

# **‘TO ASSURE SAFE AND HEALTHFUL WORKING CONDITIONS’: TAKING LESSONS FROM LABOR UNIONS TO FULFILL OSHA’S PROMISES**

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## **INTRODUCTION**

The events of the past year, which included several high-profile and deadly workplace accidents, have highlighted the fact that even in 21st century America, employees face unsafe working conditions on a daily basis. Although the deaths of twenty-five miners at the Upper Big Branch Mine and of eleven workers at the BP-TransOcean oil rig in the Gulf of Mexico dominated the news, other men and women who have not appeared on the front page face unsafe working conditions every day. Their workplaces may have self-evident dangers (old scaffolding, asbestos filled rooms) or they may be unsafe only to those employees or employers in the know (fumes in the workplace, toxic chemicals). Regardless of the type of danger, however, employees who work in these jobs are often powerless to correct the danger. As union membership has declined, so too has active enforcement of our country’s occupational health and safety laws. It is no coincidence that the companies responsible for the two biggest jobsite tragedies of the year employed non-union work forces. Although the federal government may be able to pass legislation to bolster declining unions, the health and safety of America’s workers should not be dependent upon membership in a labor union. Rather, the body tasked with enforcing work safety standards must recraft its methods in light of declining union membership, and Congress may need to intercede to ensure that the laws that were passed to protect workers in the past are adequately protecting workers today.

The Occupational Safety and Health Administration (OSHA) is responsible for preventing workplace deaths and ensuring the health and safety of American workers. The continuing health and safety dangers in

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workplaces over the past several decades, however, demonstrate that OSHA is simply not up to the job and is not fulfilling its mandate—its processes are outdated, it is consistently underfunded, and it is in desperate need of more manpower. Although it suffered from a lack of resources during the Bush Administration, OSHA appears to be more of a focal point for the Obama Administration and for Secretary of Labor Hilda Solis in particular. Rather than simply allocating additional funding for programs, however, policymakers and Labor Department officials must first step back and understand what does and does not work at OSHA. A close examination of OSHA's underlying framework is needed to determine whether OSHA's current structures are actually still useful, given the disparity between the working population and industries today from when the OSH Act was passed in 1970.

The important policy question that must be answered before the Obama Administration and Congress allocate additional money for the situation is, therefore, how can OSHA more effectively fulfill its mandate 'to assure safe and healthful working conditions,' and who can help it do so?

Unions have historically played an important role in implementing and facilitating OSHA policy. As originally conceived and implemented, the Occupational Safety and Health Act (OSH Act) places much of the responsibility for enforcement on individual workers in worksites across the country. When the Act was passed, many of these workers—nearly twenty million—were union members.<sup>1</sup> As members of a union, they were better educated about their rights, had protection through collective bargaining agreements and were better equipped to help OSHA enforce the OSH Act. In the past forty years, union membership has decreased dramatically. As a result of this decline, many workers now find it much more difficult to enforce their workplace safety rights, both independently and in conjunction with OSHA. Studying the advantages that unionized workplaces have in fulfilling OSHA's mission can recommend remedies for enhancing OSHA's effectiveness. Politicians and OSH Administrators must take lessons from unions and apply them in new and creative ways to protect workers' health and safety rights.

This article highlights the role that unions play in ensuring that OSHA's standards are enforced and discusses how OSHA could change its structure to ensure that worker safety standards are enforced in the face of declining union membership. Two themes run through this article and are

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1. GERALD MAYER, CONG. RESEARCH SERV., RL 32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22 (2004), *available at* [http://digitalcommons.ilr.cornell.edu/key\\_workplace/174/](http://digitalcommons.ilr.cornell.edu/key_workplace/174/).

important for understanding the state of OSHA today. First, as noted above, much of OSHA's enforcement is dependent on individual workers reporting health and safety violations. Second, unions—which would normally act to educate and empower workers to make OSHA reports—represent only a small fraction of America's workforce today.

Part I of this article will cover the beginnings of OSHA and explain how unions have been integral in the workplace safety and health movement prior to OSHA. Part II will highlight OSHA's inherent enforcement problems and discuss the role unions can play in achieving workplace safety even in the absence of OSHA. Part III will examine four phases of OSHA enforcement, each of which involves a critical juncture where unions can (and do) help to make the OSHA system more robust and ultimately more protective. Finally, Part IV will apply the lessons learned from unions and other successful programs to argue for new partnership programs through which OSHA can work with employee-friendly groups to deter dangerous workplace behavior.

### I. OSHA: HURTING SINCE ITS INCEPTION

Congress passed the OSH Act in 1970 to address health and safety hazards in the workplace.<sup>2</sup> Its purpose was threefold: to create a general duty upon employers to provide a healthy and safe working environment, to promulgate standards about specific risks, and to enforce these standards and monitor compliance.<sup>3</sup> Understanding how and why the Act was passed is important to understanding its limitations and how it could be made more effective.

When the OSH Act was passed, the country was exhausted from the turmoil of the 1960's and the Vietnam War. Two great leaders had been killed and students around the country were still protesting the war in Vietnam. The use of nuclear energy was on the rise, and plants that had produced war materials in the 1940s were now producing pesticides and other chemical agents that sparked a burgeoning environmental movement.

Greater attention to the environment, however, did not translate into commensurate attention to workers. One of the most important developments in environmental awareness was the publication of Rachel Carson's *Silent Spring* in 1962—a book about the danger of pesticides, particularly DDT.<sup>4</sup> The book focused almost entirely on what happened

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2. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2010).

3. *Id.*

4. RACHEL CARSON, *SILENT SPRING* (1962). The idea that the environmental movement had, in effect, stopped at the factory gates is an idea discussed in LES LEOPOLD, *THE MAN WHO*

after these pesticides were created—how they were used and the effects they had on children, pregnant mothers, lakes, and rivers—almost entirely neglecting to discuss the effect that these chemicals had on the workers who helped to manufacture them.<sup>5</sup> The book became a focal point as Americans who rallied to protect families' backyards and drinking water from contaminants—but most Americans failed to take the next logical step and think about protecting the people who were making these chemicals. Even Congress seemed not to recognize the absence of concern for those people making the dangerous chemicals as it took steps to halt environmental degradation by passing environmental legislation.

Other groups formed in the 1960s which were dedicated to researching and alerting the public to the dangers of environmental hazards, but most of these groups—like their environmentalist allies—also neglected workers. Some groups focused on nuclear deterrence but failed to “mention the health effects on uranium miners and the thousands who manufactured and tested these weapons.”<sup>6</sup> The environmental movement seemed to stop at the factory fence, even though all the problems were being created inside that fence.

Among the few people who did realize the importance of addressing environmental concerns both inside and outside the factory gates were labor groups like the Oil, Chemical and Atomic Workers and the Steelworkers, as well as crusaders like Ralph Nader.<sup>7</sup> They all saw the effect Rachel Carson had on Americans and believed the time was ripe to push for legislation against unsafe and unhealthy working environments.<sup>8</sup> In 1965, the Public Health Service published a report “which outlined some of the recently found technological dangers. It noted that a new chemical entered the workplace every 20 minutes, that evidence now showed a strong link between cancer and the workplace, and that old problems were far from being eliminated.”<sup>9</sup> Following this report, and at the request of several major unions, President Johnson proposed a job safety bill in 1968.<sup>10</sup> Internal politics and strong opposition killed it before it got to the President's desk.<sup>11</sup>

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HATED WORK AND LOVED LABOR: THE LIFE AND TIMES OF TONY MAZZOCHI 225 (2007).

5. LEOPOLD, *supra* note 4, at 224-25.

6. *Id.* at 228.

7. *Id.* at 224-25.

8. *Id.* at 229.

9. Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, 104 MONTHLY LAB. REV., 18, 21 (1981), available at <http://www.bls.gov/opub/mlr/1981/03/art2full.pdf>.

10. *Id.* at 22.

11. *Id.*

That year, in 1968, an accident killed seventy-eight workers at the Farmington Coal Mine in West Virginia.<sup>12</sup> The uproar over the tragedy led to the passage of the Coal Act (the Federal Coal Mine Safety and Health Act of 1969 (MSHA)).<sup>13</sup> This Act would eventually create what is now known as the Mine Safety and Health Administration—the mining industry’s equivalent of OSHA. After the successful passage of the Coal Act, the union battle for a more comprehensive worker safety bill was renewed by unions and others.<sup>14</sup> President Nixon had different ideas than his Democratic predecessor, however, and those ideas were not greeted receptively by labor unions.<sup>15</sup> Nixon wanted to create an independent panel to administer any new Act, rather than to have its enforcement controlled by the Department of Labor.<sup>16</sup> It is telling that when Nixon spoke about what would become the OSH Act, he devoted very little time to discussing enforcement.<sup>17</sup> Rather, he concentrated on creating a body that would promulgate standards.<sup>18</sup> He noted that “[u]nder the suggested legislation, maximum use will be made of standards established through a voluntary consensus of industry, labor, and other experts.”<sup>19</sup> He continued, saying that “[t]he Secretary will ask employers whom he believes to be in violation of the standards to comply with them voluntarily; if they fail to do so, he can bring a complaint before the Occupational Safety and Health Board which will hold a full hearing on the matter.”<sup>20</sup> The Nixon Administration’s wariness regarding harsh compliance standards helps explain why the enforcement mechanisms in the OSH Act ended up being relatively weak.

After several rounds of negotiations in the House and Senate, a bill emerged that labor unions decided they had to support.<sup>21</sup> Thus, with the support of both unions and management lobbyists, the OSH Act was passed and signed into law in December of 1970. It was the first comprehensive attempt by the federal government to mandate safe workplaces for Americans.

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12. MacLaury, *supra* note 9, at 22.

13. *Id.*

14. *Id.* at 22-23.

15. *Id.* at 23.

16. *Id.*

17. President Richard Nixon, *Special Message to Congress on Occupational Safety and Health*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=2181&st=&st1> (last visited Oct. 2010).

18. *Id.*

19. *Id.*

20. *Id.*

21. MacLaury, *supra* note 9.

The statute created the Occupational Safety and Health Administration, which was a new body to be housed in the Department of Labor and administered by an Undersecretary for Labor. The Act was passed

[t]o assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.<sup>22</sup>

OSHA is responsible for “promulgating rules and regulations, setting health and safety standards, and overseeing enforcement.”<sup>23</sup> Thus, OSHA has a two-fold job: to write standards that provide workers with a safe working environment, and to enforce those standards. Enforcement is generally accomplished by sending OSHA inspectors to workplaces and by fining employers who have breached their duty to provide safe and healthy environments for their employees.

Although its passage was a victory for health and safety advocates, the OSH Act was not a perfect bill. Even though it was passed so quickly after the Coal Act, the OSH Act lacks some of the tougher components of the Coal Act, resulting in a less effective regulatory regime. For instance, the Coal Act requires two annual inspections of surface mines and four annual inspections of underground mines.<sup>24</sup> It also mandates monetary penalties for every violation, something that the OSH Act does not do.<sup>25</sup> The OSH Act started off with a bigger challenge than the MSHA simply due to the number of work sites in its purview. However, OSHA’s very structure makes it relatively more difficult to carry out its responsibilities, even today; it lacks many of the features that make the MSHA a fairly effective regulatory structure.

## II. OSHA’S ENFORCEMENT WOES

OSHA has been hampered both by problems surrounding its promulgation of rules and standards and by problems enforcing those rules

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22. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2010).

23. NICHOLAS ASHFORD, *CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY* 141 (1976). Its sister organization, the National Institute for Occupation Safety and Health (NIOSH), is housed at the Department of Health and Human Services. NIOSH is the research wing of the program.

24. The Federal Mine Safety and Health Act, 30 U.S.C. § 820 (2010), *available at* <http://uscode.house.gov/download/pls/30C22.txt>.

25. *See id.* § 813.

and standards in workplaces across the country.<sup>26</sup> Because OSHA has no mandate or ability to inspect every workplace each year, like the Coal Act required of the MSHA, “[t]he structure of implementation envisaged under OSHA is premised upon the active enforcement of detailed safety and health standards in the nation’s workplaces.”<sup>27</sup> As former Secretary of Labor Ray Marshall has noted, enforcement must begin on the shop floor.<sup>28</sup> In other words, for the OSH Act to fulfill its potential, employees must be full partners in helping OSHA to enforce its standards and must serve as the eyes and ears of OSHA.

From the earliest days of OSHA, unions, understanding the mechanics of the Act and that enforcement would depend on workers, have been able to help their workers to enforce their rights under the law. When the OSH Act was passed, labor unions were still active and strong—nearly 30% of the workforce belonged to a union.<sup>29</sup> Since 1970, union membership has been on a steep decline. As workers are unable to meet the high costs of participating in the system, due in part to their lack of union representation,, OSHA is unable to enforce its standards in a way that deters employers from having unhealthy and unsafe workplaces.

#### A. OSHA’S WEAK ENFORCEMENT REGIME

OSHA enforces its standards primarily by conducting workplace inspections to monitor compliance. When an inspector finds a violation, OSHA issues a fine and citation and gives the employer a deadline by which to fix the problem.<sup>30</sup> The threat of these inspections and fines is intended to act as a deterrent to all employers. However, because enforcement requires workplace inspections and since there cannot be an OSHA inspector at every workplace (like there is a USDA official at every meatpacking plant), effective enforcement relies on employee activism. Unfortunately, OSHA has never fully realized the necessity of making employees full partners in its mission to enforce the OSH Act.

From its inception to the present day, OSHA has had enforcement problems. The very first complaint filed with OSHA was against the Allied

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26. A plethora of articles and books have documented the disappointment that has been OSHA. Many of those books are quoted below. Another is ROBERT S. SMITH, *THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ITS ACHIEVEMENTS* (1976).

27. David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 *INDUS. REL.* 20, 21 [hereinafter *Enforcing OSHA*] (Winter 1991).

28. Telephone Interview with Ray Marshall, Former Sec’y of Labor (Feb. 29, 2008).

29. These statistics are available at Working Life, *Union Membership: Overall (1948-2004)*, U.S. BUREAU OF LABOR STATISTICS, [http://www.workinglife.org/wiki/index.php?page=Union+Membership%3A+Overall+\(1948-2004\)](http://www.workinglife.org/wiki/index.php?page=Union+Membership%3A+Overall+(1948-2004)) (last visited Oct. 17, 2010).

30. Occupational Safety and Health Act of 1970, 29 U.S.C. § 658 (2010).

Chemical Corporation in West Virginia, where workers were being exposed to unhealthy levels of mercury.<sup>31</sup> In what has been called a “tragicomedy,” OSHA took two weeks to arrive at the plant (although a public health research service had deemed the plant an “imminent danger”) and gave advance warning to the company before inspectors finally arrived.<sup>32</sup> When they arrived, the inspectors were so horrified that they insisted on wearing respirators and left as soon as possible, but nevertheless ruled that there was no imminent danger.<sup>33</sup> After more pressure, OSHA finally issued a citation—it’s first—on May 28, 1971.<sup>34</sup> The company appealed and OSHA gave Allied Chemical a \$1000 fine.<sup>35</sup>

Unfortunately, in some ways times have changed very little since then: promulgation of standards and enforcement of those standards still fail to ensure the safety of American workers. There are thousands of chemicals being used in workplaces for which OSHA has no written standard. In over thirty years, OSHA has set only thirty permissible exposure limits (PELs),<sup>36</sup> or legal limits for exposure of an employee to a chemical substance or physical agent. Many of these standards were simply adopted as a group from levels set by the American Conference of Industrial Hygienists. Setting rules and PELs for harmful agents present in thousands of workplace sites has taken far longer than originally anticipated, and came to a near stand-still during the Bush Administration. From 2001-2009, only one new standard was completed—for hexavalent chromium—and this one standard was forced upon the agency by a 2003 United States Court of Appeals ruling.<sup>37</sup> Simple politics is not enough to explain the slowness however—some rules have languished for decades. For instance, a rule setting a PEL on silica took over ten years.<sup>38</sup> “It has been seeking to comprehensively regulate the substance—and reduce the PEL—for over a decade and the Agency seems poised to take that next step in 2010.”<sup>39</sup> Silica, when inhaled, can cause silicosis, a lung disease that can result in

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31. LEOPOLD, *supra* note 4, at 283.

32. *Id.* at 284-86.

33. *Id.* at 287.

34. *Id.* at 288.

35. *Id.*

36. *Permissible Exposure Limits*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/SLTC/pel/index.html> (last visited Oct. 17, 2010).

37. Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143, 159 (3rd Cir. 2002). *See also* Occupation Exposure to Hexavalent Chromium, 71 Fed. Reg. 10099-10385 (Feb. 28, 2006) (to be codified at 29 C.F.R. pts. 1910, 1915, et al.).

38. Brad Hammock, *OSHA in 2010: What to Expect!*, OSHA L. BLOG (Jan. 21, 2010), <http://www.oshalawblog.com/tags/silica/>.

39. *Id.*

lung failure and death.<sup>40</sup> Over 250 American workers die every year from silicosis, according to the National Institute for Occupational Safety and Health (NIOSH).<sup>41</sup> Its harmful effects have been documented since the 1930s; an advance notice was published in the Federal Register in 1974 and a final rule on silica was published in 1989 but subsequently challenged in the courts.<sup>42</sup> In 1996, OSHA finally established “a Special Emphasis Program (SEP) for Silicosis, which provided guidance for targeting inspections of worksites with employees at risk of developing silicosis.”<sup>43</sup> “OSHA plans to publish a Notice of Proposed Rulemaking in July 2010.”<sup>44</sup> The Department of Labor must act to ensure that OSHA is promulgating rules in a more timely manner so known threats are addressed properly and new threats are dealt with as they emerge.

However, even in cases where OSHA has created standards, they are defeated by poor enforcement. In 2005, an explosion killed fifteen workers and injured many others at a British Petroleum Refinery in Texas City, Texas.<sup>45</sup> Strict regulations and process safety standards that had been promulgated by OSHA and cover refineries existed at the time of the explosion.<sup>46</sup> But that was not enough: “OSHA had not done a single planned comprehensive inspection of process safety at any U.S. oil refinery between 1995 and March 2005,” when the explosion occurred.<sup>47</sup> According to the Chemical Safety and Hazard Investigation Board’s report, the explosion was totally preventable and “OSHA’s capability to inspect highly hazardous facilities and to enforce process safety regulations is insufficient.”<sup>48</sup>

In other cases, regulations are in place but they are not extensive enough. For example, in the spring of 2008, at least twelve people died in Port Wentworth, Georgia after a blast at a sugar refinery.<sup>49</sup> Over twenty

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40. *NIOSH Workplace Safety & Health Tips*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/niosh/topics/silica/default.html> (last visited Oct. 17, 2010).

41. *Silica, Crystalline*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/SLTC/silicacrystalline/index.html> (last visited Oct. 17, 2010).

42. *Id.*

43. *National Emphasis Program—Crystalline Silica*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=3790](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3790) (last visited Oct. 17, 2010).

44. *2009 Regulatory Priorities*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/dsg/2009regulatory-priorities.html> (last visited Oct. 17, 2010).

45. Steven Mufson, *Oversight of Refineries is Lax, Report Says*, WASH. POST, Mar. 21, 2007, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/20/AR2007032000648.html>.

46. *Id.*

47. *Id.*

48. *Id.*

49. Celeste Monforton, *We Could Not Rely on OSHA*, THE PUMP HANDLE (Mar. 8, 2008),

years ago OSHA had created combustible dust standards for some industries after a number of explosions, but it had neglected to act on a 2006 review by the U.S. Chemical Safety Board to extend those standards to other industries, including sugar refineries.<sup>50</sup> Even if it had extended the standards, however, it may not have had the resources to inspect the facilities anyways, just as it did not at the BP Plant. A month after the blast, Georgia's Safety and Fire Commissioner said that the state was immediately imposing stronger safety requirements to prevent this type of explosion in the future.<sup>51</sup> He noted that the state was acting "independently of OSHA because, 'we felt like we could not rely on OSHA.'"<sup>52</sup>

Unfortunately, the Commissioner is probably correct in his assessment. OSHA has failed to adopt stricter standards for many industries. And even when it does, there is no guarantee that those standards will be enforced—there are thousands of plants across the country at which explosions can and do happen.<sup>53</sup> Given the state of OSHA's enforcement capacity today, there is no reason to believe that stronger standards could be enforced even if they were adopted.

The most recent statistics available from the Bureau of Labor Statistics on deaths, occupational injuries and illnesses are for 2008.<sup>54</sup> A total of 5071 fatal work injuries were recorded in the United States in 2008, down from a total of 5657 fatal work injuries reported for 2007.<sup>55</sup> There were 4,085,400 nonfatal injuries and illnesses in private industry in 2006.<sup>56</sup>

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available at <http://thepumphandle.wordpress.com/2008/03/08/we-could-not-rely-on-osha/>.

50. *OSHA Stalling on Combustible Dust Standard*, COMBUSTIBLE DUST EXPLOSIONS & FIRES, (Mar. 4, 2008), <http://dustexplosions.blogspot.com/2008/03/osha-stalling-on-combustible-dust.html>. For more on the Chemical Safety Board's standards, see U.S. CHEM. SAFETY BD., [http://www.chemsafety.gov/index.cfm?folder=news\\_releases&page=news&NEWS\\_ID=323](http://www.chemsafety.gov/index.cfm?folder=news_releases&page=news&NEWS_ID=323) (last visited Oct. 17, 2010).

51. *Georgia Insurance Commissioner Tightens Rules on Industrial Dust*, INS. JOURNAL (Mar. 10, 2008), available at <http://www.insurancejournal.com/news/southeast/2008/03/10/88050.htm>.

52. *Id.*

53. *Plant Explosions News*, NEWS LIB, <http://plant-explosions-news.newslib.com> (last visited Oct. 17, 2010).

54. *Workplace Injury and Illness Summary*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/osh.nr0.htm> (last visited Oct. 17, 2010); *Census of Fatal Occupational Injuries (CFOI)—Current and Revised Data*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/iif/oshcfoi1.htm> (last visited Oct. 17, 2010).

55. *Databases, Tables and Calculators by Subject*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/data/> (last visited Oct. 17, 2010). The tables under the category "Occupational Injuries and Illnesses and Fatal Injuries Profiles," under the heading "Workplace Injuries" allow one to compare data in several ways.

56. *Total Nonfatal Occupational Injury and Illness Cases, by Category of Illness, Private Industry, 2006*, U.S. BUREAU OF LABOR STATISTICS, [http://www.bls.gov/iif/oshwc/osh/os/osh06\\_13.pdf](http://www.bls.gov/iif/oshwc/osh/os/osh06_13.pdf) (last visited Oct. 17, 2010).

Nonfatal workplace injuries and illnesses among private industry employers in 2008 occurred at a rate of 3.9 cases per 100 equivalent full-time workers—a decline from 4.2 cases in 2007 . . . . Similarly, the number of nonfatal occupational injuries and illnesses reported in 2008 declined to 3.7 million cases, compared to 4 million cases in 2007.<sup>57</sup>

From 1995 through 1999 there were 30,824 fatal work injuries in the United States, or about seventeen injuries a day.<sup>58</sup> Currently, the maximum fine that OSHA can levy against a company for an incident is \$70,000.<sup>59</sup> OSHA is only able to pursue a criminal penalty when a willful violation of an OSH Act standard results in the death of a worker.<sup>60</sup> The maximum penalty is a misdemeanor with a maximum of six months in jail.<sup>61</sup> In its entire history OSHA has secured only twelve criminal convictions.<sup>62</sup>

OSHA has several ways it can enforce its regulations, but its primary method of detection and monitoring is through surprise inspections following a complaint. There are two types of inspections—those initiated after receiving employee complaints, and targeted inspections.<sup>63</sup> “Early in its history, OSHA recognized that the key to effective enforcement was the ability to target inspections toward the most dangerous workplaces.”<sup>64</sup> For that reason, OSHA has built in programmed, or targeted, inspections at known dangerous workplaces.<sup>65</sup> The other inspections, based on complaints, are conducted when an employee files a formal complaint against his/her employer with OSHA. These inspections, and the fines they bring, are meant both to punish the violating employer and to have a deterrent effect on the rest of the industry. The deterrent effect is

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57. *Workplace Injury and Illness Summary*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/osh.nr0.htm> (last visited Oct. 17, 2010).

58. *National Profiles Book*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/opub/cfoichartbook/pdf/nationaloverview.pdf> (last visited Oct. 17, 2010).

59. See *OSHA Field Inspection Reference Manual, Section C(2)(m)*, OCCUPATIONAL HEALTH AND SAFETY ADMIN., [http://www.osha.gov/Firm\\_osh\\_data/100008.html](http://www.osha.gov/Firm_osh_data/100008.html) (last visited Oct. 17, 2010).

60. Occupational Safety and Health Act of 1970, 29 U.S.C. § 666 (2010).

61. *Id.*

62. In comparison, the Clean Water Act has much stricter penalties. For a single civil violation through negligence a fine cannot be less than \$2,500 or more than \$25,000 per day of the violation or up to a year in jail. For a knowing violation one can be punished by between \$5,000 and \$50,000 per day of the violation and/or up to three years in jail. Clean Water Act, 33 U.S.C. §1319 (2010).

63. 29 U.S.C. § 657 (1998).

64. THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* 139 (1993).

65. *Id.* at 139-40.

practically non-existent, however, given the slim chances of being inspected and fined. Indeed, only one of every twenty-five job sites is *ever* visited by an OSHA inspector.<sup>66</sup> Today there are over 7 million workplaces covered by OSHA and there are 1130 inspectors at OSHA, plus additional inspectors at the State OSHA agencies.<sup>67</sup>

Even if the number of inspectors were increased to the point that there was a real chance that each employer would be visited every year, there is no guarantee that problems would be caught or workplaces made safer. Indeed, inspections have not always been successful at catching problems. Secretary Ray Marshall recalled that during his term there was an inspection at a West Virginia cooling tower one week, and the next week 100 people were killed after an accident.<sup>68</sup> In order for inspections to be effective, on-the-ground support from employees must exist.<sup>69</sup> “Employee exercise of OSHA rights before, during and after an inspection is critical to achieving the quality of enforcement envisioned under the Act. The OSHA inspection force alone can provide neither enough inspectors to ensure adequate enforcement nor a sufficiently large threat effect to compel voluntary employer compliance.”<sup>70</sup> OSHA must be looking to create partnerships with workers and organizations representing workers’ interest to supplement and help them enforce standards—both pre- and post-inspection. One place in particular OSHA should be looking for guidance is to labor unions.

## B. UNIONS AND OSHA

Before OSHA, there were labor unions. Just as they were before the OSH Act, unions are still one of the keys to ensuring a safe and healthy workplace—and holding employers accountable. Unionized employees, because of the resources that unions devote to them, are “uniquely positioned to influence OSHA enforcement.”<sup>71</sup> Unions can mitigate the problem of OSHA under-enforcement in a number of ways. First, OSHA enforcement must happen at worksites themselves—because that is where

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66. MCGARITY & SHAPIRO, *supra* note 64, at 212.

67. OSHA Facts are available at OSHA’s website, OCCUPATIONAL HEALTH AND SAFETY ADMIN., <http://www.osha.gov>. The AFL-CIO has documented the dearth of inspectors by comparing it on a state by state level to the numbers recommended by the International Labor Organization. For instance, the ILO recommends that Illinois, because it has 5,869,157 employees, have 587 OSHA inspectors available. Instead, it has 58. See *Number of OSHA Inspectors by State Compared with ILO Benchmark Numbers of Labor Inspectors*, AFL-CIO (2009), available at [http://www.aflcio.org/issues/safety/memorial/upload/\\_40A.pdf](http://www.aflcio.org/issues/safety/memorial/upload/_40A.pdf).

68. Telephone Interview with Ray Marshall, *supra* note 28.

69. *Id.*

70. *Enforcing OSHA*, *supra* note 27, at 28.

71. *Id.*

the violation is, and that is where the inspection must occur. One of the most challenging problems with OSHA is that there are not enough inspectors to monitor individual workplaces, and with such a low probability that a worksite will be inspected, employers have no reason to preemptively change their behavior. Because unions operate on a local level, they have members present who are onsite and can witness any violations, serving as the eyes and ears of OSHA. Second, unions are concerned with securing greater rights for their members from management. With employers concerned about their bottom line, it is unions who are an important counterweight to stop cutbacks to programs that workers view as vital—safety and health training, for instance—but that employers view as unnecessary expenses.<sup>72</sup> Finally, in addition to having “locals” at the worksite level, most unions also have access to their international affiliate, which can provide safety and health information and educational materials for worker training.

When a union is formed at a workplace it establishes itself as the contractual representative of that workforce.<sup>73</sup> That contract, or the collective bargaining agreement, is an important source of rights for unionized workers.<sup>74</sup> The collective bargaining agreement will include agreements on wages, hours and general working conditions, and may also set up a safety and health committee or bargain for health and safety conditions.<sup>75</sup> Courts have ruled that health and safety conditions are part of the mandatory topics about which employers must bargain.<sup>76</sup>

Although the OSH Act does include important safeguards of workers’ rights, it cannot fulfill the historical role of unions. The OSH Act needs to be enforced at the local level—and unions operate at a local level. This intersection is key to understanding why union shops have an easier time enforcing their OSHA rights. Labor unions are needed to the same extent that they were needed pre-OSHA; the only thing that has changed is why

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72. The incident at the BP Texas Plant makes this point clear. BP had made deep budget cuts at the refinery in 1999. It eliminated much of its training department staff. It also eliminated many jobs, so that key equipment operators were working twelve-hour shifts for twenty-nine to thirty-seven consecutive days—leading to shoddy work due to lack of sleep. Mufson, *supra* note 45.

73. James C. Robinson, *Labor Union Involvement in Occupational Safety and Health, 1957-1987*, 13 J. HEALTH POL. POL’Y & L. 453, 454 [hereinafter *Labor Union Involvement*] (Fall 1988).

74. *See generally id.*

75. *Id.* at 454-62.

76. *See, e.g., NLRB v. Gulf Power Company*, 384 F.2d 822, 825 (5th Cir. 1967) (“We hold, therefore, in agreement with the Board, that the phrase ‘other terms and conditions of employment’ contained in Section 8(d) of the Act is sufficiently broad to include safety rules and practices which are undoubtedly conditions of employment, and that Section 8(d) requires good faith bargaining as a mutual obligation of the employer and the Union in connection with such matters.”).

they are needed. As this article will discuss, unionized workplaces are safer because workers are better able to engage in monitoring and reporting, and may even increase the employer's own compliance efforts. Unions also ensure that when employers are cited and fined, they abate their violations and their fines are not reduced. Furthermore, as non-English-speaking immigrants continue to join the American workforce, unions are important in helping them know and enforce their rights.<sup>77</sup> The education of immigrants and other workers, the confidence and organizational skills and tools that a union provides, and the legal recourses available to union members all contribute to enforcing OSHA in workplaces across the country. The greater the level of organization of a workplace, the better the chances that workers will recognize a health or safety violation and file a formal complaint, that OSHA will respond, and that the employer will abate the dangerous behavior.

### III. FOUR CRUCIAL JUNCTURES FOR WORKPLACE SAFETY

There are four crucial junctures at which a worker acting alone may find himself unable to be an effective partner in enforcing OSHA standards, and where the presence of a union greatly increases the likelihood of effective enforcement. These are: (i) identification of a hazardous situation; (ii) communication of the problem to a third party; (iii) ensuring that OSHA is aware of the problem at its inspection; and (iv) following up to make sure that the behavior is abated. When a worker comes to a juncture like this, he may reach an impasse due to inadequate information, an inability to find someone to talk to, fear of retribution or simply lack of knowledge about the situation. At each of these junctures, a union can help—with information, with legal action, and by providing support and counseling as to each situation.

From a cost-benefit perspective, at these four junctures the cost to the worker of going forward may be too high and the personal benefits too low to justify reporting a violation. The key then is to not only increase the benefits, but also to substantially lower the costs so that workers can make the correct choice for workplace safety. After all, while only one individual worker feels the costs in question, choosing the right path at each juncture can benefit all of the workers at the worksite.

Enacting the OSH Act was an attempt to lower the costs to workers. The government tried to create a system where it would be easy to issue a

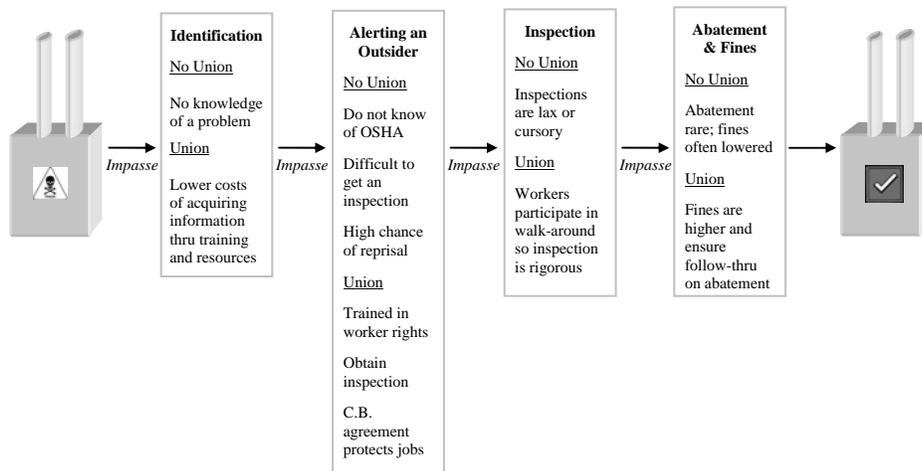
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77. Marianne P. Brown, et al., *California's Immigrant Workers Speak Up About Health and Safety in the Workplace*, HEALTH & POLICY BRIEF (UCLA Labor Occupational Safety and Health Program, Los Angeles, Cal.) (Dec. 2002), <http://www.losh.ucla.edu/losh/resources-publications/pdf/voicespolicybrief.pdf>.

complaint to a local OSHA office and then the OSHA inspector could take over. However, due to lack of information about hazards and basic workers' rights, fear of retaliation, and the inability of OSHA to guarantee employer abatement, the costs to workers have not been lowered. The presence of a union is one of the few factors that lowers the costs to the point that they become manageable for workers.

Figure 1 below provides a flow chart of the impasses that workers may face as they pursue enforcement, and the role that unions can play at each step to lower the costs faced by workers.

Figure 1: *OSHA Enforcement and the Union Effect*



### A. THE FIRST IMPASSE: IDENTIFICATION OF THE HAZARD

The first impasse that any employee faces is that of identification of the hazard. On a construction site it may be apparent that the scaffolding looks rickety; however, in factories where pesticides or chemicals are made, the safety hazard may not be apparent to the naked eye. Information on the safety of a workplace may be unavailable for many workers. Indeed, “[n]othing has more characterized the history of occupational health since the industrial revolution than the imbalance between employers and employees in access to hazard information.”<sup>78</sup>

For example, in 1977, at a pesticide mixing plant in California, an

78. JAMES C. ROBINSON, *TOIL AND TOXICS: WORKPLACE STRUGGLES AND POLITICAL STRATEGIES FOR OCCUPATIONAL HEALTH* 109 (1991). For an example of a case brought compelling the employer to reveal safety and health information to the local union, see *Oil, Chem. & Atomic Workers Local Union 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

employer told its employees that what they were mixing was safe.<sup>79</sup> There had been studies done in previous years showing the toxicity of the pesticide (DBCP),<sup>80</sup> but the employer took no steps to protect its workers, and the findings in the studies were kept confidential.<sup>81</sup> Eventually, several of the workers discovered they were sterile.<sup>82</sup> These “workers had no access to the available scientific evidence on the toxicity of the chemical they worked with, and therefore continued to be exposed until the adverse health effects became widespread.”<sup>83</sup> At that point, they alerted the leadership at their union—the Oil, Chemical and Atomic Workers (“OCAW”), one of the leading unions in the safety and health movement.<sup>84</sup> OCAW was able to get access to health information and was also able to survey the rest of its workers at other plants around the country using DBCP to ensure that they were protected.<sup>85</sup> At this point, the press, regulatory agencies, and individual cities all took notice.<sup>86</sup> Facing an onslaught of litigation, the employers—and several other chemical plants—ceased the production of DBCP.<sup>87</sup> OCAW was pushing the issue across the country in ways that no individual worker would be able to. Without the help of OCAW it is likely that the workers at the California plant, and at other DBCP-producing plants, would simply have filed workers’ compensation suits, possibly been reimbursed, and retired—or died. Indeed, rather than produce DBCP at unionized plants, the industry shifted its production of the chemical to a non-union and low-paid work force at another plant.<sup>88</sup> The workers at this plant had little knowledge of the problem and almost no ability to demand greater protection.<sup>89</sup>

After the DBCP situation, OCAW and other groups pushed through “Right to Know” legislation: the Federal Hazards Communication Act.<sup>90</sup> Like the OSH Act, this Act is vitally important, but takes a great deal of

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79. Cathy Trost, *Good Neighbor Policy*, THE DETROIT FREE PRESS, 1981, available at <http://www.aliciapatterson.org/APF0404/Trost/Trost.html>.

80. ROBINSON, *supra* note 78, at xiii. See also Trost, *supra* note 79.

81. ROBINSON, *supra* note 78, at xiv.

82. *Id.* at xiii.

83. *Id.* at xvii.

84. *Id.* at xiv, xvii.

85. *Id.* at xiv-xvii.

86. *Id.* at xv.

87. *Id.* at xvi.

88. *Id.* at xvii.

89. *Id.* at xvii. DBCP stopped being produced in the US because of EPA and OSHA regulations. It is still produced in other countries, though lawsuits seem to be prolific against most companies that make it.

90. See Hazard Communication, 29 C.F.R. § 1910.1200 (2010), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=standards&p\\_id=10099](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=standards&p_id=10099).

work to enforce and uphold. It creates a legal right for unions (and others) to demand information on chemicals and hazards from employers.<sup>91</sup> The costs of obtaining information are still too high for many workers—though workers have a right to ask for information, there is no “corresponding duty” to readily provide that information in the absence of a request.<sup>92</sup> The entire onus of gathering information—or even asking for it—is on the worker, the person in the worst position to know or demand anything.

This informational asymmetry exists even today in plants in many fields. For instance, in May 2007, several workers stepped forward after being diagnosed with a rare lung disease that had been caused by a chemical they worked with in a plant where they created butter flavoring for popcorn.<sup>93</sup> Prior to their diagnosis, these workers had no idea that the chemical in the butter flavoring—diacetyl—was harmful.<sup>94</sup> At the same time, consumers of the popcorn were diagnosed with lung problems as well, also from the same source.<sup>95</sup>

At least seven years earlier, workers at popcorn plants in the Midwest had been diagnosed with similar problems, and at least one manufacturer had discontinued use of diacetyl in its product.<sup>96</sup> Only in 2007, when consumers were actually being harmed, did public outcry reach a noticeable level.<sup>97</sup> With no unions pushing the cause, it took consumer deaths for the media to pay attention to the issue. The National Institute of Occupational Safety and Health (NIOSH) had researched the issue in the intervening years, but had taken no action at all to regulate it.<sup>98</sup> The diacetyl example presents an important case study on the costs of information. Information and studies on diacetyl existed and were relatively recent and up-to-date. However, workers in the popcorn plants had no reason to ask for the data or to doubt that their employers were using safe ingredients until they started getting sick.

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91. See Hazard Communication, *supra* note 90.

92. Nicholas Ashford & Charles Caldart, *The Right to Know: Toxics Information Transfer in the Workplace*, 6 ANN. REV. OF PUB. HEALTH 383, 384 (1985).

93. Sonya Geis, *Flavoring Suspected in Illness*, WASH. POST, May 7, 2007, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/06/AR2007050601089.html>.

94. *Id.*

95. Gardiner Harris, *Doctor Links a Man's Illness to a Microwave Popcorn Habit*, N.Y. TIMES, Sept. 5, 2007, available at <http://www.nytimes.com/2007/09/05/us/05popcorn.html?em&ex=1189137600&en=8324405698053b3b&ei=5087%0A>.

96. Andrew Schneider, *Food Worker Union Calls for End to Diacetyl in Cooking Oil; Lawmakers Seek Investigation*, SEATTLE POST INTELLIGENCER, Jan. 13, 2008, available at [http://seattlepi.nwsourc.com/national/347255\\_diacetyl14.html](http://seattlepi.nwsourc.com/national/347255_diacetyl14.html).

97. Telephone Interview with Dr. David Michaels, George Washington University School of Public Health (Mar. 21, 2008).

98. Schneider, *supra* note 96.

The movement to cease the use of diacetyl could have ended there: stopping usage of it in these large quantities in popcorn-manufacturing plants. Diacetyl is used in many cooking products, however, and thousands of cooks around the country are represented by UNITE-HERE, one of America's largest unions.<sup>99</sup> UNITE-HERE saw third parties' studies on the release of diacetyl from other cooking products and found that in some cases cooks were being exposed to even higher amounts than the popcorn workers.<sup>100</sup> It is now pushing for a ban on the product in all cooking ingredients.<sup>101</sup>

The OSH Act requires employers to provide information to any employee who requests it, to provide information on chemical hazards and to post signs throughout workplaces identifying hazards.<sup>102</sup> In practice the latter often does not happen, and so the right to request information is a meaningless right: if the hazard is an invisible one, no worker will be prompted to ask for information. Consequently, the worker is often the person least likely to have the power to demand information and the one who will be most adversely affected by that lack of information.

Thus, the first juncture a worker faces may be prohibitive: even if a worker is suspicious about the safety of the substances that he is working with, it may be difficult to obtain helpful information. When an employee does educate himself, the employer may respond with a management-produced study to show the worker that the information he found is incorrect. Even though the "right to know" is one of the most firmly established rights that a worker has,<sup>103</sup> the costs are often still too high for the right to be meaningful or effective.<sup>104</sup>

Unions can lower the costs of acquiring actionable information.<sup>105</sup> The AFL-CIO, Change to Win, and member unions have formal training programs for their stewards and locals across the country.<sup>106</sup> The Labor College has courses and training programs that train leaders of local unions around the country; one that is widely available is "Labor Safety and

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99. Schneider, *supra* note 96.

100. *Id.*

101. *Id.*

102. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 654, 657 (2010).

103. Hazard Communication, 29 C.F.R. § 1910.1200 (2010).

104. A worker has "the right to review company records on exposure monitoring" and workers are allowed information on the "identity and toxicity of substances" that they are using. These rights are for all workers, regardless of union status. ROBINSON, *supra* note 78, at 142.

105. *Labor Union Involvement*, *supra* note 73, at 458-61.

106. *Safety & Health Sites*, AFL-CIO, <http://www.aflcio.org/issues/safety/tools/infolink.cfm> (last visited Oct. 17, 2010). See also Interview with Peg Seminario, Dir. of Health & Safety at the AFL-CIO (Mar. 26, 2008).

Health.”<sup>107</sup> Besides training them on substantive matter, union leadership also educate workers about how to use the law and their collective bargaining agreements at the work site.<sup>108</sup> If a union employee notices a problem at his job, then he knows whom to talk to—either his shop steward or the local union representative. “With their structure of shop-floor stewards, local union officials, and national union health professionals, labor unions have the ability both to interpret information on workplace health and safety and to act on that information.”<sup>109</sup> Additionally, when negotiating a collective bargaining agreement a union may require the employer to have training sessions on any hazards that the employees may encounter.<sup>110</sup> Having a union provide training and education shifts the cost of obtaining information from the worker to the union. And, training and educating workers across the country results in a more educated workforce—more educated about the risks they face and about what to do about those risks.

#### **B. THE SECOND IMPASSE: ALERTING AN OUTSIDE AUTHORITY OF THE HAZARD**

Even if an employee discovers that he is working with an unsafe chemical or in an unhealthy situation, he faces a second juncture: alerting someone in a position to fix the problem. The OSH Act allows any worker to ask his/her employer to correct hazards, whether they are OSH Act violations or not.<sup>111</sup> When there is an “imminent danger” present at the work site or in what a worker is being asked to do, that employee may also refuse to continue working.<sup>112</sup> Whether the danger is imminent or not, however, employees can file individual complaints with their state OSHA program or the federal OSHA office.<sup>113</sup> That complaint, in turn, may prompt OSHA to investigate, which may lead to a citation of an employer and the employer improving the workplace conditions. The burden of starting the entire process, however, rests on the worker.

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107. *The National Labor College: Degree Programs*, NAT'L LABOR COLL., <http://www.nlc.edu/new-students/degree> (last visited Oct. 17, 2010).

108. Interview with Peg Seminario, *supra* note 106.

109. *Id.* at 454.

110. *Id.* at 458.

111. Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(f)(1) (2010). *See also Worker Rights Under the Occupational Safety and Health Act of 1970*, OCCUPATIONAL HEALTH AND SAFETY ADMIN., <http://www.osha.gov/as/opa/worker/rights.html> (last visited Oct. 17, 2010).

112. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980).

113. *Id.* at 10-11.

### 1. WORKERS' ROLES IN MONITORING AND ENFORCEMENT

OSHA's primary monitoring and enforcement mechanism is the inspection process, and OSHA depends on workers to initiate investigations by formally complaining to their local OSHA office.<sup>114</sup> Without vigilant and knowledgeable workers reporting hazardous conditions, OSHA is often unaware that violations exist.

Workers face high costs in alerting authorities for at least three reasons, each of which makes OSHA's practice of relying on complaints ineffective. First, there is the question of how to file a complaint. If employees are aware of a hazard, they may not know they have a right to complain to an agency official or they may not know the proper methods for doing so.<sup>115</sup> Second, even if a worker does file a formal complaint with OSHA, this does not guarantee a site visit by inspectors.<sup>116</sup> Third, even if an employee learns of OSHA and his rights and therefore knows how to file a complaint, he still may be wary of doing so for fear of losing his job due to retaliation (which, while illegal, is commonplace).<sup>117</sup> Unions may help lower the costs of all of these problems by giving workers an easily accessible and confidential source to complain to, by pressuring both the employer and OSHA to make changes, and by ensuring that if the worker is fired due to retaliation they have access to legal resources.

The OSH Act places a high level of responsibility on workers to alert authorities about conditions at their worksite. A high percentage of inspections are due to complaints, putting the onus of monitoring on the person least able to assert himself: the employee. Many workers do not realize they have specific rights to complain about safety hazards, or that there is a governmental system to enforce safety and health laws.

[S]ome companies with the most hazardous working conditions operate year after year . . . without ever having a complaint filed against them. Typically, such companies are small and nonunionized, have mostly women and minority employees . . . . The employees in such companies are usually ignorant of their rights under OSHA, and those few who are aware of their rights are reluctant to file a complaint

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114. *How to File a Complaint with OSHA*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/as/opa/worker/complain.html> (last visited Oct. 17, 2010). The website allows workers to go online to file a complaint. It is not on the main webpage of OSHA.

115. DON LOFGREN, *DANGEROUS PREMISES: AN INSIDER'S VIEW OF OSHA ENFORCEMENT* 205 (1989).

116. *Federal OSHA Complaint Handling Process*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/as/opa/worker/handling.html> (last visited Oct. 17, 2010).

117. LOFGREN, *supra* note 115, at 204-05.

for fear of losing their much-needed jobs.<sup>118</sup>

In a study done on worker compensation claims, the authors found that workers may be less likely to file compensation claims in nonunion shops because they are “less likely to know or be informed of the availability of and procedures for obtaining workers’ compensation in the event of an injury.”<sup>119</sup> There is no reason to assume that nonunion shops educate their workers about OSH Act rights anymore than workers’ compensation claims. Unfortunately, as the American workforce becomes more diverse, the knowledge gap will probably grow. In a small study done on immigrant workers in California, only seven of seventy-five had heard of Cal-OSHA.<sup>120</sup> Some of the workers would not contact governmental agencies because of their immigration status and because of experiences in their home countries that “led them to perceive government as ‘unfriendly’ to workers.”<sup>121</sup> Despite efforts by worker organizations and by OSHA, many workers are simply unaware of their options.

A recent study showed a huge disparity in the number of workplace accidents and the number of complaints.<sup>122</sup> In 2004, there were (at least) 5703 workplace fatalities and over 2.2 million cases of individuals missing workdays due to injuries or illnesses, yet the rate of complaints to OSHA was only seventeen for every 100,000 workers.<sup>123</sup> One would expect that the industries with the highest fatalities would have the highest number of complaints, but there is not actually a significant correlation between those industries with the highest complaints and the highest levels of violations.<sup>124</sup>

The costs associated with registering a complaint vary across the industry, but can, in many cases, be very high.<sup>125</sup> As a result, “[a]bout 120 injuries occur for every complaint that OSHA pursues.”<sup>126</sup> Construction has a much lower threshold for complaints than other sectors—only fifty complaints for each complaint inspection—while at nursing facilities there

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118. LOFGREN, *supra* note 115, at 205.

119. Barry T. Hirsch, et al., *Workers’ Compensation Reciprocity in Union and Nonunion Workplaces*, 50 INDUS. & LAB. REL. REV. 213, 217 (1997).

120. Brown, *supra* note 77.

121. *Id.*

122. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59 (2006).

123. *Id.* at 69.

124. *Id.* at 72. “The industries with the highest complaint activity are found in the manufacturing sector (and also include construction). However, in only two instances . . . do they overlap.” *Id.* Therefore, “[i]n many cases, the level of violations appears wholly unrelated to the level of complaints.” *Id.* at 73.

125. *Id.* at 79.

126. *Id.*

are over 660 employees affected by a lost-workday injury for every complaint.<sup>127</sup> It would take an intensive study across industries to find out exactly why the costs of complaining are so high, and why they vary to such a degree from industry to industry, but it is clear that “characteristics of workers and workplaces . . . affect the cost of exercising rights.”<sup>128</sup> In industries that hire more immigrants and those who are non-unionized, the costs of complaining are much higher simply because these employees lack a basic knowledge of their rights as well as the standards that employers must keep.

While “filing a complaint with OSHA or suffering with hazardous working conditions is a difficult choice for many employees,”<sup>129</sup> if an employee is a member of a union, the costs of participating in the system will be lowered: the union helps to educate its members about their rights and the standards by which employer must abide. In the workplace, knowledge is power, and unions have structures in place to guarantee that even if not every worker knows all of his or her rights, there is someone there who does. “Union workplaces tend to be more highly structured . . . [i]n the event of an injury, either workers already are aware of the availability of workers’ compensation benefits or they are quickly made aware by co-workers, shop stewards, or supervisors.”<sup>130</sup> Local unions, though often highly independent from their international counterparts, are all trained and supervised by an international union that has resources and training programs for all of its members. Furthermore, both labor federations (the AFL-CIO and Change to Win) have safety and health coordinators to ensure that the international unions have access to training programs at the Labor College. The AFL regularly puts on “train the trainer” programs where union organizers are trained on legal rights on using the power of the union and the collective bargaining agreement to secure a healthier and safer workplace and on legal rights.<sup>131</sup> Almost all major unions have a safety and health coordinator as well.

## 2. RETALIATION BY EMPLOYERS

An additional roadblock to reporting workplace dangers is fear of reprisal.<sup>132</sup> Though the ultimate cost a worker could pay may be his life, for many workers the loss of their job can be devastating.<sup>133</sup> If the cost of

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127. Weil & Pyles, *supra* note 122, at 79.

128. *Id.* at 82.

129. LOFGREN, *supra* note 115, at 204.

130. Hirsch, *supra* note 119, at 217.

131. Interview with Peg Seminario, *supra* note 106.

132. LOFGREN, *supra* note 115, at 204-05.

133. *Id.*

reporting a violation is that a worker loses his job, very few employees will feel compelled to take action. Union membership can provide protection in two ways: first, if a worker talks to his/her local union, then that union may be able to put pressure on the employer and keep the worker out of any conflict. Second, if a worker suffers retaliation, the union can call upon its legal team, which is generally of better quality than what a single worker would find.

Section 11(c) of the OSH Act grants protection from discrimination to employees who exercise their right to complain about health and safety.<sup>134</sup> Complaints are to be confidential, but employers may discover the complainant as the process moves forward.<sup>135</sup> Especially in companies “with a small number of employees, especially nonunion shops, or in large companies with small work groups, the risk of being suspected of filing a complaint can be great.”<sup>136</sup> There are many instances across industries and throughout the entire history of OSHA where workers who have spoken up have been intimidated, harassed, fired and even possibly murdered by their employers.<sup>137</sup> Just a couple years ago in Washington, D.C., ten workers who were working in the tunnel under the U.S. Capitol complained to their supervisor about the dangerous conditions—they did not have adequate ventilation and so were breathing asbestos.<sup>138</sup> The Capitol Architect fired them and told members of Congress that they were simply troublemakers. Soon after, they filed suit for retaliation and settled with a very friendly offer.<sup>139</sup> In another embarrassing—and potentially very dangerous—instance, the FAA retaliated against a safety inspector who notified officials that, due to a union strike at Northwest Airlines and the hiring of replacement workers, the airline was operating unsafely.<sup>140</sup> The Office of the Inspector General, in a 1997 audit, found that nearly 82% of employees who complained to their employers about health and safety issues were subsequently fired.<sup>141</sup> When employees bypassed their employers and

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134. Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (2010).

135. LOFGREN, *supra* note 115, at 204-05.

136. *Id.*

137. See, e.g., *The Karen Silkwood Story*, LOS ALAMOS SCI., Nov. 1995, at 252, available at <http://library.lanl.gov/cgi-bin/getfile?23-14.pdf>. For a discussion of her story, see LEOPOLD, *supra* note 4, at 314-35.

138. Marc Fisher, *Tunnel Rat Breaks Silence on Dangers of Asbestos*, WASH. POST, Mar. 18, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701161.html>.

139. *Under Pressure, Capital Architect Addresses Asbestos Hazard*, LABORERS' HEALTH AND SAFETY FUND OF NORTH AMERICA (LHSFNA), July 2007, <http://www.lhsfna.org/index.cfm?objectID=635C3362-D56F-E6FA-93619816700D82D2> (last visited Oct. 17, 2010).

140. Stanley Homes, *Airline Safety: A Whistleblower's Tale*, BLOOMBERG BUSINESSWEEK, Jan. 18, 2008, [http://www.businessweek.com/magazine/content/08\\_06/b4070000689813.htm?chan=top+news\\_top+news+index\\_businessweek+exclusives](http://www.businessweek.com/magazine/content/08_06/b4070000689813.htm?chan=top+news_top+news+index_businessweek+exclusives) (last visited Oct. 17, 2010).

141. *Whistleblower Protection Under Section 11(c) of the OSH Act*, U.S. DEP'T OF LABOR,

reported the violation to OSHA, around 51% were “improperly terminated.”<sup>142</sup> The costs of blowing the whistle may seem so high that they are not worth the possible benefits. If a worker believes a chance exists that he may be getting sick from a chemical used, or that there is a slight possibility that a pipe being laid is not sound, that danger may not be enough to outweigh the risk that the employee could lose his job.

While retaliation is illegal, it is rare that plaintiffs prevail in court. A recent study reported that whistleblowers won only 3.6% of their cases when they filed Sarbanes-Oxley (“SOX”) complaints,<sup>143</sup> and SOX is generally perceived as having a more employee-friendly burden of proof than that found in the OSH Act.<sup>144</sup> Excellent legal representation is therefore vital to having any chance at winning a retaliation claim. Of course, even with good lawyers the process is extremely slow and employees who chose to speak up may be out of a job for years if the employer will not relent.

For instance, although they were eventually rehired, a group of union pipefitters who sounded the alarm on their company and were subsequently fired were not vindicated for years.<sup>145</sup> In 1997, a crew of pipefitters working for Fluor Federal Services refused to install a valve rated for pressure of only 1975 pounds per square inch for a test of radioactive waste that would require 2235 pounds per square inch.<sup>146</sup> Because of their refusal, the crew of seven workers was fired.<sup>147</sup> The workers filed a complaint with OSHA and subsequently settled with Fluor for reinstatement, but the company insisted on laying off seven other employees to make up for hiring these seven back.<sup>148</sup> The seven to be laid off had all been supportive of the original workers and were active union supporters—one of them was even

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OFFICE OF INSPECTOR GEN., [http://www.oig.dol.gov/public/reports/oa/pre\\_1998/05-97-107-10-105s.htm](http://www.oig.dol.gov/public/reports/oa/pre_1998/05-97-107-10-105s.htm) [hereinafter *Whistleblower Protection*].

142. *Whistleblower Protection*, *supra* note 141.

143. Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67 (2007). Sarbanes-Oxley provides that whistleblower complaints are handled through OSHA. *Id.* While I did not have time to complete a FOIA request asking for the number of cases and prevailing parties bringing OSHA retaliation claims, I would suspect that the employee win rate for bringing safety/health claims is just a little higher.

144. *Id.* at 125.

145. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash. 2d 432 (Wash. 2008). *See also* Shannon Dininny, *11 fired Hanford workers awarded millions*, THE SEATTLE TIMES, Sep. 3, 2005, available at [http://seattletimes.nwsourc.com/html/localnews/2002468678\\_hanford03m.html](http://seattletimes.nwsourc.com/html/localnews/2002468678_hanford03m.html). All of the men were members of Local 598 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

146. *Brundridge*, 164 Wash. 2d at 438.

147. *Id.*

148. Dininny, *supra* note 145.

the local president and had been on the original list of workers to fire. The company spread rumors that they needed to lay off these men, creating a hostile work environment for the returning men and problems within the local union, where the company attempted to pit union brothers against one another. The men who had been reinstated, along with those who had just recently been laid off, all worked together to file a joint suit against Fluor.<sup>149</sup> In 2005, they won their suit and were awarded over \$4 million in damages and back pay.<sup>150</sup> Fluor appealed the case to the Supreme Court of Washington, and in 2008 the Court found for Fluor.<sup>151</sup> These pipefitters were all active union members and benefitted from the help of their union in bringing the lawsuit.

Unions help solve the problem of fear of retaliation in two ways. First, unions can help shield employees before they file a complaint.<sup>152</sup> A union may “provide a shield for employees by presenting the health or safety concern to management and later if necessary to OSHA. The union representative” can, in essence, take “the heat.”<sup>153</sup> Having a union present may prevent the employer from discouraging employees from filing a complaint because “such actions would be known to the union and could provoke the filing of a grievance.”<sup>154</sup>

Second, an employer that has a unionized workforce is limited in what he can do by the collective bargaining agreement. Almost every collective bargaining agreement will have a provision stronger than Section 11(c) to help protect the worker’s job.<sup>155</sup> If a union worker is fired from her job, her union will file a grievance stating that the employer has violated her rights under the collective bargaining agreement.<sup>156</sup> Given that Section 11(c) is so weak, protection under the collective bargaining agreement is vital: it may be the only thing that stands in the way of a worker losing her job. If the worker is not in a union it will be up to the Secretary of Labor to bring the charge of retaliation—it is not the worker who can initiate it.<sup>157</sup> If the

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149. Dininny, *supra* note 145. See also Hanford, GOV’T ACCOUNTABILITY PROJECT, <http://www.whistleblower.org/program-areas/environment/nuclear-oversight/hanford> (last visited Oct. 17, 2010).

150. *Brundridge*, 164 Wash. 2d at 439. See also Dininny, *supra* note 145. To read more about Hanford’s environmental and worker problems visit: [http://seattlepi.nwsourc.com/local/355924\\_hanford21.html](http://seattlepi.nwsourc.com/local/355924_hanford21.html).

151. *Brundridge*, 164 Wash. 2d 432.

152. LOFGREN, *supra* note 115, at 205.

153. *Id.*

154. Hirsch, *supra* note 119, at 217.

155. Interview with Peg Seminario, *supra* note 106. See also *Whistleblower Protection*, *supra* note 141.

156. Interview with Peg Seminario, *supra* note 106.

157. *Id.*

Secretary decides not to bring charges, a worker has very few options.<sup>158</sup>

### C. THE THIRD IMPASSE: EFFECTIVE INSPECTIONS

Secretary Ray Marshall has said that the procedures used in the OSH Act are fundamentally flawed—it is an error to think that the United States could protect the safety and health of workers merely through inspections, in part because the quality of inspections is so variable.<sup>159</sup> Two main problems exist with OSHA’s inspections. First, on many worksites the inspection itself may not be rigorous enough to reveal underlying problems.<sup>160</sup> Second, inspections are one-size-fits-all, ensuring that some industries—like construction—will not receive effective inspections.<sup>161</sup>

Initiating an OSHA inspection is an uphill battle for a single worker. Worker complaints that do not specify an imminent danger are not OSHA’s number-one priority, but unless there is an imminent danger or a death at a workplace, filing a complaint may still be the best chance that a worker has of getting OSHA’s attention.<sup>162</sup> Having a union substantially raises the probability of receiving an inspection based upon a complaint.<sup>163</sup> A study done in the mid 1980s found “a strong positive correlation between the percentage unionized and the number of complaint inspections received in an industry after holding constant workplace conditions as well as size and strike activity.”<sup>164</sup>

The intensity of the actual inspection is nearly as important as having an inspection at all, and is highly dependent on input from employees. The OSH Act gives the workers’ representative the right to accompany the OSHA inspector during the inspection, which can ensure that inspections

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158. Interview with Peg Seminario, *supra* note 106.

159. Interview with Ray Marshall, *supra* note 28.

160. *Id.*

161. David Weil, *Making OSHA Inspections More Effective: Alternatives for Improved Inspection Targeting in Construction Industry*, THE CENTER TO PROTECT WORKERS’ RIGHTS 1 (2004) [hereinafter *Making Inspections More Effective*], available at [http://www.cpwrt.com/pdfs/pubs/research\\_pubs/krweil.pdf](http://www.cpwrt.com/pdfs/pubs/research_pubs/krweil.pdf).

162. *Federal OSHA Complaint Handling Process*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/as/opa/worker/handling.html> (last visited Oct. 17, 2010).

OSHA’s top priority for inspection is an imminent danger—a situation where workers face an immediate risk of death or serious physical harm. Second priority goes to any fatality or catastrophe—an accident that requires hospitalization of three or more workers. Employers are required to report fatalities and catastrophes to OSHA within eight hours. Third priority is employee complaints and referrals. Lower inspection priorities include inspections targeted toward high hazard industries, planned inspections in other industries and, finally, follow-up inspections to determine whether previously cited violations have been abated.

*Id.*

163. *Enforcing OSHA*, *supra* note 27, at 26.

164. *Id.*

are effective, in-depth, and responsive to employees' concerns.<sup>165</sup> As in almost all other areas of OSHA enforcement, participation by an employee is key: "[a]n employee's right to accompany an OSHA inspector during a workplace tour is the most important mechanism affecting inspection intensity. This 'walkaround' right insures that OSHA inspectors address problems of concern to employees."<sup>166</sup> That "representative is chosen by the union (if there is one) or by the employees," but employers have no right to choose the representative.<sup>167</sup> For many reasons, employees may be reticent to insist on their right to accompany the OSHA inspector on his tour.<sup>168</sup> For instance, many employers will not compensate workers for time spent with an OSHA inspector on a walkaround tour.<sup>169</sup> A past OSHA inspector has noted that "[u]nion representatives often feel more free to express their opinion to OSHA inspectors than do rank-and-file members or non-unionized workers."<sup>170</sup> They also feel freer to accompany the inspector on his walkaround tour, and some "unions have bargained for walkaround pay or have elected to compensate members who participate in walkarounds."<sup>171</sup> In companies with fewer than 100 employees, less than 3% of nonunion workers exercise the walkaround right, as opposed to 48% of unionized workers.<sup>172</sup> This disparity increases with the size of the company.<sup>173</sup> As the intensity of the inspection increases, as we can expect it will if employees choose to exercise their walkaround right, the likelihood that the employer will be fined and penalized will go up as well.<sup>174</sup> The second problem with OSHA's inspections is that the one-size-fits-all approach to inspections is poorly suited to deal with workplace violations in many industries—particularly construction, which is perennially one of the most hazardous jobs.<sup>175</sup> Because the OSHA inspection regime is so ill-fitting for construction, the presence of union members is particularly important.

Construction job sites receive close to 40% of all inspections

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165. *Enforcing OSHA*, *supra* note 27, at 28.

166. *Id.*

167. *Federal OSHA Complaint Handling Process*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/as/opa/worker/handling.html> (last visited Oct. 17, 2010).

168. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-HRD-90-66BR, OPTIONS FOR IMPROVING SAFETY AND HEALTH IN THE WORKPLACE 44 (1990) [hereinafter *GAO Options Report*], available at <http://archive.gao.gov/d23t8/142142.pdf>.

169. *Id.*

170. LOFGREN, *supra* note 115, at 204.

171. *GAO Options Report*, *supra* note 168, at 50.

172. *Enforcing OSHA*, *supra* note 27, at 28.

173. *Id.* at 28-29.

174. *Id.* at 31.

175. *Making Inspections More Effective*, *supra* note 161, at 1.

performed by OSHA, yet these job sites remain some of the most dangerous workplaces in America.<sup>176</sup> Several characteristics of construction work make the inspection system inadequate.<sup>177</sup> First and foremost, construction sites move quickly.<sup>178</sup> OSHA may perform an inspection one week and find multiple violations, but by the time they cite the employer the worksite will have changed or relocated. Furthermore, many contractors and subcontractors are used in construction, so often there is not just one person on the site who is accountable for the safety and health of workers.<sup>179</sup> And lastly, different teams complete different projects at construction sites and each team may have a varying degree of hazards to deal with, as well as differing degrees of sophistication about safety and health and their rights.<sup>180</sup> Therefore, the best way to ensure that workers are well-trained is to have an outside group like a union educate them on best practices and empower them to assert their rights. For example, one construction union—the Laborers Union—has an extensive training program for its workers and also conducts on-site safety inspections, audits and evaluations so that it can report any problems.<sup>181</sup> However, while unions may help, they cannot do it all. The construction industry may be one place where the only way to solve the health and safety problems is to have a permanent safety official (as the USDA does at all meat-packing facilities).

#### D. THE FOURTH IMPASSE: PENALTIES AND ABATEMENT

Once OSHA is aware of a problem and has documented it through an inspection, OSHA must act to penalize the employer and ensure that the hazard is ceased. Unions help ensure that OSHA enforces the law and penalizes the employer in two ways. First, unions have an impact on the penalties and citations imposed by OSHA. Second, OSHA has a poor record of following up to ensure that employers cease their violations, and a union can help ensure that OSHA penalties are carried out and the workplace made safe.

Following an inspection, OSHA has the power to fine employers for their violations of standards.<sup>182</sup> Fines are intended to punish the violators

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176. *Making Inspections More Effective*, *supra* note 161, at 2. “In 2002, there were 1,153 deaths from injuries on constructions—more than in any other industry.” *Id.* at 1.

177. *Id.* at 1.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Occupational Safety and Health: Division and Mission*, LABORERS’ HEALTH AND SAFETY FUND OF NORTH AMERICA (LHSFNA), available at <http://www.lhsfna.org/index.cfm?objectID=36F88010-D56F-E6FA-9580BEB042612F48> (last visited Oct. 2010).

182. Occupational Safety and Health Act of 1970, 29 U.S.C. § 666 (2010).

and to deter future violations by that employer and others in the industry. “[T]he higher the penalty charged for a violation, the greater the incentive for employers to voluntarily comply with standards.”<sup>183</sup> The penalty is directly correlated to the number of violations found and their severity,<sup>184</sup> so the rigor of the inspection is important in determining how heavy a fine will be levied. Although penalties may initially be harsh, they are often adjusted downward at OSHA’s discretion.<sup>185</sup> Employers can appeal a penalty<sup>186</sup> and employees have the right to participate in any hearing about the reduction.<sup>187</sup> Individually, employees may not know how or whether to intercede in the hearing, and may not want to participate for fear of retaliation. Unions, however, do participate in the administrative appeals proceedings, and thus “minimize the extent to which penalties fall between the time they are first assessed and the time of final payment by the employer.”<sup>188</sup>

OSHA inspectors will issue an “abatement date”—the date by which the employer must correct the violation and pay any applicable fines.<sup>189</sup> Unfortunately, although OSHA may have invested man-hours and money into finding and citing an employer, the agency dedicates virtually no resources to following up on the employer’s behavior.<sup>190</sup> In the past, OSHA’s guidance to regional and area offices has been that the “number of follow-up inspections should not normally exceed 10 percent of all inspections.”<sup>191</sup>

The procedure for verifying abatement starts when OSHA mails citations or penalties to the employer and directs the employer to take action.<sup>192</sup> At this time, OSHA may also request that the management respond with “letters detailing specific abatement actions and the date abatement was achieved for each violation and notes that a follow-up inspection may occur if there is no response.”<sup>193</sup> According to the OSHA Field Manual, the OSHA officer must set the abatement date at the earliest

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183. *Enforcing OSHA*, *supra* note 27, at 31.

184. 29 U.S.C. § 666.

185. *Enforcing OSHA*, *supra* note 27, at 32-33.

186. 29 U.S.C. § 660(a).

187. *Enforcing OSHA*, *supra* note 27, at 33.

188. *Id.*

189. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-HRD-91-35, OSHA POLICY CHANGES NEEDED TO CONFIRM THAT EMPLOYERS ABATE SERIOUS HAZARDS 2 (1991) [hereinafter *GAO Abatement Report*], available at <http://archive.gao.gov/d20t9/143945.pdf>.

190. *Id.* at 3.

191. *Id.* at 2.

192. *Id.* at 4.

193. *Id.*

reasonable time by which the employer could remedy the problem.<sup>194</sup> If OSHA does not receive a letter from the employer stating that abatement has been achieved, an OSHA official is directed to verify abatement by telephone.<sup>195</sup> An employer may satisfy the abatement requirement by simply sending a letter with no documentation or calling the OSHA office to report that the hazard is gone.<sup>196</sup>

Of course, the only way OSHA can be certain that an employer has discontinued a dangerous practice is for an inspector to visit the workplace. Because of the lack of inspectors, however, the OSHA must rely on employers to remedy the situation and honestly report that they have done so. Not only are inspectors unavailable for verification, OSHA often inadequately documents follow-up phone calls with employers.<sup>197</sup> A GAO report in 1991 published the findings of an audit of seventy-eight of the seventy-nine OSHA offices, reporting that GAO investigators were often unable to determine how offices confirmed abatement and what type of information was acceptable.<sup>198</sup> To illustrate the problem, they selected seven case files: not one of the files had a complete written description of the corrective actions taken by the employer, and some of the files showed that OSHA would accept the oral assurance at an informal conference with the employer without obtaining any supporting evidence.<sup>199</sup> In 1989, almost a quarter of OSHA's follow-up inspections revealed that employers had not corrected known hazards.<sup>200</sup> There is no reason to think that the share of employers who take corrective action has increased since then.

Unions can be particularly effective in ensuring proper follow-up. Unions often enforce their collective bargaining health and safety rights by establishing joint safety and health committees with management.<sup>201</sup> This is particularly important in the construction and petrochemical industries because of poor enforcement and project-based jobs, but it can be used with all employers to ensure abatement. If there is a joint committee on a worksite, that body is generally tasked with ensuring that the employer abate its violations and remedy the problem.

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194. *OSHA Field Inspection Reference Manual*, § 8, Ch. 4, OCCUPATIONAL SAFETY AND HEALTH ADMIN., [http://www.osha.gov/Firm\\_osh\\_data/100008.html](http://www.osha.gov/Firm_osh_data/100008.html) (last visited Oct. 17, 2010).

195. *Id.*

196. *Id.*

197. *GAO Abatement Report*, *supra* note 189, at 4.

198. *Id.*

199. *Id.* at 4-5.

200. *Id.* at 5.

201. *Labor Union Involvement*, *supra* note 73, at 461-62.

#### IV. APPLYING LESSONS LEARNED

The Obama Administration's Department of Labor, headed by Secretary Hilda Solis, has the opportunity to begin to reverse decades of stalemates in rule-making and enforcement at OSHA. Many changes will not require additional funding, but rather a re-alignment of resources and a refocusing of priorities.

Analyzing the ways that unions contribute to the OSHA enforcement process can aid in identifying where OSHA should focus changes to achieve the greatest leverage, and to move beyond quick fixes. Although some unions focus on safety and health more than others, most union members have a basic level of knowledge about their rights, easier access to support, and a collective bargaining agreement that guarantees them basic worker rights. Because the unionized workforce is shrinking, it is also critical to ensure that even non-unionized workers have access to the knowledge and power they need to enforce their legal rights under the OSH Act.

Any program that seeks to provide the workplace-safety benefits of a union must fulfill at least the following critical roles that unions play:

1. *Education*: Workers must be educated about the dangers in their workplace and must have knowledge of their rights under the OSH Act.
2. *Retaliation Protection*: Workers must not fear being victims of retaliation and there must be a process in place for confidential complaints.
3. *Inspection Facilitation*: Inspectors must be accompanied on every visit by a representative of the employees so that inspections are rigorous and take all violations into account.
4. *Employer Abatement*: There must be an independent verification that the employer has ceased his violations.
5. *Grievance Process*: A system must be in place where workers can take problems for swift resolution and without fear of retaliation.<sup>202</sup>

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202. One key component of union protections that may fall through the cracks with some alternatives is that of the collective bargaining agreement (CBA). The CBA is at the core of a union worker's rights vis-à-vis management, and those rights are enforced through arbitration decisions. Both management and unions are more likely to actually enforce an arbitrator's decision than that of a court, and the process is much, much faster. The lack of a CBA, and with it, the lack of arbitration over differences or firings, creates a void in workers' rights. One way to

An effective program would encompass all of these aspects, and thus achieve a “union effect” by lowering the costs to workers so that OSHA standards may be fully enforced.

Since 1970, worker health and safety has, appropriately, become part of the regulatory processes of local and federal governments. This means that both federal and state governments must look for ways to partner with worker organizations in order to achieve the common goal of protecting employees’ lives. There are several ways in which governmental entities could help lower the burden on workers and supplement their limited OSHA regimes.

### A. JOINT SAFETY AND HEALTH COMMITTEES

First, state and federal OSHAs could mandate that there be a joint employee/union-management safety and health committee (JSHC) at every workplace that is within OSHA’s purview. As previously mentioned, this is one way that unions enforce the safety and health rights of their members today.<sup>203</sup> These committees give the union, or individual workers in the absence of a union, “a continuous platform” for delivering demands and making requests.<sup>204</sup> Currently, OSHA has two programs to encourage employers to develop safety and health programs, but they are voluntary.<sup>205</sup> A 1990 GAO report noted that ninety percent of all OSHA inspectors supported requiring repeat violators of OSHA standards to have workplace safety and health programs.<sup>206</sup> Washington and Oregon currently both require JSHCs at most worksites, and several countries, including Canada, require them as well.<sup>207</sup> These committees offer many benefits: they encourage local problem-solving and prevention activities, provide training

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fill this lack of protection would be to pass legislation enabling individual workers to both sue to get their jobs back (today OSHA must file suit on their behalf), and to allow workers to file citizen-suits against employers for violations of OSHA.

203. Interview with Peg Seminario, *supra* note 106. For example, the National Association of Letter Carriers has a JSHC written into their National Agreement. See *2006-2011 National Agreement between the National Association of Letter Carriers & the United States Postal Service*, Art. XIV (2002), NAT’L ASS’N OF LETTER CARRIERS, available at <http://www.nalc.org/depart/cau/agreemnt.html>.

204. *Labor Union Involvement*, *supra* note 73, at 461.

205. They are the consultation program and the voluntary protection program. See *On-Site Consultation*, OCCUPATIONAL HEALTH AND SAFETY ADMIN., <https://www.osha.gov/dcspp/smallbusiness/consult.html> (last visited, Oct. 17, 2010); *Voluntary Protection Programs*, OCCUPATIONAL HEALTH AND SAFETY ADMIN., <http://www.osha.gov/dcspp/vpp/index.html> (last visited, Oct. 17, 2010).

206. *GAO Options Report*, *supra* note 168, at 47.

207. See, e.g., *Workplace Health and Safety Rights for Manitoba Workers*, MFL OCCUPATIONAL HEALTH CARE, [http://www.mflohc.mb.ca/fact\\_sheets\\_folder/rights\\_for\\_manitoba\\_workers.pdf](http://www.mflohc.mb.ca/fact_sheets_folder/rights_for_manitoba_workers.pdf) (last visited Oct. 17, 2009).

and education materials for workers, and can act as alternatives to the OSHA process. Workers can report problems first to these committees which can, in turn, handle the problem. If the employer fails to remedy the problem, the committee can file a complaint with OSHA and ensure that a proper inspection takes place, as a union would.

The biggest problem with mandating JSHCs is their tendency to become a tool for the employer. A bill to reform OSHA, proposed in 1998, called for mandatory JSHCs, but the issue of how to ensure that committees would remain independent was never fully resolved, and the bill eventually failed.<sup>208</sup> Any legislation mandating a JSHC would need to include a requirement for employee representation as a counterbalance to employer power. This representation could consist of labor-union involvement (where unions exist) or the involvement of members from one of the nation's many committees on occupational safety and health (COSH), and would provide a source for independent information and resources. There could also be a seat at the table for one of these groups to moderate. Washington State requires that the worker representatives be elected directly by the workers, regardless of whether the worksite is unionized or not—thus ensuring that workers have an independent voice.<sup>209</sup> Given the total lack of options in non-union worksites, mandatory JSHCs may be the best chance at improving OSHA enforcement, without requiring billions of dollars in federal funding.

### B. SAFETY REPRESENTATIVES

Second, short of having a JSHC at every workplace, OSHA could mandate that every site have a Safety Representative (SR) who is autonomous and has a direct line to OSHA. A European study on safety and health in construction showed that “the presence of a safety representative onsite” had the strongest correlation with increased safety compliance.<sup>210</sup> The report noted that

safety representatives influence safety compliance not only through their influence on the response to audits and hazards but also through other means. Thus they encourage the reporting of hazards and help ensure that these reports lead to better safety compliance on site. Their presence also makes it significantly less likely that workers will

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208. Telephone Interview with Jordan Barab, Senior Labor Policy Advisor, Edu. and Labor Comm., U.S. H.R. (Apr. 14, 2008).

209. *GAO Options Report*, *supra* note 168, at 50.

210. Nick McDonald & Victor Hrymak, SAFETY BEHAVIOR IN THE CONSTR. SECTOR, REPORT TO THE HEALTH AND SAFETY AUTH. 3 (Ir.), *available at* <http://www.elcosh.org/record/document/71/d000055.pdf>.

continue to work in hazardous situations.<sup>211</sup>

The SR would have the power to levy fines, would ensure that safety materials were given to all employees, and would organize trainings on safe workplace habits. The SR would also be available for a confidential discussion with any worker with a complaint or question, and would file complaints on behalf of employees to increase confidentiality.

To be effective, a Safety Representative must have authority over contractors as well as owners. The practice of hiring contractors to complete specific tasks, while economically sensible, often leads to a lack of leadership on safety and health issues. Having an SR present could solve this problem if the SR were given enforcement abilities over all aspects of a job. For example, if Wal-Mart contracts out cleaning services, the SR would make sure that those cleaners were working in safe and healthy ways and would be there to help them, just as he would also make sure that Wal-Mart's stockers were lifting and unloading boxes in safe ways. If it were found infeasible to mandate that every workplace have an SR, the mandate could be limited to certain worksites—for instance, to any shop that had more than a certain number of complaints over a particular time period. Alternatively, SRs could be responsible for multiple job-sites and required to visit them all regularly.

### C. DEPARTMENT OF LABOR POLICIES

Third, Department of Labor policy should recognize the important role that labor unions play in worker health and safety. Agency officials in the Obama Administration are more union-friendly than in the previous administration. These officials, starting with Assistant Secretary for Health and Safety David Michaels, should take time to understand the impact that unions and other organizing committees have, not just on wages and contracts, but also on the health and safety of workers.

OSHA could encourage partnerships between employers and unions by rewarding employers that have a union that focused on health and safety. If OSHA were able to reward employers that had unionized workforces, employers would have a legitimate reason to engage with unions and reduce hostilities. Furthermore, although the unionized workforce is shrinking, in some sectors active organizing is ongoing and major breakthroughs are occurring, particularly in the hotel and service workers industries. These organizing drives could be helped along if an outside force like OSHA explicitly recognized the work that unions do in promoting safety and health on the job. Unions are at the forefront of organizing workers in

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211. McDonald & Hrymak, *supra* note 210.

dangerous industries and using collective bargaining agreements to ensure the health and safety of their workers. For instance, UNITE-HERE recently commissioned a study—possibly the first of its kind—on the detrimental health effects of increasing the demands on hotel cleaners.<sup>212</sup> The study showed that hotels now have more beds, more and heavier linens and pillows, and less space to maneuver in, but cleaners are expected to clean the same number of rooms in the same amount of time.<sup>213</sup> The study found that these requirements were causing health problems and musculoskeletal injuries in many of the housekeepers.<sup>214</sup> This study was presented to a hotel during negotiations over a collective bargaining agreement with UNITE-HERE.<sup>215</sup> “The data from the study enabled the union and room cleaners to make and justify a contract proposal calling for a significant reduction in housekeeping workload.”<sup>216</sup>

#### D. COMMITTEES ON OCCUPATIONAL SAFETY AND HEALTH

Finally, the government and OSHA could look to form partnerships with other worker-friendly groups that may not carry the political baggage of traditional labor unions. Organizations like this already exist around the country in the form of Committees on Occupational Safety and Health (COSH). There are many COSHs at the local and state levels. Each is funded differently and has a different focus, but all are independent non-profit (and non-partisan) organizations that work with state labor groups, individual workers and others to create safe and healthy workplaces and to train workers.<sup>217</sup> Like any nonprofit organization, their capacity is directly correlated with their resources. For instance, in Wisconsin, WisCOSH is a recipient of the Susan Harwood Grant administered by OSHA.<sup>218</sup> With that money, WisCOSH offers trainings for building and construction workers, teen and new worker trainings, immigrant workers’ rights trainings and even classes on legal rights for those facing illegal retaliation.<sup>219</sup> The New

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212. Paul Tau Lee & Niklas Krause, *The Impact of a Worker Health Study on Working Conditions*, 23 J. PUB. HEALTH POL’Y, no. 3, 2002 at 268-69, available at <http://www.lohp.org/docs/pubs/hotelwork99.pdf>.

213. *Id.* at 277.

214. *Id.* at 277-78.

215. *Id.* at 279-80.

216. *Id.* at 280.

217. See, e.g., *New York Committee for Occupation Safety and Health, Home Page*, NYCOSH, <http://www.nycosh.org> (last visited Oct. 17, 2010); *Massachusetts Coalition for Occupational Safety and Health*, MASSCOSH, <http://www.masscosh.org> (last visited Oct. 17, 2010); *Philadelphia Area Project on Occupational Safety and Health*, PHILAPOSH, <http://www.philaposh.org> (last visited Oct. 17, 2010).

218. See *WisCOSH’s Worker Safety & Health Report—Reporting WisCOSH Activities and Occupational Safety & Health Information*, WISCOSH, <http://www.wiscosh.info> (last visited Oct. 17, 2010).

219. *Id.*

York COSH is affiliated with 200 labor unions and over 400 individuals—workers, lawyers, worker-health specialists, and others.<sup>220</sup> NYCOSH “helps workers learn how to protect themselves by teaching them about the hazards in their workplace, and by showing them ways to control and eliminate the dangers.”<sup>221</sup>

COSH organizations, though often affiliated with unions and workers groups, are separate organizations and networks that are solely dedicated to worker safety and health. As noted above, if Joint Committees are mandated by OSHA reform legislation, one way to ensure that the worker side of the Committee is adequately informed and independent would be to significantly expand grants that are available for COSH organizations—both to grow existing ones and to start new ones. Of course, no matter how much worker organizations do for non-union employees, they will never be as effective as unions because they will not be able to negotiate collective bargaining agreements, which provides a power to employees that the OSH Act cannot match. However, COSH organizations can run trainings, speak up for workers, and be a great resource in places where there are no unions.

### CONCLUSION

At the heart of the struggle for a safe and healthy workplace is an imbalance of power between the employer and employee—an imbalance that unions have, throughout their history, struggled to minimize. The National Labor Relations Act was passed seventy-five years ago to help working people in their struggle by allowing employees the right to organize and bargain collectively around workplace issues like wages and health and safety.<sup>222</sup> The OSH Act was passed forty years ago to ensure that all workers, union and non-union, have the right to a safe workplace.<sup>223</sup> Both acts were supposed to make the federal government an ally of working people as they fight for the right to organize, to bargain and to have good wages and a safe and healthy working environment. Both, however, have failed to live up to their promises, largely because the decline in union membership has made implementation and enforcement difficult—but there is still much potential. Workers can exercise a great deal of power when they fight collectively for their rights. Unions may be the only institution in America that level the playing field for workers in all aspects of their jobs. Other organizations, like committees on safety and health and other local non-profits, may also help remedy the inequality that exists between the

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220. See *About NYCOSH and its Staff*, NYCOSH, [http://www.nycosh.org/about\\_NYCOSH/about.html](http://www.nycosh.org/about_NYCOSH/about.html) (last visited Oct. 17, 2010).

221. *Id.*

222. See National Labor Relations Act, 29 U.S.C. §§ 151-69 (1935).

223. See Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (2010).

employer and employee, especially in terms of prioritizing safety and health on the job. Nonetheless, these organizations can do only so much alone. As Secretary Solis recently noted: “When it comes to workplace protection, workplace health and workplace safety, let me be clear: the Labor Department is back in the enforcement business.”<sup>224</sup> This is good news for America’s workers, but it will take more than words to ensure that OSHA is up to the task.

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224. *Remarks as Prepared for Delivery, National Workers Memorial at the National Labor College, Silver Spring, Maryland*, U.S. DEPT OF LABOR, [http://www.dol.gov/\\_sec/media/speeches/20090428\\_NLC.htm](http://www.dol.gov/_sec/media/speeches/20090428_NLC.htm) (last visited Oct. 17, 2010).