regulatory standards, instead of examining the root causes of the incidents. While OHS agencies can refer a case to a local prosecutor (or, in Fed-OSHA’s case, to the Department of Justice) if they think the office may be able to charge the employer with a criminal offense, referrals are rare due to the perceived difficulty of building a winning case and a lack of institutional motivation to try.

SOLUTION



Sporadic criminal investigations and occasional prosecutions are insufficient to deter fatalities and injuries. Instead, criminal investigation and prosecution should be made regular components of state and local responses to workplace incidents and serious violations. Achieving that will require states to institutionalize the structures and procedures necessary to pursue these cases.

First, in state-plan states, state law should require OHS agency inspectors to immediately notify local prosecutors whenever they learn of a workplace fatality or serious injury. Because the criminal penalty system suggested earlier in this manual would enable misdemeanor charges for virtually all serious violations, even where

no one was injured, state-plan OHS agencies should devise a clear set of rules for deciding which of these violations to refer for possible prosecution. Perhaps agencies could focus on hazards that have been difficult to deter by other means (e.g., those that should be subject to mandatory-minimum civil penalties, as suggested earlier in this manual), or violations that exposed workers to particularly grave hazards or made it very likely that workers would be harmed. However, these referrals may not have much of an impact if local prosecutors have little experience in such incidents or lack the institutional motivation to investigate them.

A more ambitious structural reform, in either Fed-OSHA or state-plan jurisdictions, would be to establish an OHS section within the state or local prosecutor's office, similar to the "environmental crimes" sections found in many jurisdictions. This permanent, specialized unit would ensure that workplace fatalities, injuries, and serious violations do not get lost or ignored among all the other crimes considered by prosecutors. The attorneys and investigators assigned to the OHS section would, over time, develop expertise in these kinds of cases. The OHS section should be responsible for training law enforcement officials on how to investigate workplace incidents with an eye toward potential criminal prosecution.

Ideally, a deputy district attorney and an investigator from the office should be on call 24 hours a day to respond to reports of workplace fatalities or serious injuries. Once at the worksite, they would be responsible for directing the collection of all physical and testimonial evidence that might be useful in building a criminal case, in cooperation with the law enforcement officers on the scene.

Because most prosecutors are likely to be found in major cities, advocates may wish to campaign for an "OHS circuit prosecutor" program

to ensure equally effective enforcement in less-populated areas. The state would provide funding for a small team of roaming prosecutors to help crack down on workplace incidents and violations in rural areas, where local district attorneys typically lack the resources and expertise to prosecute anything but standard criminal cases.

Advocates can work with local lawmakers to require police departments to investigate all workplace fatalities as potential cases of manslaughter or reckless homicide, and in each case provide a written report to the OHS agency explaining whether such charges are appropriate. This requirement would ensure that police officers no longer view such fatalities as "just accidents." Work-related fatalities should not be viewed by law enforcement as distinct from all other deaths—exclusively under the jurisdiction of regulatory agencies—simply because they occur on the job.

CHALLENGES

Efforts to institutionalize a strong response to workplace fatalities, injuries, and other serious violations will face a number of challenges. Foremost among them will be social and cultural issues. The notion that workplace deaths are merely unfortunate "accidents" is so deeply entrenched that many communities may bristle at the thought of prosecutors treating well-regarded business owners like criminals. Circuit prosecutors brought in from other areas may be dismissed as outsiders, with no understanding of rural or industrial life.

Political pressure may also threaten these programs. If the company responsible for a fatality is a significant contributor to local political campaigns and/or one of the area's major employers, prosecutors may face intense pressure from up their chain of command to drop the case.⁸²



Resource constraints will also be a challenge. Creating an OHS section in the local prosecutor's office is likely to be a tough sell when state and local budgets are stretched thin, so advocates will need to make great efforts to raise the profile of workplace fatalities.

EXAMPLES

The best model for institutionalizing criminal enforcement is the Los Angeles County District Attorney's Office, which pioneered most of the reforms suggested above. In 1984, it became the first local prosecutor's office in the country to establish a section devoted to OHS-related crimes. The office then began educating law enforcement on techniques for investigating workplace fatalities by holding seminars and distributing training tapes.⁸³

The office's practice of conducting its own workplace investigations led to much more frequent criminal charges in L.A. County—brought in about 10 to 20 percent of all occupational fatalities—than in other counties where prosecu-

tors relied on case referrals from Cal/OSHA, California's state-plan OHS agency.⁸⁴ Utilizing its statutory authority, the office also filed charges for a number of serious violations where the risk of death was particularly high, even though no one had been injured (e.g., an "unshored" 18-foot-deep trench that had not collapsed).⁸⁵

Several other institutional innovations were also introduced in California. It is one of only a handful of states that require safety inspectors to automatically notify prosecutors of workplace fatalities.⁸⁶ Cal/OSHA includes a criminal Bureau of Investigations, which is made up largely of former police officers. And in 2001, California initiated a Circuit Prosecutor Project to help pursue criminal charges for workplace deaths in rural areas. Despite bringing several trailblazing cases, the small project faced intense resistance from judges and communities and was ultimately terminated.⁸⁷ A separate circuit project for environmental crimes is still in operation and would serve as a useful model for worker safety advocates.⁸⁸

Robust Fatality Investigations: Ensuring Effective Responses to Workplace Deaths

PROBLEM

Investigations of work-related fatalities by OHS agencies are not typically conducted with the depth, diligence, transparency, and family participation that the situations warrant. These problems prevent agencies from identifying the multiple factors that led to a fatality, holding the employer properly accountable, and gathering information that can lead to new rules to help prevent future incidents.

First, OHS fatality investigations often do not begin until many hours or even days after the death occurs. Under Fed-OSHA regulations—and virtually all the state plans as well—employers have up to eight hours to notify the agency of a work-related fatality or an incident causing hospitalization of three or more employees.⁸⁹ In other words, employers have ample time to disturb the “scene of the crime,” whether intentionally (by hiding evidence of a safety violation) or inadvertently (by cleaning up the area in order to allow work to continue). Employers can use that time to discuss the incident with the victim’s co-workers, intimidate them from speaking to investigators, or make them doubt their own recollections. Aside from any employer influence, witnesses may begin to forget crucial details if their statements are not taken immediately after the incident.

Second, when OHS agency inspectors show up to a fatality scene, their focus is too narrow. The goal of these investigations is typically limited to assessing the working conditions that immediately led to the fatality, with an emphasis on uncovering citable violations. Often, a worker’s death is the result of practices, policies, or management system failures that increase OHS

risks, a link that can only be identified through a comprehensive examination of the incident’s root causes. These failures may include inadequately controlled hazards like a lack of sufficient training, language barriers, ineffective maintenance of equipment, worker fatigue, or a culture that emphasizes speed and production over worker safety. The more superficial analysis typically conducted by OHS agencies is likely to lead to changes in the workplace that fail to resolve root causes and thus leave workers vulnerable to future injuries and fatalities.

Third, victims’ families and other workers’ advocates often feel shut out by the opaque investigation and settlement process carried out by OHS agencies. In 2012, Fed-OSHA issued a directive intended to improve communications with victims’ families. Under the new policy, Fed-OSHA contacts the family early in the process to obtain information that might be useful and to explain the process and timeline for the investigation. Fed-OSHA is then supposed to provide updates to the family, supply them with copies of citations issued to the employer, and explain the results once the investigation is closed.⁹⁰ But even with this new policy, family members still report being unable to obtain access to any information in Fed-OSHA’s case file (e.g., inspector’s notes, photographs, or surveillance camera footage) until all litigation between the employer and the agency is over, which is typically not until months or years after the fatality occurred. And families often feel their voices are not being heard, especially when they learn—after the fact—that the agency and its attorneys cut a deal with the employer in settlement negotiations, with drastically reduced penalties and downgraded violations.

SOLUTION: ENSURE THAT EVIDENCE IS PRESERVED



Advocates in state-plan jurisdictions should consider campaigning for a law that requires quicker reporting of workplace deaths.

Unions could also add such a requirement to collective bargaining agreements. There is no need for employers to be given an eight-hour window to make a simple phone call to the state agency. Employers should be required to report a work-related fatality no later than 15 minutes from the time they learn about it, or would have learned about it with diligent inquiry. This reporting requirement should also be triggered by incidents that cause serious bodily harm to one or more employees, especially if such incidents could potentially result in criminal liability under the state's law (one of the reforms we suggested earlier in this manual). The short timeframe will ensure that the agency has the best chance of arriving at the scene while the physical evidence is unchanged and the event is still fresh in witnesses' minds.

Employers should be required to take all appropriate measures to prevent the destruction or alteration of any evidence that might be useful in an investigation. A violation of this requirement should be classified as a felony, punishable by up to five years in prison (similar to the punishment for making false statements in OHS documents suggested earlier in this manual), to ensure executives and managers take it seriously.

SOLUTION: GIVE VICTIMS AND THEIR FAMILIES A GREATER VOICE



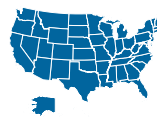
As a first step, advocates in state-plan jurisdictions should consider urging their state OHS agency to adopt Fed-OSHA's 2012 directive

on improving communications with families, if it has not done so already.⁹¹

But states should go significantly beyond that directive. State-plan OHS agencies should be required by law or regulation to give victims, their families, and their representatives the right to meet with the agency administrator to discuss the investigation before the agency's decision to issue a citation or take no action. Families should be informed within 24 hours of any notice from the employer that it is contesting a violation. They should be provided an opportunity to appear and make a statement in any proceedings before the agency's review commission. They should be notified of the date and time of all proceedings and receive an explanation of their rights to participate in them, before the agency enters into an agreement to modify or withdraw a citation. Families should have an opportunity to appear and make a statement before (or send a letter to) the parties conducting settlement negotiations. Families should also be notified that they can designate someone to be their representative with respect to their communications with the agency and their exercise of these rights.

While some of these rights could potentially be granted in an agency policy statement or a regulation, cementing them in a law would be the most enduring long-term solution.

SOLUTION: REQUIRE A PUBLIC INQUEST INTO THE CIRCUMSTANCES OF WORKPLACE DEATHS



Advocates in both Fed-OSHA and state-plan jurisdictions should consider urging legislation at the state or local level to require an inquest for each workplace fatality. Among the other benefits outlined below, inquests would ensure detailed investigation of the management system failures and other "root causes"

that are often overlooked during fatality investigations performed by OHS enforcement agencies.

Historically, coroner's inquests were routinely held after an individual's sudden or unexplained death. The purpose of the inquest was not to determine anyone's culpability for the death, or to assign civil or criminal liability, but rather to determine the causes and circumstances of the death. For the most part, the role of these inquests in the United States has been supplanted by modern forensic science, with many states converting from coroners to "medical examiners." In other countries, however, inquests are still common—and in some cases mandatory—following workplace fatalities.

A public inquest would be an extremely useful tool for improving the quality and transparency of investigations into workplace fatalities, for a number of reasons:

■ **Prompt factfinding**

An inquest should be held as soon as possible—and no later than six months—after the fatality. It would produce a detailed and definitive account of the facts surrounding the worker's death. This account could be introduced in subsequent civil lawsuits or criminal prosecutions, not as a showing of guilt or liability but as a credible explanation of what happened.

■ **Transparency and publicity**

The details of the worker's death would be aired in a public forum, permitting attendance by the worker's family and friends, as well as co-workers and members of the media. Attendees would be able to see the evidence presented, including inspector's notes, photographs, and video footage. The publicity surrounding an inquest could also help bring attention to each worker's individual story and the inadequacies of existing regulation.

■ **Public participation**

The inquest should be presided over by a local magistrate or state court judge. The judge would ultimately decide whom to call as witnesses, after taking suggestions from various parties. At the inquest, witnesses could be questioned not only by the judge, but by any interested parties, including relatives (and representatives) of the deceased worker. Local prosecutors, police officers, and agency inspectors could be called to give testimony based on their observations. The evidence would be heard by a jury of local residents, which would ultimately deliver a factual account of the fatality.

■ **Comprehensive analysis of the cause**

If there was a history of dangerous practices or "close calls" leading up to the fatality, or an attempt by other workers to bring attention to hazardous conditions, these facts would likely come out in witness testimony and become part of the factual account. This in-depth examination would help to identify root causes of workplace deaths and uncover dysfunctional corporate cultures. Over time, a series of inquests would produce a public record of deaths in particular industries, allowing observers to identify trends and patterns.

■ **Recommendations on record**

An inquest jury can make recommendations designed to prevent similar deaths in the future, including desirable changes to laws and regulations. While they would be non-binding, these recommendations would put employers, lawmakers, and regulators officially on notice about the changes that need to be made, which would be increasingly difficult to ignore as incidents continue to occur.



CHALLENGES

Advocates can expect varying levels of opposition to the solutions recommended above. Some employers may argue that, in the aftermath of a workplace fatality or serious injury, they have responsibilities that are far more pressing than quick reporting of the incident to a regulatory agency. They may claim that their immediate focus will be on calling and assisting emergency services and dealing with distraught workers. But those activities do not have to be done by the same person. An employer can assign one or more employees with the task of immediately reporting the incident, or the person who calls 911 can also call the OHS agency. Also, the reporting requirement is very minimal. All that is required is a phone call giving the name of the establishment, the time and location of the incident, the names of affected employees, and a brief description of what happened.⁹²

Employers will likely oppose granting new rights to victims and their family members on the grounds that emotional victim statements may unduly sway agency officials and decisionmakers at hearings. OHS agencies and their lawyers are likely to be wary of granting these rights as well, suggesting that they might hamper the

agency's flexibility and delay the timely resolution of cases. However, none of those concerns outweighs the family's right to be heard in review commission proceedings and settlement negotiations. Most victims and family members have acquired a deep understanding of the factors that contributed to the incident, and they typically have valuable ideas for improving worker protections that deserve to be considered. Family members consistently say that it is too late to help their loved one and so their greatest motivation is to see that the penalties and interventions help to ensure that another family does not have to endure the grief that they have experienced.

The biggest challenge to creating a system of public inquests is the novelty of such a process in modern U.S. law. The public and policymakers may have misconceptions about the purpose of the inquest and what it entails. States will likely object to an increased workload for magistrates and judges. And employers will strongly resist the idea of being questioned by victims' families and other parties in a public forum. Advocates will have to educate lawmakers on the value of inquests in other countries, using examples of reforms they have helped to bring about, the increased transparency they provide, and the great importance placed on them by workers, their families, and the public.

EXAMPLES: QUICK REPORTING AND EVIDENCE PRESERVATION

The most prominent example of a quick reporting requirement is found in federal mine safety rules. Since 2006, the Federal Mine Safety and Health Act (Mine Act) and Mine Safety and Health Administration (MSHA) regulations have required mine operators to report to MSHA within 15 minutes from the time they know or should know that a reportable incident has occurred. This requirement applies not only

Killed at Work: Surviving Family Left in the Dark

Sherman Holmes spent nearly his entire life in and around rural Michigan's stately forests. He worked in the logging industry after graduating high school in the 1970s, and when he moved on to a job as a bus driver and custodian for the local school system he spent his off hours in the woods hunting and fishing. His love for the outdoors was so strong that he went back to work in the logging industry after retiring from the school system. By that time, though, things had changed. Holmes was especially surprised by his employer's attitude toward workplace safety. In the 1970s, he was issued a hardhat and wore it every day. When he went to work for K & K Forest Products in 2010, the company told him they could not afford to provide him with a helmet.

On February 2, 2011, K & K sent Holmes and several other employees to fell groups of clumped trees before an impending storm. Under pressure to get the work done, Holmes and his co-workers were working quickly and close together—closer than OSHA regulations allow. Tragically, one of the felled trees struck Holmes in the head and killed him before an ambulance arrived on the scene.

Holmes's daughter Danielle Dole recounts a stream of indignities following her father's death that exemplify the problems that might be addressed by improvements to OHS agency policies. No one called Danielle or the rest of Holmes's family; they learned that he might be in danger only after seeing a cryptic message on Facebook: "A Holmes was killed in the woods today." Frantic, they called various hospitals and the police station in search of details. No representative from Michigan's state-plan OHS agency (MIOSHA) reached out to the family, who had to call several times to learn the status of the investigation into Holmes's death. The first contact the family had with anyone who had official knowledge of the incident was a call from K & K's insurance company, offering to issue them Holmes's final paycheck. Later, when the family went to collect a workers' compensation payment, Danielle recalled that no one could look them in the eye or give them any information about Holmes's death.

MIOSHA fined K & K Forest Products \$1,525 for Sherman Holmes's death. Holmes's daughter criticizes the small penalty, noting that the tree that killed her father garnered more than \$3,000 in profits for K & K. Dole is haunted by the way both the company and government officials treated her father's death. "Workers need advocates," she says. "We have nobody for us."

to fatalities, but other serious injury incidents, structural collapses, fires, and other very serious events and close calls.⁹³ An employer who fails to meet the 15-minute deadline faces a penalty between \$5,000 and \$65,000.⁹⁴ The Mine Act also contains provisions requiring the employer to preserve evidence that would assist in an investigation.⁹⁵

EXAMPLES: GIVING VICTIMS AND THEIR FAMILIES A GREATER VOICE

The Protecting America's Workers Act (PAWA) bill proposed a broad set of victims' rights provisions, which forms the basis for the reforms suggested above.⁹⁶ Also, MSHA already requires the assignment of a family liaison in fatal

mine incidents, as required by the 2006 MINER Act,⁹⁷ and MSHA meets with the victim’s family to explain any citations before the company receives them.

EXAMPLES: PUBLIC INQUESTS FOR WORKPLACE FATALITIES

In England and Wales, coroner’s inquests are held within six months of all workplace fatalities, since they are considered unnatural or sudden deaths.⁹⁸ And in Scotland, a unique form of inquest called a “fatal accident inquiry” is held after every workplace death—before a judge, with no jury. A public prosecutor presents evidence in the public interest, and other parties can be represented as well.⁹⁹

Some provinces in Canada require a coroner’s inquest for deaths in certain industries. In New Brunswick, an inquest is mandatory whenever someone dies at a “high-risk” workplace, such as a woodland operation, sawmill, lumber processing plant, food processing plant, fish processing plant, construction project site, or mining site.¹⁰⁰ In Ontario, inquests are mandatory for all construction- and mining-related fatalities; a jury of six citizens hears the case and can make recommendations to any entity. The coroner cannot require the recommendations to be adopted, but recommendations made to the Ministry of Labor are evaluated by a legislative committee that has the authority to adopt new regulations. Workers’ advocates throughout Canada have been fighting to require inquests for all workplace deaths.¹⁰¹



Responsible Contractor Laws: Holding Government Contractors Accountable for Worker Health and Safety

PROBLEM

Without robust policies to ensure that their contractors have effective OHS programs, government agencies run the risk of subsidizing construction firms that operate hazardous worksites. Agencies typically hire the lowest bidder, so companies that cut corners on worker health and safety on the assumption that it reduces project costs may be rewarded with lucrative government contracts. By failing to set a high standard for worker safety in their public works projects, state and local authorities are missing a major opportunity to reshape the market and incentivize safer worksites throughout the industry.

Construction is one of the most hazardous industries for workers. Frequent injuries and deaths from falls, electrocutions, and striking objects impose unbearably high costs on individuals, families, and local economies. Public Citizen estimates that, between 2008 and 2010, fatal and nonfatal construction injuries cost the states of Maryland \$713 million, Washington \$762 million, and California \$2.9 billion in medical services, lost productivity, administrative expenses, and lost quality of life.¹⁰²

The firms responsible for many of these injuries and fatalities, and those with histories of citations for unsafe practices, continue to receive contracts from state and local governments. For example, by early 2013 SER Construction Partners had been repeatedly cited for serious, repeat, and even willful violations of Fed-OSHA standards for excavation and trenching, and yet the company was still raking in \$20 million over a ten-month period from contracts with the City of Houston, not to mention a slew of

other Texas municipalities. And in late 2013, after a 28-year-old worker named Angel Garcia died after falling four stories while working on a large, publicly funded renovation project at Texas A&M University, the company was found to have violated Fed-OSHA's demolition standards. Just six months earlier, four workers had been seriously injured on the same campus when a construction site collapsed; the two companies responsible both had extensive rap sheets of Fed-OSHA violations before being hired to work on the university project.

SOLUTION



Advocates should campaign for legislation that would require state and local agencies to consider a bidder's OHS policies and performance before awarding public contracts. Such laws or ordinances could be enacted in both state-plan and Fed-OSHA states. The most effective way to implement this requirement would be through a prequalification process, in which firms are not allowed to enter bids until they pass a rigorous OHS evaluation. This requirement should apply to both general contractors and subcontractors seeking to work on public projects, to ensure that all the companies involved in managing the worksite pass muster.

The benefits of such a program, including improved worker safety, increased productivity, and lower insurance costs for employers, reach far beyond public contracts, since companies hoping to remain eligible for bidding would have to maintain a good OHS record in all their work—including projects done for private clients.

A committee of national experts has developed a strong model bill, included in a series of reports by Public Citizen, for state legislatures to use in designing a prequalification system.¹⁰³ The bill instructs the state labor department to develop, in consultation with stakeholders, a standardized questionnaire and rating system for evaluating potential bidders on objective criteria, including among other things:

■ **Planning**

Employers should use written, site-specific OHS plans.

■ **Leadership**

Employers should demonstrate a commitment by management to worker health and safety.

■ **Training**

Employers should provide effective and regularly scheduled OHS training of workers and supervisors, in a language and format that each employee can understand.

■ **Employee participation**

Employers should have policies that encourage workers to report unsafe conditions and work-related injuries. They should grant workers the right to immediately stop working in hazardous conditions.

■ **Compliance record**

The rating system considers numerous aspects of an employer's compliance record, including: Fed-OSHA lost-time incident rates and injury-and-illness rates; workers' compensation experience modification rates (EMRs, which reflect the number and value of a firm's workers' compensation claims, as compared to those of other firms in the same industry); citations and penalties by state and federal OHS agencies; and stop-work orders issued for violating OHS or other laws.

■ **Other factors**

The state labor department should consider any other factors it finds useful in evaluating OHS performance.

* * *

Building on this model bill, advocates may want to consider pushing for additional disclosures, such as: (1) records of any state or federal OHS agency inspections, regardless of the outcome; (2) copies of any settlement agreements with agencies; (3) decisions issued by OHS review commissions (or any other independent bodies that hear employers' challenges to OHS agency citations and penalties); and (4) records of "close call" incidents that could have resulted in worker injuries. Requiring potential bidders to disclose five years' worth of these items would provide agencies with broader context for a firm's compliance history. Firms should also be required to identify and submit any OHS policies they use that go beyond mere compliance with specific Fed-OSHA or state-plan standards. Also, bidders could be required to establish a whistleblower protection policy and to supply proof of workers' compensation coverage. The state department of labor should set a minimum passing score for the questionnaire, and bidders should have to undergo the evaluation at least once a year to remain eligible.

Advocates may also want to urge legislators to incorporate safety audits into the rating system. Insurance carriers often provide audits at the employer's request, in an effort to identify potential OHS violations and hazards so the employer can correct them before workers are injured and file workers' compensation claims, or an OHS agency discovers them upon inspection and imposes penalties. While the information in these audits is much more valuable than simple injury-and-illness statistics, requiring employers to submit their recent safety audits as part of the prequalification process could dis-

States with Existing OHS Prequalification Programs

- **California** does not require agencies to adopt a prequalification system, but for those that choose to, the state has developed a model questionnaire with scoring guidelines. (Cal. Pub. Cont. Code § 20101; http://www.dir.ca.gov/od_pub/prequal/PubWksPreQualModel.pdf)
- **Massachusetts** requires prequalification for contractors and subcontractors bidding on projects costing \$100,000 or more. A record of excessive safety violations or injuries found to qualify for workers' compensation may be cause for taking a company off the qualified list. (810 CMR 9.00 et seq.)
- **Connecticut** requires prequalification for projects costing more than \$500,000. (C.G.S. § 4a-100)
- **Tennessee** requires contractors (who have already been awarded contracts by the state's Department of Transportation) to certify that they have an effective Employee Safety and Health Program before work can begin. (Tennessee Department of Transportation, Construction Division, Contractor Employee Safety and Health Program, http://www.tdot.state.tn.us/construction/Safety_Health_Program/EmployeeSafetyandHealth.pdf)

courage employers from requesting the audits in the first place. Instead, contractors should be encouraged to submit any safety audits prepared in the past five years, along with information about any corrective actions they took in response. The state's prequalification scoring system could give potential bidders credit both for submitting the audits and for any corrective actions. This way, employers would have new incentives to monitor for hazards and to fix them when they are discovered.

Debarment, or prohibiting noncompliant companies from receiving contracts, is another critical issue. By creating the possibility that a firm would be prohibited from bidding on or receiving government contracts, state legislatures or local governments could establish significant economic incentives for firms to improve their health and safety programs. One justification for debarment is to preserve the integrity of the prequalification process. Prospective bidders would have strong incentives to submit false

records, so they should be required to attest to the accuracy of their responses under penalty of perjury. If the department discovers that a firm provided misleading information, the firm should be debarred for a substantial period of time (e.g., five years), meaning that it would be unable to bid on public contracts until the debarment expired. Another justification for debarment is to penalize continued non-compliance with OHS-related laws and regulations. Just as prequalification ensures that worker safety is taken into account at the front end of the public bid process, state and local agencies also need the authority to debar irresponsible contractors from bidding on future contracts based on chronic safety violations, either for a fixed period of time or permanently (depending on the severity of the violations).¹⁰⁴

So far, responsible contractor programs have focused almost exclusively on the construction industry, but there are many other industries, including health care and security, that con-

tract with state and local agencies and whose workers face serious job hazards. Advocates may want to explore ways to implement similar programs for these industries as well.

It may be useful to frame these contracting policies as a responsible use of taxpayer dollars. Such a strategy might help to make the idea more appealing to politically conservative policymakers and the broader public, for whom issues of worker safety may not resonate as strongly.

CHALLENGES

Trade associations fighting against prequalification programs say that rigorous prequalification is impractical. They claim that general contractors will not have time to adequately screen subcontractors and verify their safety records during the hectic bidding process, since they often have to accept sub-bids at the last minute.¹⁰⁵ However, if the state maintains a standing list of contractors and subcontractors that have already been prequalified, then general contractors can quickly and easily select from that list with confidence during the bidding process. Massachusetts, for example, has successfully implemented such a database.

The shortcomings of existing measures of employer safety also present a challenge. Because there are too few OHS inspectors, and because some employers fail to report on-the-job injuries, inspection records and official injury reports may not reflect the actual incidence of hazards or occupational injuries and illnesses. Employers might also argue that these OHS recordkeeping requirements were intended for monitoring industry-wide trends and writing better rules, not for singling out firms for different treatment based on their numbers.

Employers whose workers are represented by a union or other labor organization may have a reported injury-and-illness rate that is higher,

or history of OHS inspections that is greater, than non-union competitors. Workers with union backing may not feel as discouraged from reporting injuries and may be less likely to fear retaliation for reporting OHS hazards or for contacting a government agency for unresolved OHS problems. For these reasons, unionized firms may fear that too much emphasis on these metrics will put them at a competitive disadvantage in the bidding process. Labor unions might object as well because a firm's inability to secure contracts would result in fewer jobs for their members.

A similar concern arises with workers' compensation EMRs, because these reflect only the injuries for which workers file compensation claims. Many employers pressure workers into not filing claims for on-the-job injuries, and weighing this factor heavily in contracting decisions could result in employers increasing the pressure on workers to not file compensation claims.

These concerns can be addressed by designing a prequalification process that looks at a wide range of factors, not just a firm's reported injury rates, EMRs, and inspection histories. These metrics could be components of the evaluation, but they would be balanced by more qualitative factors, including a firm's written safety plan and its programs for employee training and participation.

EXAMPLES

Many states have prequalification programs in place, although most do not address issues of worker safety at all, instead focusing on companies' financial health, bonding capacity, and previous experience. The few programs that do address worker safety take into account only a limited set of factors, such as the firm's EMR, its history of citations, and its record of safety meetings. Moreover, these programs—with the exception of California's—do not guarantee that

the OHS factors will be consistently and meaningfully incorporated into the evaluation.

Public Citizen and the National Council for Occupational Safety and Health (National COSH) have been urging state and local officials to

consider bidders' safety records before awarding public contracts. Bills closely resembling the model legislation described above have been recently introduced in Maryland,¹⁰⁶ North Carolina,¹⁰⁷ and Tennessee.¹⁰⁸

Innovative Contracting Policies at the Local Level

- **Montgomery County, MD** has developed a detailed set of terms and conditions that govern OHS in construction contracts, which it recently updated to require prequalification of subcontractors as well.
(http://www6.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=8703)
- **Durham, NC** requires bidders to answer detailed questions about their compliance records and safety plans.
(Appendix B, <http://durhamnc.gov/ich/op/pwd/consproj/Documents/RainCatchers/All%20Apendices.pdf>)
- **Fairfax County, VA** evaluates bidders across a wide range of safety criteria, with false submissions resulting in disqualification, debarment, or contract termination.
(<http://www.fairfaxcounty.gov/dpwes/construction/bids/constrsafety.pdf>)
- **The Los Angeles Unified School District** uses a robust questionnaire that covers subjects from training documentation to reporting of "close call" incidents. Contractors' safety practices are also directly evaluated during the course of the work, and sometimes again upon completion, to provide more information for future prequalification efforts.
(<http://www.laschools.org/new-site/prequalification/forms>)
- **The New York City Council** in 2013 introduced an ordinance that would require all contractors and subcontractors applying for financial assistance on city development projects (1) to have apprenticeship programs, including safety training, and (2) to disclose any OHS violations within the past 10 years, to be posted on the city's website. (Int. No. 1169)
- **The Oakland and Fremont, CA** city councils passed resolutions in early 2014 that direct their city managers to address wages, benefits, and OHS conditions at waste recycling facilities when negotiating franchise agreements.
- **The Austin, TX** City Council adopted an ordinance in July 2010 that requires all construction projects with a city permit to provide workers a rest break of no less than 10 minutes for every four hours worked.
(http://austintexas.gov/sites/default/files/files/Contract_Management/Rest_Break_Ordinance_posters.pdf)

Cross-Agency Partnerships: Working across Government to Protect Workers

PROBLEM

OHS agencies are denied the resources they need to inspect all, or even a significant number, of the 9 million workplaces in the United States. The AFL-CIO calculates that it would take more than a century for these agencies to inspect every workplace at current funding levels. Thus, Fed-OSHA and the state-plan agencies rely on workers and their advocates to identify dangerous working conditions. Each year, they conduct tens of thousands of inspections based on complaints from workers or their representatives and referrals from other agencies. As described above, workers who can identify conditions that violate OHS standards may file a complaint and wait for an OHS inspector to conduct an investigation, but many workers are afraid to blow the whistle on unsafe working conditions because they understandably fear their employers will retaliate against them.

Officials from other government agencies who observe potential OHS violations, by contrast, need not fear employer backlash for reporting the dangerous conditions to OHS agency officials. These referrals can be a valuable tool for OHS agencies, providing another source of reliable information about worksites that may need improvements.

SOLUTION



Various state and local government agencies could do a better job of referring cases to Fed-OSHA and state-plan OHS agencies for investigation. Building inspectors, fire marshals, and other agents who enforce local codes often have legislatively granted powers to

remove people from buildings or stop work at construction sites when they observe conditions that are particularly dangerous for workers or members of the public. Although this authority arises out of the agencies' power to enforce building and fire codes, the linkages to OHS concerns are often clear. In New York City, for instance, the Department of Buildings (DOB) Environmental Control Board enforces local codes dealing with excavation and demolition—hazardous jobs that are carried out increasingly by immigrant and other vulnerable workers.

Workers' advocates can capitalize on the stop-work powers of state and local inspectors by campaigning to ensure that inspectors have a strong understanding of how their codes overlap with OHS regulations. Advocates could campaign for training programs that would educate inspectors about the overlapping issues and ensure that the inspectors submit referrals to an OHS agency every time they issue a stop-work order or code violation that directly relates to worker safety.

An important facet of this approach to strengthening OHS protections is that it can be accomplished without buy-in from a legislative body, although legislative support would certainly strengthen the program. For instance, advocates could consult with OHS experts who could review state or local codes and develop a "cross-walk" document that links provisions of those codes to state or federal OSHA regulations. That document could be the centerpiece of a campaign to connect various code enforcement agencies with OHS agency enforcement staff. Importantly, many localities have adopted consensus standards (e.g., National Fire Protection Association codes and standards) as their

local codes, creating an opportunity for a multi-jurisdiction cross-walk document and outline for OHS referral procedures.

Examples of major OHS hazards that might be covered in both building codes and OHS regulations are: demolition, excavation and trench digging, scaffolds, cranes, fire hazards, and access to fire exits. When building inspectors find code violations related to these hazards, they should immediately submit a referral to the state-plan OHS agency or local Fed-OSHA area office.

Wage-and-hour officials whose primary job is to ensure that workers are being paid fairly are the other group of enforcement authorities who may have the opportunity to ask workers if they have observed conditions of concern at their workplaces. As a practical matter, employers who violate wage and hour laws are likely to be the same ones that violate OHS regulations. Cal/OSHA collaborates with state agencies that enforce wage-and-hour laws, workers' compensation requirements, contracting, licensing, and other work-related programs.¹⁰⁹ This California Labor Enforcement Task Force investigates worker complaints and has developed an innovative inspection-targeting program that combines the agencies' staff, knowledge, and authorities. A firm with health and safety problems that might not rise to the level of "imminent danger" required for a Cal/OSHA stop-work order might nonetheless be ordered to shut down if sufficient wage-and-hour or workers' compensation violations are also uncovered by the task force during a joint inspection.

CHALLENGES

Major budgetary constraints and overworked staff are problems in almost every government agency. Proposals that would add OHS-related responsibilities on top of code inspectors' existing workloads may not garner sufficient support



from code inspectors to be workable. Certainly if OHS advocates go to the state legislature in hopes of securing a legal mandate to develop partnerships between code enforcers and OHS agencies, a lack of support from the code enforcers could doom the proposal. Workers' advocates must develop the evidence that improving linkages between stop-work authority and OHS standards is a low-cost, high-impact concept. On the cost side of the equation, advocates can explain that the burden on code inspectors would be as minimal and easy as a phone call to the state-plan OHS agency or local Fed-OSHA area office. Some referrals—including unsafe excavations, rickety scaffolding, and blocked fire exits—are problems that should obviously be referred to OHS agencies. With improved education and training, some less obvious hazardous conditions, such as improperly stored chemicals or inadequate protection for employees working at heights, could lead to referrals that will keep workers safe. Workers' advocates could further strengthen their case by compiling statistics comparing the number of building code inspections in a locality with the number of planned inspections by the relevant OHS agency.¹¹⁰

The issue of preemption will inevitably arise when advocates begin discussing how regula-



tions other than those adopted by Fed-OSHA might be used to protect workers in Fed-OSHA's jurisdiction. The recommendation laid out above, though, is simply that government officials who enforce other laws and regulations should refer more cases to Fed-OSHA when violations of their regulations correspond to potential violations of OHS regulations. The other officials' laws and regulations are, by definition, the laws of general applicability that are not preempted by the OSH Act (see A Brief Explanation of Preemption, above).

EXAMPLES

New York City's Department of Buildings (DOB) is a prime example of a local code enforcement

agency that issues stop-work orders for OHS-related violations. The department has numerous code provisions that relate directly to workers' health and safety, including requirements related to cranes, hoisting equipment, scaffolding, demolition, and excavation. Many are simple notice or permitting requirements that mandate, for instance, that firms obtain a permit and notify neighbors before excavating below certain depths. Stop-work orders can be issued for failure to meet those obligations. Scofflaw employers who neglect to follow these building codes might very well take the same cavalier attitude towards OHS requirements, so it is critical that building inspectors refer such cases to OHS enforcement officials.

Annual State-Level Audits: Grading Agency Performance

PROBLEM

Workers in every state experience injuries, illnesses, and fatalities due to workplace hazards, but without adequate information on what the state-plan OHS agencies are doing or not doing to address those problems, it will be difficult for advocates to pinpoint exactly what changes these agencies need to make to better protect workers.

Fed-OSHA evaluates the performance of the state-plan OHS agencies in its Federal Annual Monitoring and Evaluation (FAME) audits to determine whether they are “at least as effective” as Fed-OSHA—the minimum legal standard that determines whether states can continue to run their own OHS programs. The evaluations focus mainly on a set of quantitative measures that states are required to track, from average penalty amounts to the promptness of agency activities.

Fed-OSHA’s reports, while valuable, cover only certain aspects of agency performance. Advocates will need more information about their state-plan OHS agency’s practices in order to identify problems and pursue much-needed reforms.

SOLUTION



Legislatures in state-plan jurisdictions should create a system for conducting annual performance audits of the state’s OHS agency.

A legislative oversight committee, for example, or an independent commission with worker members could be the entity responsible for conducting these audits, preparing detailed reports, and posting them online. The oversight body would develop qualitative and quantitative measures to evaluate the agency’s performance, prepare a detailed report, and post it online. The oversight body’s purpose would be broader than Fed-

OSHA’s: Instead of simply determining whether the state program meets the (fairly low) bar set by Fed-OSHA, the committee would focus on maximizing the program’s effectiveness, ideally to a point that far surpasses the performance of Fed-OSHA and other states.

State-level audits could be useful in persuading lawmakers and the public of the need for reforms, including many of those suggested in this manual. Also, once a state adopts any of these reforms, the oversight body could be responsible for monitoring implementation.

The following are just a few examples of the topics and metrics that could be examined by the oversight body:

- What are the mean and median number of days or hours for the agency to respond to complaints, fatalities, and imminent danger situations?
- What are the average initial penalties and average “final” penalties for each citation category (serious, willful, repeat, etc.)?
- What percentage of serious hazards is corrected during the inspection?
- How effective is the agency’s outreach to industry about particular hazards (e.g., fall protection on construction sites) in reducing the number of fatalities and injuries related to the hazard?
- In what percentage of inspections do union representatives participate with the OHS agency staff?
- In what percentage of inspections do representatives from community-based organizations participate with the OHS agency staff?
- What are the language abilities of the OHS agency inspectors?

- Has the agency taken proactive steps to encourage second-language ability among its staff (e.g., recruiting inspectors with second-language skills; paying for tuition, books, and time off when workers take language classes)?
- What percentage of the agency’s citations are overturned or have the penalty reduced on appeal?
- Is the agency adequately preserving its enforcement records and making enough information publicly available to enable workers and advocates to monitor the agency’s progress and identify areas for improvement?

CHALLENGES

Lawmakers and agencies may object to the overlap between the state-level audits and Fed-OSHA’s FAME evaluations, claiming that the state audit would entail an unnecessary duplication of effort. Advocates can point out that Fed-OSHA’s evaluation criteria set a low bar for performance. State officials should want their program to be more effective than Fed-OSHA.

State-plan OHS agency staff may be concerned that the metrics are unfair because they don’t take into consideration their inadequate funding. Advocates can respond by indicating that the oversight body’s report has the potential to provide evidence that the agency needs additional resources.

A major source of tension in designing an audit plan will be developing the evaluation metrics. Some groups are likely to prefer *outcome-based measures*, designed to reflect the impact of agency performance on workplace safety (e.g., injury and fatality rates). Others may prefer *activity-based measures*, which focus on the agency’s practices and procedures (e.g., the number of inspections conducted). Both types have strengths and weaknesses, and advocates could argue for a combination of both. Also, audits should consider quantitative measures (e.g., the percentage of inspections with violations), as well as qualitative

measures (e.g., interviews with workers or their representatives on the agency’s effectiveness) to obtain a more comprehensive picture of agency performance.

State-plan OHS agencies may feel that activity-based metrics invite too much scrutiny of specific agency practices, leading to micromanagement by the oversight committee and depriving the agency of flexibility and discretion in how it operates its program.¹¹¹ And employers are likely to be wary of any audit program that might influence agencies to step up their enforcement practices.

Advocates should also be aware of any unintended consequences that may result from agencies attempting to satisfy the audit measures. For example, if an agency is judged only on the number of inspections performed, it might begin to conduct a greater number of relatively simple “safety” inspections while neglecting to conduct more complex “health” inspections. To avoid these kinds of unintended consequences, advocates could emphasize the need for an independent body with worker representation that would be responsible for developing the auditing program.

EXAMPLES

State legislative audits of agency performance are common, and indeed, many state legislatures have offices that specialize in conducting these audits on behalf of standing oversight committees. In Maryland, for example, the Office of Legislative Audits (located within the Department of Legislative Services) undertakes performance audits of state agencies at the request of the legislature’s Joint Audit Committee. On some occasions, the legislature may even request outside watchdog groups or research organizations to conduct an audit.¹¹²

Fed-OSHA’s FAME reports offer a good starting point for what these audits could look like, but as suggested above, advocates should encourage a much broader investigation into agency performance.¹¹³

Conclusion

Activists, organizers, and other workers' advocates operating at the state and local level will usher in the next generation of OHS policies. Because of resistance in Washington to worker protections, forward-looking Members of Congress and progressive officials at Fed-OSHA often get mired in political fights when they seek to enact changes to federal OHS laws and policies so as to better protect workers. Their counterparts in state legislatures, city councils, and state-plan OHS agencies also face opposition from moneyed interests, but

grassroots organizing and a closer connection between workers and elected officials can lead to more victories and improved worker protections. This manual proposes a broad array of changes to law and policy in an effort to give workers and their advocates in every locality a starting point for discussing new campaign ideas. By collecting these ideas and presenting them to advocates around the nation, we hope to have achieved a modest first step toward big improvements in workers' health and safety.



Appendix: Overview of the OSH Act and Workers' Compensation

FED-OSHA AND THE OSH ACT

The Occupational Safety and Health Act (OSH Act) is a federal law enacted by the U.S. Congress in 1970. It established a new federal agency—the Occupational Safety and Health Administration (OSHA), within the U.S. Department of Labor—to develop and enforce occupational health and safety standards. The agency is charged with developing and enforcing a variety of workplace safety standards.

The law also established a process whereby states could petition Fed-OSHA to recognize a state agency as an effective replacement for the federal program in that state. Upon recognition and after a period of “concurrent jurisdiction” meant to ensure a smooth transition, the “state-plan” agency has full authority to establish and enforce occupational health and safety standards. Fed-OSHA does not extend OSH Act protections to public-sector employees (e.g., police, firefighters, teachers, etc.), but approved state-plan agencies do. Twenty-one states and Puerto Rico have gone through this process and established “state-plan” agencies that establish and enforce standards within their jurisdictions. Four other states and the U.S. Virgin Islands have obtained Fed-OSHA’s approval to operate partial state plans that cover only public-sector workers (Fed-OSHA retains jurisdiction over private-sector workplaces).

Fed-OSHA has its headquarters in Washington, D.C., but most inspection work is conducted out of area offices at the state and local levels. Inspections are initiated for a variety of reasons. Many are prompted by a complaint from a worker, a reported fatality or injury, or even

an inspector noticing something amiss while driving down the road. Sometimes other government agencies refer cases to Fed-OSHA. Roughly 60 percent of OSHA inspections are scheduled through its system for randomly selecting worksites and its industry- or hazard-specific “emphasis programs.” State-plan states operate in a similar fashion, although their emphasis programs often target industries that present unique challenges in their geographical jurisdictions.

The OSH Act also established the Occupational Safety and Health Review Commission. When an employer challenges a citation issued by Fed-OSHA, the case is litigated before an administrative law judge and can be appealed to the Review Commission. The Review Commission’s decisions are reviewable in federal appellate court. State plans also give employers an opportunity to challenge citations through an administrative process and ultimately appeal the decision in a court, although the exact procedures vary from state to state.

WORKERS' COMPENSATION

In every state but Texas, employers are required to carry workers’ compensation insurance that will pay medical expenses for employees injured or made ill on the job and replace income for those who are out of work recovering for extended periods of time. States have different laws spelling out which employers must have coverage. Texas does not require any employers to have workers’ compensation coverage, while California requires anyone with at least one employee to have the insurance. In many

states, smaller employers or employers in certain industries, such as agriculture, are exempt from this requirement. If injured workers miss a certain number of consecutive work days—three days in many states, seven in others—they are entitled to receive payments equal to a portion of their wages for the time they are unable to work.

Ideally, the workers' compensation system encourages prevention by offering lower premiums to employers who keep their workplaces healthy and safe. The system should also ensure that workers who are injured at work or who suffer job-related illnesses get prompt care that allows them to recover and return to work, and that those who must miss several days of work—or, in the worst cases, cannot work again—receive prompt cash payments and avoid severe financial hardship.

In many cases, however, the system simply does not work as it should to encourage prevention and give prompt assistance to injured and ill workers. Some employers who are required to have insurance may avoid purchasing it or lie about what kind of workers they employ. Some keep their workers' compensation premiums low by pressuring workers not to file workers' compensation claims, or by fighting the claims in administrative proceedings. Insurers generally also argue that occupational diseases cannot be proven to have stemmed from a particular workplace exposure, so workers with occupational illnesses receive compensation much too

rarely. Adjudication of workers' compensation claims can be a lengthy process, and in some cases workers face long delays before getting the medical care or cash benefits they desperately need, and to which they are entitled.

Many workers have reported feeling helpless and harassed when they tried to secure compensation, and stories of these difficulties can discourage other workers from filing compensation claims. As a result, workers' families, private health insurers, and public programs like Medicaid and Social Security end up bearing costs that should have been covered by the workers' compensation system.

Some states are working to improve their workers' compensation systems, but sometimes efforts for "reform" are aimed at reducing employers' costs without improving prevention or compensation for workers. In recent years, advocates have come together to fight efforts to decrease maximum dollar amounts or time limits for workers' compensation benefits.

To learn more, visit the nonprofit website Workers' Comp Hub, (<http://workerscomphub.org>), a project of the National Council on Occupational Safety & Health (National COSH) and the National Economic & Social Rights Initiative (NESRI). The site offers resources on the workers' compensation system in general, as well as specifics for programs in various states; for instance, Pennsylvania workers can download PhilaPOSH's Injured on the Job handbook.¹¹⁴

Notes

1. See J. Paul Leigh, *Economic Burden of Occupational Injury and Illness in the United States*, 89 MILBANK Q. 728 (Dec 2011).
2. 29 U.S.C. § 651(b). OSH Act provisions related to standard-setting, enforcement, adjudication, and state-plan approval are found in 29 U.S.C. §§ 655, 658, 659, 660, and 667.
3. Chart adapted from AFL-CIO, *Death on the Job: The Toll of Neglect*, 90 (May 2014), available at <http://www.aflcio.org/content/download/126621/3464561/DOTJ2014.pdf> (last accessed June 9, 2014).
4. Freeman and Rogers, *WHAT WORKERS WANT* (2D ED.) (Cornell Univ. Press, 2006).
5. Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees under OSHA and the NLRA*, 4 CORNELL J. L. & PUB. POL'Y 65 (1994).
6. Ruth Ruttenberg, *The Role of Labor-Management Committee in Safeguarding Worker Safety and Health*, p.1, prepared for U.S. Dep't. of Labor, Bureau of Labor-Management Relations and Cooperative Programs (1991).
7. Liu et al., *The Pennsylvania Certified Safety Committee Program: An Evaluation of Participation and Effects on Work Injury Rates*, Rand Center for Health and Safety in the Workplace Working Paper WR-594-PA (Aug. 2008), available at http://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR594.pdf (accessed May 6, 2014).
8. H.R. 1280 (103d Cong); H.R. 3160 (102d Cong).
9. U.S. DEP'T. OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., "US Labor Department's OSHA cites Jacksonville, Fla.-based Bacardi Bottling following death of temporary worker on 1st day," Region 4 News Release 13-149-ATL, Feb. 11, 2013, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=23640 (accessed May 6, 2014). See also Grabell, Pierce, and Larson, *Temporary Work, Lasting Harm*, PROPUBLICA, Dec. 18, 2013, at <http://www.propublica.org/article/temporary-work-lasting-harm> (accessed May 6, 2014).
10. U.S. DEP'T. OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., "OSHA launches initiative to protect temporary workers; Workers' Memorial Day remembers those who died on the job," OSHA News Release 13-800-NAT, Apr. 29, 2013, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=23994 (accessed May 6, 2014).
11. See U.S. DEP'T. OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., *Training Requirements in OSHA Standards and Training Guidelines*, OSHA Pub. 2554 (revised) (1998), available at <https://www.osha.gov/Publications/2254.html> (accessed May 6, 2014).
12. For more information about what makes a good training program, advocates may wish to refer to OSHA's Susan Harwood Best Practices (<https://www.osha.gov/dte/sharwood/best-practices.html>), NIEHS's Worker Education Training Program (https://www.niehs.nih.gov/careers/hazmat/about_wetp/), or voluntary standards like the ANSI/ASSE *Criteria for Accepted Practices in Safety, Health and Environmental Training* (ANSI/ASSE Z490.1-2009).
13. See SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *Workplace Posting Requirements* (Mar. 2014), available at <http://www.shrm.org/legalissues/stateandlocalresources/stateandlocalstatutesandregulations/documents/stateposting.pdf> (accessed May 6, 2014).
14. 505 U.S. 88 (1992).
15. Annotated Laws of Massachusetts, General Laws ch. 149, § 159C(b)(2) (2013).
16. STATE OF CALIFORNIA – DEPT. OF INDUSTRIAL RELATIONS, DIVISION OF WORKERS' COMPENSATION, *Notice to Employees – Injuries Caused by Work*, available at <https://www.dir.ca.gov/dwc/NoticePoster.pdf> (accessed May 6, 2014).
17. STATE OF CALIFORNIA – DEPT. OF INDUSTRIAL RELATIONS, DIVISION OF WORKERS' COMPENSATION, *Time of Hire Pamphlet*, available at <https://www.dir.ca.gov/dwc/DWCPamphlets/TimeOfHirePamphlet.pdf> (accessed May 6, 2014).
18. Elizabeth C. Tippet, *The Promise of Compelled Whistle-blowing: What the Corporate Governance Provisions of Sarbanes-Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 16 (2007) (citing survey of eighty-four whistleblowers which found that 82 percent of those whistleblowers experienced harassment after blowing the whistle, 60 percent were fired, 17 percent lost their homes, and 10 percent admitted to attempted suicide).
19. See CENTER FOR EFFECTIVE GOVERNMENT, *Securing the Right to a Safe and Healthy Workplace: Improve State Laws to Protect Workers* (2013), available at <http://www.foreffectivegov.org/files/regs/right-to-safe-workplace.pdf> (accessed May 6, 2014); PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *Whistleblower Paradox: Laws Improve as Prosecutions Mount*, <http://www.peer.org/news/news-releases/2013/07/18/whistleblower-paradox-laws-improve-as-prosecutions-mount/> (accessed May 6, 2014).
20. Roy Maurer, *OSHA Finds Widespread Problems with State Whistle-Blower Programs*, SOC. FOR HUMAN RESOURCES MANAGEMENT, Sept. 21, 2012, at <http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/osha-problems-state-whistle-blower-programs.aspx> (accessed May 6, 2014).
21. U.S. GOV'T ACCOUNTABILITY OFFICE, *WHISTLEBLOWER PROTECTION: Sustained Management Attention Needed to Address Long-standing Program Weaknesses*, GAO-10-722 (Aug. 2010).
22. A "good faith" standard is arguably easier for workers to satisfy in order to trigger their whistleblower protec-

- tion rights than the alternative “reasonableness” standard found in many statutes. A whistleblower protection law that employs the “good faith” standard would, therefore, likely offer greater protections to workers. A “good faith” standard simply asks whether the worker’s belief was sincere or honest. In contrast, a “reasonableness” standard asks whether a hypothetical “reasonable person,” facing the same circumstances as the worker, would reach the same conclusion about whether the workplace conditions potentially violated a law or regulation or were otherwise inconsistent with an important public policy. Both standards are well recognized in law and could be readily administered by the courts. Advocates may find that the adoption of a “good faith” standard will likely be singled out by business groups as one of the more contentious aspects of a whistleblower protection law. In contrast, a whistleblower protection law that employs a “reasonableness” standard may be more politically viable in some states. Another disadvantage of the “good faith” standard is that it could potentially invite personal attacks on workers who invoke their whistleblower protection rights. For example, an employer might attempt to dredge up negative aspects of a worker’s employment record in order to argue that the worker was not acting in good faith when exercising his or her whistleblower rights.
23. Gerard Sinzduk, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV 1633 (2008).
 24. See, e.g., 30 U.S.C. § 815(c)(2) (providing for temporary reinstatement of whistleblower mine workers).
 25. PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER), *State Whistleblower Laws – Overview*, at <http://www.peer.org/assets/docs/wbp2/overview.pdf> (accessed May 6, 2014); NATIONAL WHISTLEBLOWERS CENTER, *State Whistleblower Statutes*, at http://www.whistleblowers.org/index.php?option=com_content&task=view&id=742&Itemid=161 (accessed May 6, 2014).
 26. N.J. Stat. sections 34:19-1 through 34:18-14.
 27. A “good faith” standard simply asks whether the worker’s belief was sincere or honest. In contrast, a “reasonableness” standard asks whether a hypothetical “reasonable person,” facing the same circumstances as the worker, would reach the same conclusion about whether the workplace conditions potentially violated a law, standard, regulation, or “clear mandate of public policy” (including those related to OHS matters), or otherwise amounted to a criminal act. Both standards are well recognized in law and could be readily administered by the courts. Advocates may find that the adoption of a “good faith” standard will likely be singled out by business groups as one of the more contentious aspects of a right-to-refuse law. In contrast, a right-to-refuse law that employs a “reasonableness” standard may be more politically viable in some states. Another disadvantage of the “good faith” standard is that it could potentially invite personal attacks on workers who invoke their right to refuse dangerous work. For example, an employer might attempt to dredge up negative aspects of a worker’s employment record in order to argue that the worker was not acting in good faith when exercising his or her right to refuse.
 28. Occupation Safety and Health Act, Revised Statutes of Ontario, §§ 43 – 49.
 29. Robert Hebdon and Douglas Hyatt, *The Effects of Industrial Relations Factors on Health and Safety Conflict*, 51 IND. & LAB. RELATIONS REV. 579 (July 1998).
 30. Some states, such as Ohio, have common law rights-of-action available to workers, which allow them to sue their employers when they act with “reckless disregard” for worker safety. The solution proposed here would not require workers to prove such a high degree of wrongdoing.
 31. AFL-CIO, *Death on the Job: The Toll of Neglect*, p.88 (Apr. 2013), available at <http://www.aflcio.org/content/download/79181/1933131/version/1/file/DOTJ2013.pdf> (accessed May 6, 2014).
 32. See, e.g., Randy Lee Loftis, *OSHA no match for workplace dangers that kill thousands*, DALLAS MORNING NEWS, Nov. 23, 2013, available at <http://www.dallasnews.com/investigations/20131123-osha-no-match-for-workplace-dangers.ece> (accessed May 6, 2014).
 33. AFL-CIO, *Death on the Job: The Toll of Neglect*, p.107 (Apr. 2013), available at <http://www.aflcio.org/content/download/79181/1933131/version/1/file/DOTJ2013.pdf> (accessed May 6, 2014).
 34. If a worker has been injured, the workers’ compensation system is available. And if the employer has acted with a sufficient degree of disregard for employee safety, the tort system may be available, too. The purpose of a citizen suit provision in public health laws, however, is to provide members of the public with a cause of action that does not require an injury—that is, citizen suits complement the preventative function of administrative enforcement. Workers’ compensation and the tort system only come in to play after an injury or fatality has occurred.
 35. See 42 U.S.C. § 7604 (CAA citizen suits), 33 U.S.C. § 1365 (CWA citizen suits).
 36. Testimony of David Michaels, Assistant Sec’y, Occupational Safety & Health Admin., U.S. Dept. of Labor, before the Subcomm. on Workforce Protections, Comm. on Educ. & Labor, U.S. House of Representatives, March 16, 2010, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1062https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1062 (accessed May 6, 2014).
 37. For non-serious violations, and serious violations of low or moderate gravity that did not result in serious injury or illness, employers can agree to fix the cited hazard during the inspection itself (or immediately afterward), and OHS agencies will reward this effort by applying a 15-percent “quick fix” reduction to the gravity-based penalty. OSHA Field Operations Manual 6-14 to 6-16 (2011), available at https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf (accessed May 6, 2014).
 38. Jim Morris, Chris Hamby & M.B. Pell, *Regulatory Flaws, Repeated Violations Put Oil Refinery Workers at Risk*, Ctr. for Pub. Integrity, Feb. 28, 2011, [Notes](http://www.publicinteg-

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- city.org/2011/02/28/2111/regulatory-flaws-repeated-violations-put-oil-refinery-workers-risk(accessed May 6, 2014).
39. These percentages are derived from data in the “osha_violation” table, available at OSHA Enforcement Data, http://ogedsw.dol.gov/views/data_summary.php (accessed Jan. 6, 2014).
 40. Jim Morris, Chris Hamby & M.B. Pell, *Regulatory Flaws, Repeated Violations Put Oil Refinery Workers at Risk*, Ctr. for Pub. Integrity, *supra* n.38.
 41. See, e.g., CALIFORNIA CHAMBER OF COMMERCE, *Governor Vetoes Bill Presuming Employer Guilt in Safety Citations* (Oct. 14, 2013), at <http://www.calchamber.com/headlines/pages/10142013-governorvetoesbillpresumingemployerguiltinsafetycitations.aspx> (accessed May 6, 2014).
 42. See Protecting America’s Workers Act, H.R. 1648, 113th Cong. § 309 (2013); Robert C. Byrd Mine & Workplace Safety & Health Act of 2013, S. 805, 113th Cong. § 704 (2013).
 43. Compare 29 U.S.C. § 659(b) (OSH Act) with 30 U.S.C. § 815(b)(1)(a) (Mine Safety and Health Act).
 44. 30 U.S.C. § 815(b)(2).
 45. Of course, the U.S. Congress should also update the OSH Act’s penalties.
 46. 28 U.S.C. § 2461 note. See also, Protecting America’s Workers Act, H.R. 1648, 113th Cong. § 311 (2013).
 47. If a hazard can reasonably be fixed on the spot, or within one or two days, the inspector should require that it be fixed within that timeframe, not rely on unnecessary financial incentives to get the employer to do so.
 48. 29 U.S.C. § 667(c)(2).
 49. Letter from Occupational Safety & Health State Plan Assoc. to David Michaels, Assistant Sec’y for Occupational Safety & Health, U.S. Dept. of Labor, Aug. 6, 2010, available at [http://op.bna.com/env.nsf/id/sbra-89jqgs/\\$File/osh-paaug6.pdf](http://op.bna.com/env.nsf/id/sbra-89jqgs/$File/osh-paaug6.pdf) (accessed May 6, 2014).
 50. VA. DEPT. OF LABOR & INDUSTRY, OCC. SAFETY & HEALTH, *Field Operations Manual*, Ch. 11, at p.16 (2013), available at http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\181\GDdoc_DOLI_5354_v1.pdf (accessed May 6, 2014).
 51. Minn. Stat. § 182.666(2a).
 52. MINNESOTA DEPT. OF LABOR AND INDUSTRY, OCCUPATIONAL SAFETY AND HEALTH DIVISION, *OSHA Workplace Inspections*, p.4 (2012), available at <http://www.dli.mn.gov/osha/PDF/inspectionbooklet.pdf> (accessed May 6, 2014).
 53. 8 CCR § 336(i).
 54. Compare 29 U.S.C. § 666(e) (original OSH Act criminal fines of \$10,000 and \$20,000) with Historical Notes for OSH Act, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHA&p_id=3389 (accessed May 6, 2014) (describing how the Sentencing Reform Act of 1984 raised the maximum criminal fines for misdemeanors resulting in death to \$250,000 for individuals and \$500,000 for organizations).
 55. Where prosecutors can identify individual managers or executives who were directly responsible for corporate policies that led to workplace fatalities, they should prosecute those individuals. Where the corporation’s dysfunctional practices are systemic—the product of a corporate culture that tolerates high levels of danger in its drive for profits and productivity—they should charge the corporation itself. The two situations are not mutually exclusive: In some cases, prosecutors should include both individual officers and the corporation in the indictment.
 56. See James W. Harlow, *Corporate Criminal Liability for Homicide: A Statutory Framework*, 61 DUKE L. J. 123, 144-49 (2011).
 57. See *id.* at 131-34 for specific observations on the current state of corporate homicide prosecutions.
 58. These suggestions include and expand upon California state law and the Protecting America’s Workers Act legislation. See Protecting America’s Workers Act, H.R. 1648, 113th Cong. § 312 (2013); Cal. Lab. Code §§ 6423, 6425. See also 18 U.S.C. § 3571 (describing the criminal fines available for various types of federal offenses).
 59. See James W. Harlow, *Corporate Criminal Liability for Homicide: A Statutory Framework*, 61 DUKE L. J. 123, 153-165 (2011) (outlining a strong model statute for corporate manslaughter).
 60. C.M.V. Clarkson, *Corporate Culpability*, 2 WEB JOURNAL OF CURRENT LEGAL ISSUES (1998), available at <http://www.gigablast.com/get?q=&c=dmoz3&d=203910500167&cns=0> (accessed May 6, 2014).
 61. See, e.g., Steven Bittle, *STILL DYING FOR A LIVING: CORPORATE CRIMINAL LIABILITY AFTER THE WESTRAY MINE DISASTER* (2012).
 62. H.B. 1144, 114th Gen. Assembly, 2d Sess. (Ind. 2006), available at <http://www.in.gov/legislative/bills/2006/IN/IN1144.1.html> (accessed May 6, 2014).
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 64. Browne Jacobson, *Sentence Handed Down Following Fifth Corporate Manslaughter Conviction* (Jan. 17, 2014), http://www.brownejacobson.com/about_us/resources/bulletins/sentence_handed_down_following.aspx (accessed May 6, 2014); Pinsent Masons, *New Corporate Manslaughter Cases Opened by CPS up 40% in 2012*, <http://www.pinsentmasons.com/en/media/press-releases/2013/new-corporate-manslaughter-cases-opened-by-cps-up-40-in-2012> (accessed May 6, 2014).
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- com/story/2006/01/19/179510/-The-Corporate-Man-slaughter-Act-New-Bill-in-Indiana# (accessed May 6, 2014).
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