The Next OSHA:
Progressive Reforms to Empower Workers

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Executive Summary

In the aftermath of the financial meltdown of 2008, Americans are increasingly concerned about imbalances of influence and power in American society and how those imbalances have weakened the regulatory system that Congress designed to protect us from dangerous corporate actors. The real estate industry's abusive lending practices, BP's massive oil spill in the Gulf of Mexico, the tragedy at Massey Energy's Upper Big Branch Mine, and nationwide recalls of meat, eggs, peppers, spinach, and peanuts have called into question the basic capacities of numerous federal regulatory agencies. The Supreme Court's *Citizens United* decision in 2009 and its outsized and immediate impact on the 2010 and 2012 national election cycles heightened concerns about elected officials' biases and motivations. Last fall, the Occupy Wall Street protests prompted a national conversation about who holds the power to set our nation's socioeconomic policies.

Congress enacted the Occupational Safety and Health Act over 40 years ago. A transformative law at the time it was passed, the OSH Act has not proved nimble enough to address the evolving challenges faced by U.S. workers. Below, we discuss how changes to the OSH Act and its implementing regulations and policies could better empower workers to ensure that all workers have safe and healthy workplaces. We focus on workers and their power to influence the policies that keep them safe and healthy on the job. Numerous issues affect workers' health and safety, from workers' compensation reform to health care policies to wage and hour problems, but we focus here on health and safety regulation by federal agencies.

Empowering Workers (Page 3)	• **Strengthen education and training requirements** • **A private right-of-action to enforce the OSH Act**
Improved Regulatory Response to Violations (Page 6)	• **Increased fines and jail time for criminal violations** • **Use of administrative compliance orders** • **Expanded use of Responsible Corporate Officer Doctrine** • **Application of the Alternative Fines Act** • **Adjust civil fines to keep up with inflation** • **Expand workers' rights to participate in inspections** • **Revamp fatality investigations**
Strengthening OSHA's Administrative Powers (Page 16)	• **Increased funding, with supplemental user fees for certain programs** • **Improve state-plan oversight** • **Eliminate the split-enforcement model** • **Adopt next-generation rulemaking reforms**

Regulatory Dysfunction

Congress created the Occupational Safety and Health Administration (OSHA) and its companion agencies, the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Review Commission, 40 years ago. Since then the nation has made substantial progress toward Congress's goal of ensuring that American workers come home at night safe and sound. While fatality, injury, and illness rates have fallen drastically, thousands of workers still die on the job every year from workplace accidents, and tens of thousands die from having been exposed to toxic chemicals at work. Hundreds of thousands are injured or become ill. The cost of these preventable accidents and illnesses is staggering, approaching $250 billion per year in direct and indirect costs.[1]

Clearly, our existing regulatory system is not getting the job done. As we detailed in a previous report, *Workers at Risk: Regulatory Dysfunction at OSHA*, OSHA cannot protect workers better because of a combination of factors:

- **Insufficient resources**: OSHA operates on a shoestring budget. Its primary worker-focused health and safety training program runs on just $10 million per year. Although enforcement is OSHA's biggest outlay, this vital program is also drastically short of money: the ratio of OSHA inspectors to workers in OSHA's jurisdiction was 1-to-30,000 in the late 1970s, the ratio has since doubled to 1-to-60,000. And the funds for rulemaking are so limited that, over the last decade, OSHA has withdrawn more rules from its regulatory agenda than it has finalized.[2]

- **An outmoded statute**: Because Congress has not significantly amended the OSH Act since it was first created, OSHA must deal with issues that other public health agencies have moved past. For instance, the OSH Act still uses a split enforcement model that entrusts a separate agency—rather than an independent branch of the Department of Labor—with reviewing enforcement actions. The statute also still includes an inefficient risk-based, one-hazard-at-a-time system for setting health and safety standards and lacks basic priorities set by Congress or deadlines for completing rulemaking.

- **A weakened regulatory process and overly centralized review**: In the forty years since the OSH Act's adoption, Congress and the Executive Branch have taken part in a steady accretion of analytical steps that separate recognition of an occupational hazard from issuance of final regulations to protect workers from the hazard. OSHA undertakes "significant risk" analysis, economic and technological feasibility analyses, cost-benefit analysis, small business impact analysis, peer review of its work, administrative notice-and-comment, data quality review, and multiple rounds of negotiations with the White House's Office of Management and Budget. Writing a single rule can take a decade or more.

These issues were not anticipated when Congress passed the OSH Act, but 40 years of concerted efforts by regulated industry to shrink and stifle OSHA have brought us to this unfortunate pass. The remainder of this paper highlights how to solve these problems and sketches a picture of what the next OSH Act and the next OSHA should look like.

Empowering Workers by Reforming Federal Occupational Health and Safety Law

The bulk of federal occupational health and safety resources are concentrated on enforcing basic workplace standards Substantial resources also go to employer-focused "compliance assistance," a regulatory reinvention program held over from days when federal agencies' coffers were more flush. Comparatively fewer OSHA resources go to strengthening workers' role in the occupational health and safety system. Thus we begin this paper by describing reforms that would give workers the power to improve workplace health and safety without OSHA's assistance. These reforms involve improving workers' education and training programs as well as enhancing the deterrence-based enforcement tools that workers can use to turn that knowledge into safe and healthy jobs.

Education, Training, and H&S Committees

Well educated and well trained workers are the most empowered – they know their rights, they know when they're wronged, and they know the best way to correct a hazardous work environment. Education and training must go together, and improvements in the scope, quality, and frequency of education and training should be hallmarks of the next occupational health and safety system.

Improvements in the scope, quality, and frequency of health and safety education and training should be hallmarks of the next OSHA.

The education and training programs available to U.S. workers are a haphazard patchwork. Union members often have exemplary programs available, but union membership is dwindling as "right to work" laws and union-busting proliferates. Certain classes of hazards (e.g., respirable toxins) demand special training, as do some jobs (e.g., pesticide applicators), but those cases are limited. A case could be made for the proposition that the OSH Act's General Duty Clause, by requiring employers to implement feasible means of abating recognized hazards that are likely to cause death or serious physical injury, requires employers to educate and train workers about those hazards. But a regulatory program that more precisely delineates rights, responsibilities, and guidelines would better ensure that all workers are adequately educated and trained to deal with workplace hazards.

The basic elements of a good education and training should educate workers about:

- Known hazards and means of eliminating, avoiding, or managing them;
- Ways to spot new hazards and anticipate how changes in work can affect health and safety;
- Best practices for handling health and safety concerns (e.g., notice of occupational health specialists in area);

- Their rights under various laws (and the agencies that enforce them);
- How to use available mechanisms to promote compliance with applicable laws and regulations; and
- How to be actively involved in government agencies' development of new regulatory standards.

Beyond these basic elements, educational requirements could be variable and adjusted accordingly, based on hazardousness of job and other specific needs.

The federal government must also develop a way to ensure that all workers have access to education and training programs. Sweden has adopted a system in which health and safety committees play a prominent role in worker training.[3] Every workplace with five or more workers must have a safety steward; every workplace with at least 50 workers must have a joint labor-management safety committee. Safety stewards and safety committees are responsible for occupational health and safety education and training in their workplaces. Workers are guaranteed pay for the time spent in training. Variations on this system exist in much of Europe and in Britain.[4] A similar system in the U.S. would vastly increase the number of qualified occupational health and safety trainers and improve opportunities for all workers.

Congress should establish an obligation for corporate officers to notify workers when an officer has knowledge of imminent dangers at a company worksite. The corporate officers' duty would ensure that the basic education and training provided to workers as described above is not the only manifestation of their right-to-know, but rather the framework upon which employers and workers build an active dialogue on workplace hazards. Corporate officers' bird's-eye view of a company's operations puts them in a unique position to forestall a calamity. When BP went through a period of major restructuring in the late 1990s and adopted a "run to failure" policy for aging equipment, board members were warned of the risk that the company's Texas City refinery would kill someone within months.[5] It did: On March 23, 2005, 15 workers died in an explosion at the plant – just months after the memo was delivered to the board. The duty to warn should extend to the potentially affected public and regulatory agencies, as well.

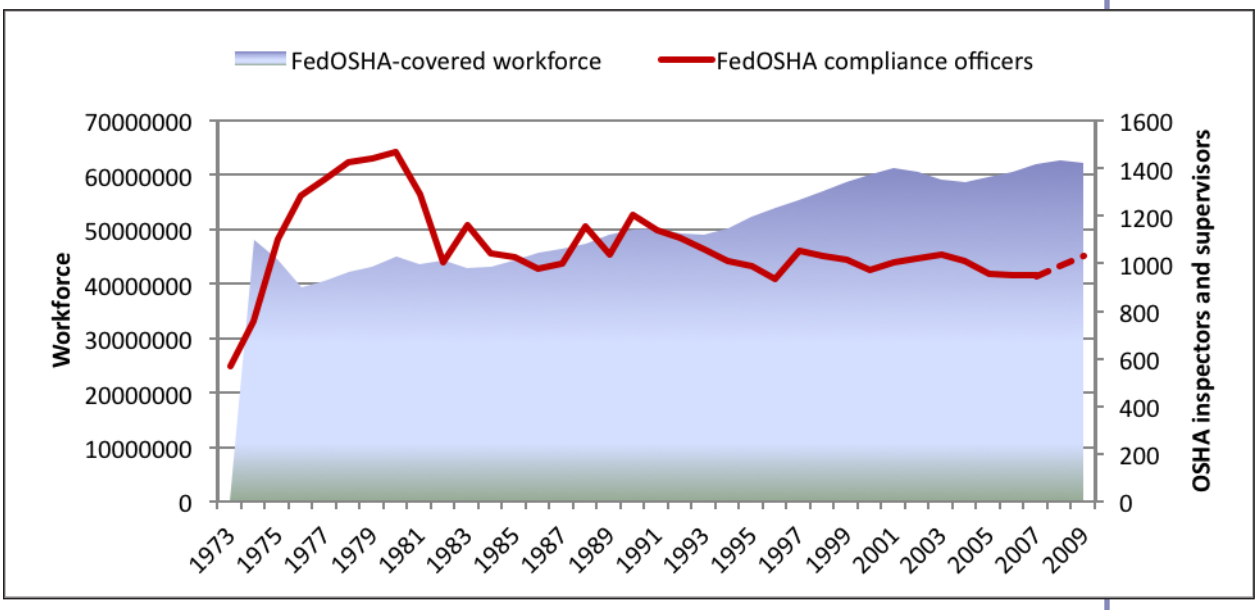
A citizen suit provision in the OSH Act would empower workers to take on a stronger role, both in enforcing standards and in making the statute more vibrant and adaptable to changing working conditions.

Citizen Suits

In addition to a strong knowledge base, workers also need effective legal tools to prompt changes in their working conditions when their employers are not responsive. Under current law workers lack the power to commence legal action on their own accord against an employer that is breaking the law; instead, they must make a formal complaint to OSHA and await the agency's response. While OSHA is generally responsive to workers' complaints, workers should not have to rely on an underfunded OSHA to redress serious health and safety issues in the workplace. Workers need to be able to wield power that's proportionate to their huge stake in the game. That power should come in the form of an amendment the OSH Act that would create a legal vehicle for enforcing worker rights against employers.

In the field of environmental protection, Congress has included "citizen suit" provisions in the Clean Air Act, Clean Water Act, and more than a dozen other statutes, deputizing "private attorneys general" with the power to enforce the laws' mandates. In general, the citizen suit provisions Congress has enacted allow any person to file suit in federal court to cure violations of the applicable law after giving the appropriate regulatory agency a period of time (typically 90 days) to file its own action. If the government files a lawsuit, it takes the lead in the litigation, but the citizen is entitled to remain as a party to the litigation and can object to any "sweetheart" settlements. If the government fails to take action, the citizen may seek injunctive relief and civil fines (to be paid to the U.S. Treasury) to remedy violations of the relevant statutes and regulations. Most citizen suit provisions also allow prevailing plaintiffs to recover reasonable attorneys' fees and litigation expenses from violators. The citizen suit tool has proved successful in the environmental field, particularly in cases brought against government agencies for failing to meet statutory deadlines for rulemaking, but also in ensuring broader compliance by industry. Citizen suits have also been instrumental in fostering the growth of many local and national public interest groups.

Congress's creation of the environmental citizen suit provisions was an innovation spurred by the recognition that federal agencies cannot monitor every source of pollution in the United States, much as OSHA and its state partners cannot monitor every worksite. Between the federal OSHA and its partner state-plan agencies, approximately 2,200 inspectors must somehow enforce the OSH Act and its implementing regulations in more than 8 million workplaces. While an OSHA inspection is more likely in some targeted industries (e.g., construction), most businesses will never see an OSHA inspector.



A citizen suit provision in the OSH Act would empower workers to take on a stronger role, both in enforcing occupational safety and health standards and in making the statute more vibrant and adaptable to changing working conditions. The citizen suit provisions of environmental laws provide space for forward-looking plaintiffs to push the boundaries of the laws to ensure that their goals of eliminating pollution are achieved, even in the face of new environmental threats. They also allow citizens to push back against efforts by polluters to test the edges of compliance when the relevant agencies are not inclined to do so. Workers and their representatives could strive for similar impacts on occupational safety and health law if given the opportunity to do so through the establishment of a private right of action to enforce the OSH Act and its basic precept that each employer must provide jobs that are free from recognized hazards.

If Congress were to add a citizen suit provision to the OSH Act, unions and the plaintiffs' bar would likely undertake the bulk of the work that goes into filing and pursuing legal action. Nonprofit worker centers that provide education, training, job-search help, legal advice, and other resources to primarily non-union workers would also likely play an important role. It is important to note the difference between citizen suits and tort law that has been largely displaced by workers compensation programs. Citizen suit cases would not be premised on personal injury, but rather violations of the OSH Act and its standards. The cases would be more preventive than compensatory and the bulk of the fines would be paid to the government (less reasonable attorneys' fees).

Penalties must be increased for cases involving worker fatalities, and criminal prosecution should not hinge on whether a worker dies.

Improved Regulatory Response to Violations

Empowering workers through education, training, and citizen suits will improve compliance with statutory and regulatory requirements. If workers are to be protected, however, it is also necessary for OSHA enforcement to be a credible deterrent. An empowered workforce and stronger OSHA go hand in hand.

Criminal Enforcement

The OSH Act's provisions for criminal enforcement need to be strengthened. If an employer willfully violates an OSHA standard and causes a worker's death, the crime is a Class B misdemeanor conviction, which carries a maximum of six months in jail. This is the same level of punishment that Congress has prescribed for digging up wild ginseng roots in a national park.[6] The criminal enforcement provisions need to reflect the sanctity of human life. Willful violations of the law that lead to a worker's death are tantamount to homicide. They should be treated as such, with the potential for a felony conviction, multi-year jail terms, and large financial penalties brought against the individual corporate officers who are responsible for creating such scofflaw conditions. And while criminal penalties must be increased for cases involving worker fatalities, criminal prosecution should not hinge on

whether a worker dies. Any willful violation of the Act or its underlying regulations should be subject to criminal prosecution, and Congress should establish a tiered penalty structure so that the punishment fits the crime. For instance, misdemeanor penalties might be appropriate for willful violations where the defendant can prove that the violation probably would not cause death or serious physical injury, but felonies should be available for most willful violations, given that willful violations evince a blatant disregard for workers' health and safety.

The OSH Act's meager criminal sanctions create no incentive for federal prosecutors to take up typical cases of occupational safety and health violations, given prosecutors' resource constraints and competing incentives to pursue high dollar, long jail term felony cases. Federal prosecutors are stretched thin, enforcing drug trafficking, tax evasion, and other laws that have penalties substantial enough to create a credible deterrent effect on others who might consider violating those laws. Occupational health and safety cases, with their misdemeanor penalties, do not attract much attention. A 2003 *New York Times* investigation of worker fatalities between 1982 and 2002 found that 2,147 workers died in 1,242 cases where willful violations of the OSH Act led to the workers' deaths.[7] OSHA referred just 119 of those cases to DOJ, and DOJ attorneys took up a mere 51 cases.

The *Times* statistics point up a complication that is a bigger issue for OSHA than most other agencies that prosecute criminal actions. The reason that OSHA referred less than 10 percent of potential criminal cases to DOJ is likely tied to OSHA's obligation to protect the workers who continue to labor at the worksites where criminal violations are alleged to have occurred. OSHA does not have the power to force employers to make changes to their worksites to correct alleged violations while a case is still pending, which gives employers a major bargaining chip in settlement negotiations. Fearing jail time, employers can offer to immediately abate alleged violations and pay civil fines in exchange for OSHA agreeing to refrain from referring the case to for criminal prosecution.

Such a scenario played out in the aftermath of the massive explosion at Massey Energy's Upper Big Branch mine. The tragedy was fueled by coal dust that had built up to dangerous levels because of corporate officials' pressure to "run coal" instead of perform vital maintenance. Soon afterward, Massey was bought out by Alpha Natural Resources and the most notorious executive, Don Blankenship, left the company for a career as an industry consultant. The Department of Labor reached a non-prosecution agreement with Alpha in December 2011. Instead of pursuing criminal sanctions for violations of federal law that led to the death of 29 men, DOL agreed to a plan in which Alpha would pay $35 million for past regulatory violations (only $10.8 million of which arose out of the Upper Big Branch tragedy), spend $80 million on investments in safety and infrastructure, create a $40 million mine health and safety trust fund, and cap the potential payout to victims' families at $46.5 million.[8]

OSHA and the Department of Justice should use the responsible corporate officer doctrine in cases involving violations of the OSH Act and its standards.

Congress should authorize OSHA to issue administrative compliance orders. One reason OSHA refers so few cases for criminal prosecution is that resolution of criminal cases takes much longer than civil cases. The entire time a criminal case is pending, which can take years, defendants can legally refrain from changing working conditions, leaving workers in hazardous situations. Because OSHA has an obligation to protect workers, it will typically settle cases with employers to ensure speedy hazard abatement, dropping potential criminal claims in the negotiations. If OSHA had the power to issue administrative compliance orders to eliminate hazardous conditions, government attorneys would have the time to build and prosecute criminal cases without leaving workers in harm's way.

When amending the OSH Act to provide OSHA with the power to issue administrative compliance orders, Congress must be careful to design the provision in a way that ensures the orders' effectiveness. The Supreme Court recently issued a decision that could hinder EPA's use of similar orders under the Clean Water Act. In that statute, Congress failed to designate the time at which compliance orders are ripe for judicial review. Without that statute-specific language on the subject, the Supreme Court held that the administrative compliance orders can be reviewed by a federal court as soon EPA issues them, under the Administrative Procedure Act's provisions for judicial review of any final agency action.[9] Congress would have to be mindful of this issue when giving OSHA the power to issue compliance orders, lest the Court's interpretation of new legislation defeat the purpose of the orders by giving the recipients of those orders the option of tying them up in court. To make the OSHA compliance orders most effective, Congress must explicitly state in the statutory amendment that the orders are not subject to pre-enforcement judicial review and that penalties or fines for failure to comply with the order will only be levied when OSHA has proved a violation of the statute in an enforcement proceeding.

OSHA should establish a presumption in favor of filing criminal charges in all cases involving willful violations of the Act or its standards when a worker dies. OSHA's Area Directors make the initial determination whether to refer a particular case for criminal prosecution. OSHA's Field Operations Manual reads, almost discouragingly:

> Following the investigation, if the Area Director decides to recommend criminal prosecution, a memorandum shall be forwarded promptly to the Regional Administrator. It shall include an evaluation of the possible criminal charges, taking into consideration the burden of proof requiring that the Government's case be proven beyond a reasonable doubt. In addition, if correction of the hazardous condition is at issue, this shall be noted in the transmittal memorandum, because in most cases prosecution of a criminal/willful case stays the resolution of the civil case and its abatement requirements.

The Manual should be revised to clarify that criminal referrals ought to be the norm. The deterrent effect of a federal policy that promotes criminal enforcement for all willful violations will have a greater positive impact on workers' health and safety than the current practice of settling most cases to ensure speedy hazard abatement.

To ensure that Area Directors fully consider the impacts of their decisions on criminal referrals, OSHA should update its policies for engaging the victims of criminal behavior – and their families and co-workers – in the inspection process. The proposed Protecting America's Workers Act, introduced by Lynn Woolsey in the House and Patty Murray in the Senate, would give victims and their families an opportunity to meet with the Secretary of Labor or an authorized representative before a decision is made about the issuance of citations. OSHA does not need congressional authorization to create such a policy, though. The agency could simply make it standard procedure to invite victims, co-workers, and their families to the closing conference that occurs at the end of each inspection. They should be given an opportunity to make a statement about the incident and how OSHA should respond.

In addition to strong criminal penalties, OSHA and the Department of Justice should use the responsible corporate officer doctrine. Born out of criminal cases in the food and drug context and expanded into the world of environmental crimes, the doctrine enables the government to hold high-level corporate officials criminally liable for violations of public health and welfare statutes.[10] Federal judges originally established the concept that criminal penalties should be applied when corporate officers are in a position of responsibility with respect to behavior that is proscribed by a statute and the officers are not powerless to prevent others from engaging in that conduct.[11] Over the years, the responsible corporate officer doctrine became such an important tool for effectuating the mandates of various public health laws that Congress began inserting the language in new statutes. The Clean Water Act, for example, explicitly includes responsible corporate officers in the definition of "persons" covered by the statute. But since the doctrine is a part of the federal common law, government lawyers do not need explicit statutory authority to pursue cases using its concepts. For instance, the SEC has filed suit against two corporate officers whose company was accused of bribing Brazilian customs officials in violation of the Foreign Corrupt Practices Act, basing the case on their roles as responsible corporate officers rather than prohibited actions they took themselves.[12] For publicly traded corporations, liability under the responsible corporate officer doctrine also brings with it a threat of potential shareholder litigation for violation of fiduciary duties.[13]

Applying the responsible corporate officer doctrine to violations of the OSH Act would leverage the statute's relatively weak criminal penalties to greater effect. Veterans of corporate defense law firms know that the threat of jail time for people who normally spend their days in executive office suites can result in dramatic changes in corporate policy. In addition, the government's use of the doctrine would pressure executives to use their influence to stop crimes of omission as well as crimes of commission. Massey Energy's Don Blankenship might have been a perfect candidate for application of the responsible corporate officer doctrine, with his infamous memo imploring mine workers to put production ahead of safety because "coal pays the bills" and hauntingly prescient boasts that "We don't pay much attention to the violation count."[14]

Corporate defense lawyers argue that the responsible corporate officer doctrine is inconsistent with their beliefs about the *mens rea* requirements in criminal law, that corporate officers who fail to ensure compliance with the law lack the criminal intent that justifies harsh penalties. *Mens rea* requirements, however, vary depending on what balance should be struck between deterrence and the degree of personal responsibility a person has for a crime. Public health and welfare statutes were designed to create powerful disincentives against both engaging in and condoning certain behavior, so holding corporate officers who have substantial power over a company's operations responsible for violations of the statutes is a good way to deter OSH Act violations throughout the company. Moreover, the threat of criminal liability being imposed on corporate officials who know or should know about violations of occupational safety and health laws creates a stronger sense of responsibility for how they wield their significant power over workers' lives and livelihoods. In *U.S. v. Park*, the Supreme Court rejected a corporate president's argument that he should not be held liable under the Clean Water Act's application of the responsible corporate officer doctrine because he had, "by reasons of his position in the corporation, responsibility and authority either to prevent in the first instance or promptly to correct, the violation complained of, and that he failed to do so."[15] Were similar principles to be applied more regularly in the OSHA context, workers' safety and health would no longer be an after-thought for corporate executives.

The Alternative Fines Act should also be applied to violations of the OSH Act. Under the Alternative Fines Act (AFA),[16] once the government has secured a conviction for criminal violation of a law (e.g., for willful violation of an OSHA standard leading to an employee's death), sentencing can be extended beyond the confines of the particular statute. The AFA allows for fines of up to twice the economic gain realized by the defendant as a result of violating the law, or twice the economic loss incurred by others. Fines under the AFA can reach up to $250,000 (or $500,000 for a company) if a worker dies, so long as the gain- or loss-based fine does not unduly complicate or prolong sentencing.[17] The ability to bump penalties from, say, tens of thousands of dollars under the OSH Act's basic structure to hundreds of thousands using the AFA could be sufficient enticement for Department of Justice attorneys to take on more occupational safety and health cases.

The small penalties available under the OSH Act, potential for only Class B misdemeanor convictions even in cases of willful law-breaking, and infrequent prosecution by DOJ creates little deterrent effect for bad-actor employers. Congress should increase the criminal penalties available under the OSH Act and create a potential for felony convictions and significant jail time. But in the meantime, the responsible corporate officer doctrine and Alternative Fines Act provide other strong incentives to avoid violating the OSH Act, and OSHA and DOJ should use these laws to gain stronger deterrence.

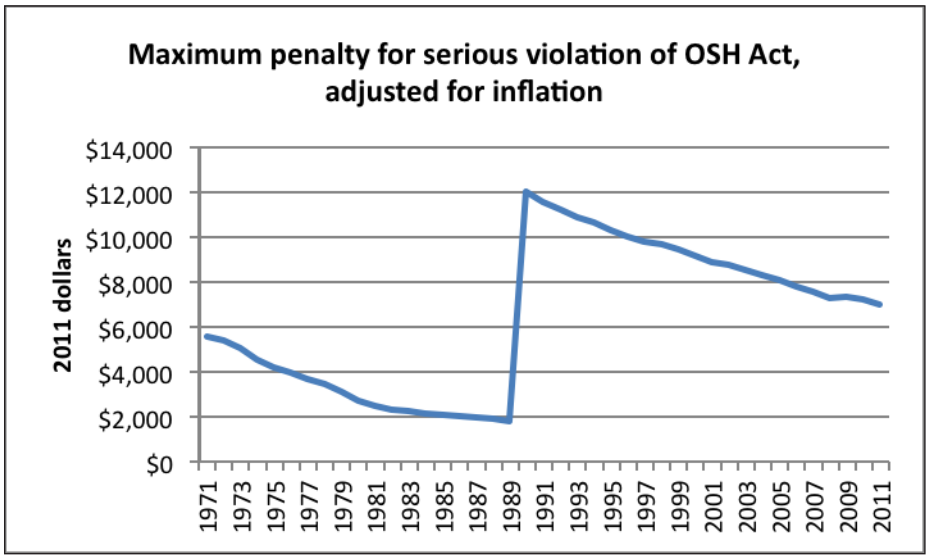
Strengthening Civil Enforcement

The penalty structure of the existing OSH Act should also be revamped so that it can be more effective in cases of less egregious employer wrongdoing, where monetary penalties are appropriate. Congress has set the maximum penalties far too low. A "serious" violation of the law can only bring a maximum penalty of $7,000 and OSHA has a statutory obligation to reduce penalties depending on the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. OSHA makes these reductions in almost every case. The DOL Inspector General found that following inspections "conducted between July 2007 and June 2009, 98 percent of citations received penalty reductions, with reductions totaling $351 million."[18] Even after OSHA adopted an "enhanced" penalty policy in 2010, the average penalty per serious violation of the law following institution of the new policy was a puny $2,100.[19] At this level, the economic consequences of violating the law are negligible for almost any business.

Moreover, employers' failure to pay even these slight fines is a serious problem. In 2008, the majority staff of the Senate Committee on Health, Education, Labor and Pensions analyzed OSHA debt-collection data for the preceding four years. They found that even in the most severe cases – those involving the death of a worker – employers often delayed or simply never paid their fines. At the time the Senate staff wrote its report in 2008, more than 15 percent of employers who were penalized following a worker death in 2007 had not paid their fines. Looking back further, it found more than 11 percent delinquency in fatality cases from 2006, 10 percent from 2005, and 9 percent from 2004.[20]

Congress's failure to update the civil penalty structure of the OSH Act – combined with normal macroeconomic inflation, a growing number of workplaces, and fewer compliance staff – means that OSHA's enforcement power has been significantly eroded in real terms over the last 40 years. It has been more than 20 years since the statutorily defined maximum penalties were adjusted for inflation and, in that time, the real value of penalties has decreased by 42 percent. In the meantime, Congress passed a law requiring all other public health agencies to change their penalties every four years to adjust for inflation.[21] From a workers' perspective the effect of excluding OSHA from this requirement is clear: failure to adjust for inflation is equivalent to devaluing the importance of her health and safety on the job.

Congress should pass a law that allows for annual increases in maximum penalties, based on Bureau of Labor Statistics inflation data.



Public health statutes that Congress enacted in the years following the OSH Act reflect an awareness that only substantial civil fines will create incentives for employers to follow the laws. Civil penalties of tens of thousands of dollars per day of violation are not uncommon in the post-OSH Act environmental laws. Similar fines under the OSH Act would send a message to employers that the cost of doing business should include the cost of doing business safely, not the cost of paying fines. At the very least, Congress should pass a law that allows for annual increases in maximum penalties, based on Bureau of Labor Statistics inflation data.

Congress should also give workers additional authority to participate in enforcement proceedings. In particular, workers need greater opportunities to be a part of the negotiations that affect settlement agreements between OSHA and employers cited for violations. Under current law, workers and their representatives have a chance to weigh in on proposed settlement agreements between OSHA and an employer, but they are only allowed to challenge one aspect of an agreement—the length of time allowed for abating hazards.[22] A better system would put workers or their representatives at the negotiating table with the power to object to any terms of the deal that affect workers' health and safety. The Protecting America's Workers Act would give workers and their representatives a stronger voice, by creating a statutorily guaranteed opportunity to file objections to the abatement period, violation classifications, and penalty amounts within 15 days of OSHA issuing citations.

Improving Investigations

Even raising the penalties for OSHA violations will do little good if inspections are not targeted and conducted in a way that leads inspectors to find the most serious problems. OSHA and the state-based agencies that also enforce the OSH Act have a mixed record when

it comes to targeting. The federal agency does a good job of targeting inspections, with roughly three-quarters of inspections uncovering employer non-compliance and 87 percent of those cited employers being cited for serious violations. By comparison, the median rate for state-plan agencies in 2009 was 64 percent of inspections "not in compliance," with three-quarters of those inspections resulting in serious violations. The state-plan median numbers mask substantial variability, too, with "not in compliance" inspections ranging from 21 percent (Nevada) to 92 percent (Wyoming) and the fraction of noncompliant employers with serious violations ranging from 29 percent (Nevada, again) to 90 percent (Virgin Islands).[23] Of course, these programs cannot be judged on numbers alone – Wyoming OSHA has a high "not in compliance" rate, but is notorious for its failure to reduce state occupational fatality rates, which have remained at or near the worst in the nation for more than a decade.[24]

Routine inspections would be improved by enhancing the right of workers to participate in the inspection. Workers often have intimate and valuable knowledge of the root causes of hazards in a particular workplace. In unionized workplaces, OSHA's Field Operations Manual instructs inspectors to seek out a worker representative to participate in OSHA inspections, and workers' collective bargaining agreements sometimes ensure that a worker representative participates in OSHA inspections and is paid for the time it takes. (Of course, such collective bargaining agreement provisions are exceedingly rare, covering perhaps a few hundred thousand workers.)[25] The union is also there to back them up in case of retaliation, so their participation in the inspection can be more meaningful. At worksites where a union is not present but a safety committee is, the Field Operations Manual instructs OSHA inspectors to invite a member of the safety committee to participate in the investigation, although it almost never happens because these committees are often dominated by management and bringing in employees for purposes of the OSHA inspection could violate the National Labor Relations Act. Unfortunately, the most common situation is one in which no union and no safety committee exists. There, the level of worker representation during an inspection is left to the individual OSHA inspector's discretion. The Field Operations Manual instructs inspectors to "determine if other employees would suitably represent the interests of employees on the walkaround" or, if choosing another employee is "impractical," to "conduct interviews with a reasonable number of employees."[26] The practical application of this instruction, however, is highly dependent on the type of inspection being conducted. When an inspection is complaint-based, the complainant will, on rare occasions, identify a worker representative to take part in the inspection, although fear of retaliation and anonymous complainants often complicate the OSHA inspector's ability to identify the best person to represent workers. Programmed inspections, those initiated by OSHA on its own accord, are even less likely to involve a worker representative at non-union sites.

Routine inspections would be improved by enhancing workers' rights to participate in the inspection.

The changing nature of the U.S. workforce further complicates matters. Many industries are using more contingent and temporary workers, often employed by staffing agencies but placed at worksites controlled by another company. Construction companies, warehouses,

hotels, and many other businesses use a contingent workforce to reduce personnel costs and adapt to changing workloads, but the practice complicates almost every aspect of OSHA enforcement, including the process of identifying and engaging good employee representatives (see text box).

OSHA should instruct its inspectors to request that employers post a notice that informs employees an inspection is under way and provides contact information for the inspector or local OSHA office so that the workers can identify an employee representative for the remainder of the inspection. Inspectors should also be encouraged to reach out to alternative sources of worker representatives before initiating any inspection of a non-emergency nature (e.g., health and safety specialists from relevant unions, worker centers likely frequented by that company's workers, social workers, or even members of a faith-based institution).

All worker fatalities should be treated with the diligence that NIOSH and CSB investigators apply to their investigations.

OSHA should also revamp how it responds to workplace fatalities. In 2009, the agency began posting brief synopses of fatalities on its website, a good policy which could be improved upon by updating the initial notices with full reports of complete incident investigations.[27] Without those reports posted online, the public only has access to a basic inspection summary that includes little more than a list of citations issued. Additional information would empower workers to take steps toward preventing similar tragedies, either through changes to their own workplaces or through advocacy to improve regulatory policy. Especially helpful would be reports that provide comprehensive analyses of the causes of incidents. NIOSH has a program that provides a good example. The Fatality Assessment and Control Evaluation (FACE) program conducts in-depth investigations into fatalities that have certain characteristics of special importance to NIOSH's epidemiological researchers (e.g., immigrant laborers, firefighter deaths). Their investigations are based on the principle that workplace fatalities have multifactorial and interrelated causes. Instead of focusing attention on violations of regulatory standards, investigators look for root causes as varied as language barriers and fatigue. Similarly, the Chemical Safety Investigation Board (CSB) conducts independent investigations of workplace fatalities and other incidents that occur at chemical processing and manufacturing facilities. In addition to examining a broad array of factors that contributed to the incident under investigation, CSB investigations result in exemplary final reports, which include detailed descriptions of the investigation as well as recommendations for employers, workers, government agencies, and standard-setting organizations. Importantly, CSB tracks the status of its recommendations and posts information on its website to inform the public about the extent to which those recommendations have been implemented.

All worker fatalities should be treated with the diligence that NIOSH and CSB investigators apply to their investigations. While it is important that OSHA investigators identify regulatory violations related to worker deaths, it is just as incumbent upon them to look beyond those concerns to identify other issues that could potentially be addressed through regulation to prevent future tragedies. Sustained investigations of this sort could lead to the

identification of hazards that, over time, could become "generally recognized" and therefore subject to the statute's general duty clause. OSHA is somewhat constrained by its six-month statute of limitations on issuing civil penalties under the OSH Act, but even if Congress does not change that provision, enhanced investigations could be conducted in phases, with citations issued first and broader analyses and recommendations issued later.

In early 2012, the Public Justice Center, a Baltimore nonprofit that provides legal services to people living in poverty, filed a complaint with OSHA alleging that a local staffing agency was illegally docking workers' pay for medical exams, training, and protective equipment. The workers were being sent to an asbestos-removal job, which, under OSHA regulations, means that employers must cover the cost of all those things. The workers asked that attorneys from the Public Justice Center be designated as their employee representatives when OSHA went to investigate the complaint.

When OSHA arrived at the site to conduct an inspection, none of the workers named in the complaint were still employed there. The staffing agency named in the complaint was still providing staff to several of the subcontractors on the site, but they were not sending the complainants back. On the first day of the inspection, Public Justice Center attorney Alexandra Rosenblatt accompanied the OSHA inspector as a third-party expert who could aid in the conduct of the investigation. However, on the second day, the contractor controlling the site refused entry to Rosenblatt, at which point the OSHA inspector would have had to pause the inspection and obtain a warrant from a federal judge to continue to have Rosenblatt on site. Rather than give the contractors time to correct on-site violations (the complaint also alleged inadequate decontamination zones), the inspector continued without Rosenblatt.

This case highlights a number of problems that Congress and OSHA must sort out in order to protect workers effectively in the modern economy. Case law regarding third-party participation in OSHA inspections is limited to the question of whether unions representing striking workers should be authorized to accompany inspectors when an employer objects. (They should.) Courts have not yet addressed the same question with respect to non-union worker representatives. Multi-employer sites, where different worker representatives could be designated by different groups of workers, create another set of issues.

Fixing OSHA

OSHA needs stronger enforcement powers, and it must find ways to employ existing and new powers as effectively as possible. OSHA, however, is hobbled in other ways that require the attention of Congress and of the agency. Fixing OSHA not only requires an increase in the agency's paltry budget, it also requires improved oversight of state plans, the elimination of the split enforcement model that gives the Occupational Safety and Health Review Commission (OSHRC) opportunities to disrupt OSHA enforcement programs, and changing the way in which new standards are adopted.

Increased Funding

Congress must give OSHA additional resources to protect American workers.

Congress must give OSHA additional resources to protect American workers. Given today's budget climate, Congress should utilize alternative revenue-producing schemes that would augment outlays from the U.S. Treasury, such as a user fee model.

Since the OSH Act was enacted in 1971, America's GDP has grown from $1.1 trillion to $14.5 trillion (a 1300-percent increase) and the U.S workforce has increased from 70 million to more than 130 million. OSHA's resources have not followed suit. In fact, OSHA's staff has actually decreased in size relative to the American workforce the agency is responsible for protecting since the 1970s,[28] and the agency's budget has only increased marginally in real terms.

An obvious, if politically difficult, solution to this problem is additional funding. OSHA has been fortunate to avoid the budget-slashing that other federal agencies have endured over the last few years, but that might be largely attributable to the simple fact that OSHA is a tiny piece of the overall budget pie. Its budget of just over $500 million is less than 0.02 percent of the federal government's total outlays, which top $3 trillion. OSHA's budget also is small compared to other public health agencies like EPA ($9 billion) and FDA ($2.4 billion). OSHA's small size may mean congressional deficit hawks see little benefit in cutting such a minor program. Unfortunately, the opposite has not proved true. OSHA's small size has not given it an edge in getting budget increases on the theory that a few tens of millions, small on the overall federal balance sheet, would be a great boon for the agency.

Congress should therefore adopt a user fee system for at least part of OSHA's program. The Voluntary Protection Program (VPP) is the first place Congress should look to test alternative revenue models. The program costs OSHA money and expertise but delivers benefits mainly to employers in the form of reduced workers compensation premiums. To

keep it running OSHA is obliged to shift experts who could be conducting inspections or worker training into the "compliance assistance" work of VPP. Compliance is employers' responsibility, so VPP should be funded through a dedicated account that is paid by program participants. Doing so would enable OSHA to replace the resources lost from traditional enforcement programs, targeting its limited resources at dangerous worksites where workers are likely to suffer illness or injury, rather than "model" worksites with lower risks. OSHA and congressional staff have discussed the idea of applying a user-fee model to VPP, but a satisfactory program design has not yet been achieved. User fees for VPP must be designed in a way that adequately and consistently funds the program without encouraging explosive growth that could undermine OSHA's ability to fulfill its other core duties, like enforcement and worker training. Congress could put a cap on the total amount of VPP user fees that OSHA is allowed to keep (the Miscellaneous Receipts Act requires all money collected by federal agencies to be deposited in the U.S. Treasury, unless otherwise provided by Congress). A specific line item in OSHA's budget limiting the number of full-time equivalent staff dedicated to VPP would be another option to keep the program in check.

Ever since President Ronald Reagan slashed OSHA's budget in the early 1980s, the agency has had to try to do much more with a lot less. To better understand the implications of funding that has remained nearly constant for the past three decades when adjusted for inflation, OSHA should create a mock, or "true-up," budget.[29] The purpose of this exercise would be to determine the level of resources OSHA would need to achieve and maintain an empowered workforce in which no worker suffers material impairment of health or well-being as a consequence of her work—in other words, to fulfill its statutory mandate. Such a budget would be a drastic departure from current practice, which involves making budget requests that incrementally depart from a baseline of the previous two years' enacted budgets. OSHA – and all other public health agencies, for that matter – would do better to set budgets based on what it needs to achieve their goals, rather than what they need to get by. The true-up budget would prove eye-opening to all OSHA stakeholders, including the regulated industries that are as frustrated as public interest groups by chronic delays and persistent violations by their competitors.

As part of the budgeting process, OSHA should think broadly about altering the balance of its expenditures. For instance, years ago, OSHA spent equal amounts of money on worker training and employer compliance assistance. Yet over time the two complementary programs have become unbalanced: compliance assistance now amounts to more than $120 million per year, while worker training has stagnated at $10 million annually. OSHA should explore ways to rebalance these expenditures.

Improving Oversight of State Plans

OSHA must do a better job of ensuring that the power-sharing scheme that Congress adopted in the OSH Act does not lead to a proliferation of unsafe workplaces in states where the federal agency lacks enforcement authority. This is not a hypothetical problem. During a construction boom on the Las Vegas Strip in 2007 and 2008, 12 workers died in 18 months. Factors contributing to the deaths included blatant violations of Nevada OSHA's standards. Harold Billingsly, a 46-year-old ironworker fell 59 feet to his death at a site where the employer had failed to install legally required netting or temporary floors to prevent just such a fall.[30] It took an exposé by the *Las Vegas Sun* and a walkout by workers to halt the tragic trend of fatalities at the multibillion-dollar construction site. Nevada OSHA was doing such a poor job of protecting workers that the federal agency set up a new area office in the state just to oversee the state plan. More recently, OSHA and Hawaii have engaged in talks about the possibility of OSHA taking over part of Hawaii's state plan.[31]

Congress should do away with the division of enforcement power between OSHA and the Review Commission by shifting adjudicatory power into the Department of Labor.

Twenty-seven states have opted to develop their own laws and policies for protecting workers from occupational illness and injury. While the creation of these state plans eliminates OSHA's need to conduct inspections and do much of the administrative work inherent in the job of protecting the workforce, OSHA still is responsible for ensuring that the state plans are at least as effective as the federal program. The "at least as effective" requirement is written into the OSH Act, and OSHA conducts an individualized audit of each state plan on an annual basis to ensure the state plans are adequate.[32]

The public debate about the adequacy of state plans largely centers on how OSHA measures their effectiveness, in particular whether OSHA should use injury, illness, and fatality rates. OSHA and some stakeholders, including unions, argue that the well-documented shortcomings of these statistics weigh against using them as metrics of state plans' adequacy. Instead, OSHA prefers to use performance measures such as the number of inspections conducted, the frequency of citations, the speed with which the agency responds to complaints, and other indicia that federal funds contributed to the program are being spent on core administrative duties. State-plan officials and their advocates in the Occupational Safety and Health State Plan Association (OSHSPA), however, argue that the ultimate measure of a state plan's effectiveness should be objectively calculated statistics. Often, this argument is made in an effort to justify shifting state resources from deterrence-based enforcement to cooperative compliance assistance programs. Although OSHA's performance measures could surely be tweaked at the edges, overall they provide a better assessment of the adequacy of state programs than do simple statistics that systematically undercount numerous occupational concerns (e.g., long-latency occupational cancers).

The debate about metrics obscures a more important aspect of OSHA's oversight of state plans. The yearly audits need more teeth. Although the audits are designed to be accountability tools, there are no real consequences for states other than they can receive

praise or criticism from OSHA. The criticism is not working because it is not tied to either rewards for positive achievements or penalties for failure. For example, in the FY 2010 audit of Maryland's state plan (the most up-to-date audit available online), OSHA notes that Maryland failed to act on a recommendation from the previous audit.[33] The state had adopted a policy of giving employers an automatic 50-percent reduction on proposed penalties when an employer fixes hazards identified during an inspection before the inspector leaves the site. Since the federal policy only authorizes a 15-perceent reduction in such cases, the auditors determined that aspect of Maryland's state plan was not at least as effective as the federal program. OSHA recommended a change in policy in its 2009 audit, but Maryland officials would not budge. Lacking any good tools to penalize the state for its inaction, OSHA could only respond with continued discussion and monitoring of the problem.

At the other end of the spectrum, states that break ground with innovative policies to empower and protect workers get little more than a pat on the head from the federal government. California's and Washington's state occupational health and safety agencies, for example, are often at the vanguard of protecting workers. California has trudged forward on new standards for air contaminants while the federal standards stagnate. Washington state recently adopted a first-of-its-kind rule to protect healthcare workers from hazardous drugs (e.g., chemotherapy and antiviral drugs, hormones, and some bioengineered drugs). These state-initiated changes to worker protections are recognized in OSHA's state plan audits, but do not result in any tangible benefits for the state agency. In fact, it is not even clear what benefits federal OSHA might bestow upon a high-performing state-plan agency.

OSHA needs new tools to shape state policies. The threat of reduced federal funding might be a powerful motivator for state officials, but if the threat materializes, it is likely to have ripple effects on worker safety as the state agency loses resources to enforce existing laws. Instead, OSHA should make greater use of its authority to take over inadequate state plans. The publicity that would accompany such a take-over, even if it were only for a matter of months, would shine a stronger light on wholly inadequate programs, like the one in Nevada. Short-term federal take-overs have been demonstrated to prompt significant changes in state plans. Following the 1991 fire at Imperial Food Products in Hamlet, North Carolina, where 25 workers were killed and 54 injured because they were trapped behind locked fire doors, OSHA found serious problems with the North Carolina state plan. OSHA took over most enforcement responsibilities in the state for four years, until the North Carolina legislature made major changes in relevant state laws, funding and staffing levels increased, and the state agency improved training programs.[34]

Using embarrassment as a motivation only works if the state is actually embarrassed. Still, there are real limits on OSHA's ability to improve the performance of state plans through punishment. Rewards for innovation might be a better solution.

Eliminating the Split Enforcement Model

Congress should do away with the division of enforcement power between OSHA and the Review Commission by shifting adjudicatory power into the Department of Labor. The existing model, which places prosecuting authority in OSHA and adjudicatory authority in the Review Commission, is based on the faulty theory that one agency holding both of those roles might impinge on employers' rights to due process.[35] In reality, every other public health agency (save for the Mine Safety and Health Administration) operates under a unified enforcement model and manages to protect affected parties' due process interests by strictly separating the personnel responsible for prosecuting and adjudicating cases, as required by the Administrative Procedure Act since the 1940s.

The split enforcement model in the occupational health and safety arena creates confusion about the interpretation of some standards, which is ultimately a problem both for employers and workers. For years after Congress passed the OSH Act, the Review Commission took the position that Congress, by granting the Commission the power to adjudicate disputes about OSHA citations, gave it the power to make broad policy determinations. OSHA, on the other hand, argued that the Review Commission should accept OSHA's interpretations of the OSH Act and simply engage in case-specific fact-finding to affirm, modify, or vacate individual OSHA citations and penalties. In 1991, the Supreme Court sided with OSHA in holding that reviewing courts must defer to OSHA's interpretation of the OSH Act contained in its regulations when confronted with conflicting, but reasonable, interpretations held by OSHA and the Review Commission.[36]

Notwithstanding the Supreme Court's unambiguous recognition of OSHA's fundamental supremacy in setting occupational safety and health policy, the Review Commission keeps fighting to retain policymaking power by reading the Supreme Court's opinion in a narrow manner.[37] The Commission's trick is to argue that OSHA's reading of its own standards or the OSH Act are unreasonable, allegedly making *Martin* inapplicable and giving the Review Commission the power to decide the case based on its own interpretation.[38] Such decisions can lead to significant confusion about the state of the law. For example, in the highly anticipated *Summit Contractors* case involving liability of various employers on a multi-employer construction site, the Commission ruled that OSHA's reading of the statute and regulations was unreasonable and decided not to impose liability on a particular employer. The Eighth Circuit overturned the Commission's decision. After the Commission drafted a strikingly narrow follow-up decision, a prominent attorney for large employers suggested the Review Commission's original decision, even though it had been overturned by the Eighth Circuit, might still apply everywhere but areas in the Eighth Circuit's jurisdiction.[39]

Abolishing the Review Commission and vesting adjudicatory power in the Department of Labor would end the institutional infighting that sows seeds of confusion for employers, employees, and OSHA inspectors.

Next Generation Rulemaking

Congress and the White House should streamline the rulemaking process and institute administrative reforms to ensure balanced input into the process. The administrative process that OSHA must navigate to establish new worker protections is so arduous that the agency is in danger of becoming irrelevant to workers' evolving health and safety concerns. A recent analysis by Public Citizen found that in the last 20 years OSHA has finalized just nine new health standards and 13 new safety standards; only three of those 22 new standards were finalized in the last 12 years.[40]

The record is appalling given the state of existing OSHA regulations. The standards for air toxics, for instance, are so outdated that most major employers follow voluntary guidelines that reflect newer toxicological research and are more stringent than OSHA's standards. The U.S. Chemical Safety Board has linked OSHA's lack of a standard for combustible dust to numerous explosions that have injured or killed workers.[41] And an unfinished rule that will address overexposure to crystalline silica would prevent thousands of new cases of debilitating lung disease every year if it ever makes it through the rulemaking gauntlet.

OSHA's rulemaking process should be streamlined to allow for faster finalization of new rules.

To be truly supportive of an empowered workforce, OSHA's rulemaking process must be updated to give workers a stronger voice in setting priorities, restructured in a way that ensures balanced access and input to the process, and streamlined to allow for faster finalization of new rules.

Setting regulatory priorities based on workers' concerns would result in greater worker engagement in the rulemaking process, ultimately empowering workers to demand significant improvements in their jobs. Under the leadership of Assistant Secretary David Michaels, OSHA took a stab at engaging workers in setting rulemaking priorities by hosting a "PEL web forum" in August 2010 to identify hazardous chemicals for which OSHA could develop a regulatory strategy. The process was transparent (public suggestions were posted online) and many people weighed in. But while the web forum was a positive development in some respects, its scope and duration were limited. OSHA should work to build on this experience by developing a program that regularly engages workers through the web, worksite visits, and other means to provide the agency with their advice about regulatory priorities regarding a broader scope of hazards.

Empowering workers to have a stronger voice in the rulemaking process will also necessitate some restructuring of the rules governing how outside parties participate in that process. Empirical studies of participation in OSHA rulemaking indicate that employers and their trade associations produce more of the documentation that affects rulemaking than labor unions.[42] The problem is that the rules governing public participation in the regulatory process have no filters to ensure balanced input to the process. Thus the stakeholders with the greatest resources at their disposal contribute a greater quantity of information for OSHA

staff to sift through and analyze. In practical terms, this means that well-funded trade associations can stall the rulemaking process by submitting reams of information, regardless of its quality and relevance.

Proposed OSHA rules also go through an informal hearing process, in which interested parties can testify about their opinions on the proposal, answer questions posed by OSHA staff, and cross-examine other parties. These hearings, like the written comment process, are open to anyone, which allows employers and their trade associations to dominate. A ten-minute limit on each witness's prepared testimony provides some assurance of balance, but really has little effect because the cross-examination by other parties and OSHA officials takes the most time.

Limitations on documentation submitted to the record and times for participation at hearings could create more balance in OSHA's rulemaking process.

OSHA's internal rulemaking processes are not the only problem. OMB creates an additional participatory sandtrap for regulations through its open-door policy of taking meetings with any party interested in providing opinions about proposed regulations. OSHA's attempt to craft a rule that will regulate workers' exposure to silica dust provides an excellent case study. After OMB received a draft proposal from OSHA, it held seven different meetings over the course of five months – five with different industry sectors, one with unions, and one with members of the American Thoracic Society. The proposal has been stalled at OMB for more than a year, preventing OSHA from publishing it in the *Federal Register* and beginning the process of taking public comment and holding hearings.

Free and open public participation in the rulemaking process was a hallmark of progressive regulatory programs that were created in the 20th century, but with the rising influence of trade associations (with their associated political action committees) and the falling rate of unionized workers, the original design needs to be restructured to ensure balanced input. The federal appellate courts provide a useful example of reasonable limitations on participation. At each stage in the litigation process, each side is given equal opportunity to present arguments—the courts impose page limits on briefs and background documents, as well as time limits on the overall length of oral arguments (including time for the judges' questioning). Similar limitations on documentation submitted to the record and times for participation at informal hearings could create more balance in OSHA's rulemaking process.

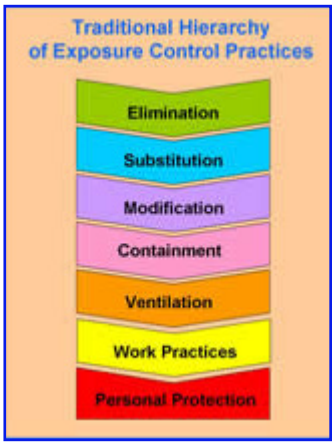
A more balanced process must also be streamlined to reduce the amount of time between OSHA's recognition of a hazard and its implementation of a strategy for controlling the hazard. Major rules often take more than a decade to run the rulemaking gauntlet. The problem is, in large part, political. Both President Bush and President Obama have been openly critical of regulatory agencies and have used OMB's review powers to stifle new regulations. OSHA's silica rule is a prime example, having been prevented from even reaching the first stage of public notice in the *Federal Register* because of OMB's year-long delay. The political problem could be resolved through a political solution. A broad spectrum of workers' advocates, from unions to local workers' centers, can pressure politicians

to free OSHA to do its job. They need OSHA to be open with them about the sticking points for particular regulatory programs. By posting records of all communications with politicians, trade associations, and other stakeholders, OSHA could give workers' advocates information they need to devise campaigns aimed at eliminating political roadblocks.

A nimble rulemaking apparatus that works quickly to incorporate stakeholders' input with OSHA staff expertise would greatly benefit workers by promoting the creation of nationally uniform standards that can address emerging hazards.

Eliminate significant risk determination; adopt a hazard-based hierarchy of controls

Congress also needs to improve the basic rules governing OSHA's regulatory authority. Congress's initial delegation of rulemaking authority to OSHA was crafted in broad terms that have since been interpreted by the Supreme Court in a way that makes setting new health standards a Herculean task. The OSH Act defines "occupational safety and health standard" to be a rule that is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The Supreme Court found an implicit requirement that OSHA must establish that employees are *unsafe* because of a "significant risk" attributable to a particular hazard before the agency can create a new health standard. Although the decision might seem reasonable at first glance, the Court failed to provide any useful guidance on what type of risk is to be considered significant and the term "significant risk" is nowhere to be found in the statute. As a result, the risk assessment process is now one of the most time-consuming steps in developing new rules.



The hierarchy of controls shows, from top to bottom, the most- to least-effective means of protecting workers from occupational hazards. Source: CDC/NIOSH.

Risk-based regulation is not the optimum approach for an agency that operates under the severe budgetary and political constraints that encumber OSHA. When the regulatory process begins with meticulous assessment of the risks posed by a single chemical, "paralysis by analysis" inevitably ensues. The science of estimating real-world occupational risks using epidemiological data or experimental research is inherently uncertain, so well-meaning scientists (and less well-meaning regulatory opponents) engage in a recursive process of identifying uncertainties, researching them to better understand the overall science of risk, and identifying new avenues for research. Allowing this process to play out

is time consuming, making new rules an expensive endeavor, even if scientists outside of the agency conduct most of the research. In addition to the time and expense required for risk assessment, OSHA risks political backlash and litigation if it attempts to move forward with a rule while uncertainties are still being hashed out.

Congress should do away with the Supreme Court's vague "significant risk" requirement by rewriting the OSH Act's delegation of rulemaking authority. A lesson could be learned from the field of environmental law. Congress initially instructed EPA to craft risk-based regulations to deal with toxic air pollution, but when the risk analyses got so laborious that EPA's regulatory efforts in that field ground to a halt, Congress amended the Clean Air Act. Under the new law, Congress identified 188 toxins that EPA should regulate and told the agency to set standards based on an assessment of the best pollution-control technologies in use. To speed the development of new occupational safety and health standards, Congress should undertake a similar effort to redesign the OSH Act's standard-setting system.

Congress should do away with the Supreme Court's vague 'significant risk' requirement by rewriting the OSH Act's delegation of rulemaking authority.

In the OSHA context, technological hazard remediation is built into the "hierarchy of controls" model that undergirds the OSH Act. The hierarchy of controls establishes an order of preference for selecting the means to eliminate occupational hazards. Employers focus first on the elimination of hazardous conditions and substitution of hazardous agents. When elimination or substitution is not feasible, employers are to develop engineering and administrative controls that reduce workers' exposure to hazards enough to keep them safe and healthy. Only when elimination, substitution, engineering and administrative controls are insufficient should employers rely on personal protective equipment to protect workers.

Even without congressional action, OSHA can work toward a hazard-based regulatory system. Instead of individualized risk-based rulemakings to address toxic chemicals and other health hazards, OSHA should adopt a hazard-based approach that utilizes the concept of a hierarchy of controls to ensure adequate protections for workers. In fact, the Injury and Illness Prevention Program rule that is currently under consideration could be just the approach that is called for. The basic framework for injury and illness prevention programs requires employers, through an engaged workforce, to identify and assess workplace hazards, establish prevention and control programs to deal with those hazards, provide education and training to workers, and institute a system for continuous program evaluation and improvement. According to OSHA, "numerous studies have examined the effectiveness of injury and illness prevention programs at both the establishment and corporate levels," demonstrating "that such programs are effective in transforming workplace culture; leading to reductions in injuries, illnesses and fatalities; lowering workers' compensation and other costs; improving morale and communication; enhancing image and reputation; and improving processes, products and services."[43]

Conclusion

Every year in late April, the families and friends of workers who died on the job gather, along with government officials and worker advocates, to commemorate Workers' Memorial Day. In honor of the thousands of workers who die on the job every year and the many more who are injured or become ill, they pledge to continue working toward the OSH Act's stated goal of safe and healthful employment for all. The slow pace of the incremental steps toward that goal can be frustrating, but with a clear vision of what it takes to achieve the goal, progress is inexorable. The vision presented in this paper – of empowered workers supported by a strong regulatory system – is imminently achievable. Unless, however, the improvements we recommend are taken, the annual commemoration will continue to be a reminder that we have failed to protect America's workers through political and legal neglect.

Endnotes

[1] J. Paul Leigh, *Economic Burden of Occupational Injuries and Illnesses in the US*, 89 Milbank Q. 728 (2011).

[2] Since 2001, OSHA has finalized twelve rules that increased protections for workers and withdrawn 29 rules, according to analysis by Center for Progressive Reform staff. *See also,* OMB Watch, *The Bush Regulatory Record: A Pattern of Failure,* n.7 (Sept. 2004), *available at* http://www.cs.cornell.edu/gries/howbushoperates/OMBWatchRegs.pdf (last accessed Mar. 28, 2012).

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[4] Alison Morantz, *The Elusive Union Safety Effect: Toward a New Empirical Research Agenda*, Labor and Employment Relations Association, Proceedings of the 61st Annual Meeting (2009).

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[6] *See, e.g.,* National Park Service, U.S. Dep't. of the Interior, *Offenders Get Jail Time for Ginseng Poaching and Theft* (May 19, 2011), *available at* http://www.nps.gov/grsm/parknews/conviction.htm (last accessed March 30, 2012) (noting that poaching ginseng in a national park carries a maximum criminal penalty of six months in jail and/or a fine of $5,000).

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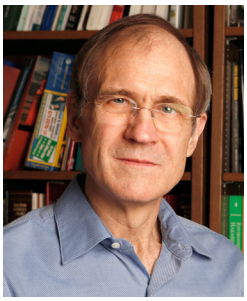

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