

OSHA REFORM

PHOTOCOPY
PRESERVATION

**The White House
Washington**

FAX COVER SHEET

Office of Domestic Policy

**Old Executive Office Building
Washington, D.C. 20500
FAX: (202)-456-7028**

To: Nicole Elkan

FAX No: 205-6813

From: Mike Schmidt

Phone: 456-5567

Date: May 3

Pages (Including cover): 4

Comments: Here's our position on
OSHA reform -- I will keep
digging on product liability.

SENT BY:

12-30-93 : 8:45AM :

USDOL SOL LLC

202 383 81481# 8/27

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DEC 22 1993

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Kennedy:

In testimony before the House Education and Labor Committee in April of this year, I stated that the time had come to reform the Occupational Safety and Health Act. I explained that improved workplace safety and health is an important aspect of this Administration's commitment to better jobs for all Americans in the New American Workplace. In a highly competitive global economy we cannot tolerate the high costs of workplace fatalities, injuries and illnesses. We must recognize that investment in our workers is the best investment we can all make in our future. As we have stated in Vice President Gore's National Performance Review, this Administration is committed to encouraging companies to embrace labor-management cooperation and to giving employees the tools to humanize the workplace.

As I committed in my testimony, we have been working diligently to explore the concerns of labor, management, the insurance industry, safety and health professionals, and the public with the framework of a law that has not been changed in more than twenty years. We held dozens of meetings with stakeholders, and staff have carefully considered technical issues. I have personally had meetings with several groups representing key stakeholders, and my senior staff and I have spent time considering both the individual questions presented and our overall approach to this issue.

The Department of Labor now joins you in support of rapid legislative action. Your bill introduces new ways to "reinvent" regulation of workplace health and safety through comprehensive health and safety programs and joint safety and health committees. Empowering workers to participate in safety and health activities and encouraging employees and management to cooperate to improve the places in which they work will save lives and tax dollars, and will make government regulation less burdensome. These concepts are the key to a new worksite-based model of injury and illness prevention.

Note - we
did not sign
on to this
bill back,
stock + barrel,
although AFL-CIO
is interpreting our
position as
such.

We are therefore pleased to support your efforts to enact legislation that would:

- * establish comprehensive occupational safety and health programs and joint safety and health committees, and improve whistleblower protection;
- * address gaps in the protection of public employees;
- * increase Federal criminal felony penalties, to complement those now available to State authorities, to enable us to appropriately punish both collective and individual conduct that is truly criminal in nature;
- * place additional requirements on the construction industry to ensure efficient coordination of safety and health protection among the many and constantly changing employers on construction projects; and
- * put into effect the Permissible Exposure Limits for airborne contaminants in general industry adopted by the agency under the prior Administration.

When the Congress returns from its recess, we will be prepared to testify on your legislation in detail. In addition to further explaining our position on the initiatives mentioned above, we will be ready to suggest changes that appear to be needed on such matters as employee litigation rights, procedures (including statutory deadlines) for standards action, changes to section 4(b)(1) of the Act, and administrative organization. This will give us time to ensure that other agencies which have expertise on particular technical features of the legislation have an opportunity to work with us.

We will also be able to refine our estimates of the resource needs, compliance costs, and benefits for Federal, State, and local government entities and the private sector. In so doing, we will take into account the bill's provisions granting the Secretary flexibility with respect to small worksites and low hazard employment, including, where appropriate, State and local government worksites and employment. We would also like to work with you to ensure that our budgetary and personnel policies can accommodate this important new initiative. In the interim, we would be pleased to provide continued technical assistance to your staff, and to work with you to develop incentives to promote compliance that meet our goals.

In the context of our active support for OSHA reform, we see no need to wait when we can take action administratively. The recent confirmation of Joe Dear as Assistant Secretary will allow

SENT BY:

12-30-93 : 9:40AM :

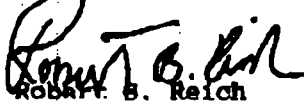
USDOL SOL LLC

202 395 6148:# 7/ 7

us to move quickly ahead on a number of initiatives that have been developed over the last few months and which are consistent with the legislative initiative. By way of example, we intend to move ahead promptly with a regulatory effort to require employers to establish comprehensive occupational safety and health programs, and explore ways to have those programs and their implementation regularly certified by either private sector experts or suitable employee representatives. We are exploring a new approach to data collection that will allow us to target our limited compliance resources much more effectively. We have plans underway to increase the efficiency of inspectors through streamlining the inspection process, and to otherwise strengthen our enforcement efforts. We are also looking for ways to work with employers to encourage worker-management cooperation in the field of safety and health.

I want to assure you that my staff and I will be available to work with you as you press forward with OSHA reform legislation. You will have our full and active support in your endeavors.

Sincerely,



Robert B. Reich

<u>NAME</u>	<u>Agency</u>	<u>Phone</u>	<u>Fax</u>
Ellen Seidman	NEC	456-2802	456-2223
David Zeigler	OSHA	219-6091	
Richard Hayes	OSHA	219-6093	
Larry Katz	DOL	219-5108	219-7659
Bonnie Deane	NEC	456-2471	456-2223
Frank Frodyma	OSHA	219-8021	219-8343
John Monrall	OMB	395-6882	395-5167
Bill Dickens	CEA	395-4597	395-6853
Michael Silverstein	OSHA	219 8021	219 8343
Joe Dear	OSHA	219-7162	219-6064
Mary Ann Richardson	OCIA/DOL	219-6141	219-5108
Ross Eisenbray	OCIA/DOL	219-6141	219-5108
John Baker	OCIA/DOL	219-6141	219-5108
Mike Schmidt	OPL	456-7777	456-7028
CHARLOTTE HAYES	DVP	456-6277	456-6231
Paul Forgan	OMB	395-3925	395-6148
Conna Powers	OMB	395-3803	395-6148
Pam Vanille	OMB	395-3262	395-1596
John Fenech	OMB	395-4638	395-5167
Sally Katzen	OMB	456-4852	
Tom Williamson	SOH/DOL	219-2675	219-7257
Joe Woodward	SOH/DOL	219-7723	

THE WHITE HOUSE

WASHINGTON

December 8, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BOB RUBIN

SUBJECT: OSHA Reform

I. **ACTION-FORCING EVENT:** Lane Kirkland will meet with you on Friday, December 10 and will want to know the Administration's position on OSHA Reform. While assuring Mr. Kirkland that we support reform, including the principles of the pending Kennedy-Ford bills, it will be important to avoid endorsing the specific provisions of those bills.

II. **BACKGROUND/ANALYSIS:** The Occupational Safety and Health Act has not been amended in 20 years. Substantial concerns have been raised about its efficacy, cost, and coverage. In March, Senator Kennedy and Chairman Ford introduced essentially identical bills that would, among other things:

- o Require all employers (subject to limited Secretarial exemptive authority) to establish comprehensive occupational safety and health programs, and all employers with more than 10 part- or full-time employees to establish joint safety and health committees at each worksite;
- o Increase whistleblower protection;
- o Expand OSHA coverage to public employees in 27 states not currently covered by approved state plans and to all federal employees (except congressional employees);
- o Increase federal criminal penalties and establish individual criminal liability for willful violations that cause serious bodily injury;
- o Put into effect a 1989 OSHA regulation concerning Permissible Exposure Limits for approximately 500 airborne substances that had been overturned by the Supreme Court because individual risk determinations were not made for each substance.

DOL estimates that compliance will cost the private sector approximately \$13 billion annually, state and local governments approximately \$1.8 billion, and non-OSHA federal agencies \$200 million. They estimate that over 1,000 fatalities and 1.4 million injuries will be prevented, and that over \$13 billion will be saved in reduced medical costs, workplace disruption and other related areas.

The most controversial areas are the requirement for joint worker-management committees and the coverage of state and local employees. Labor generally has made support of committees the litmus test for support of the bill; business has been equally adamant on the other side because of both costs and prospects that committees would be used to organize workers. AFSCME has made coverage of state and local employees -- many of whom work in very hazardous conditions -- one of its top priorities. On the other hand, for the 27 states that do not now cover public employees, coverage would be an unfunded state mandate.

Attempts by both DOL and congressional committees to bring labor and business together to find a bill both can support have failed. Labor, DOL and the bills' sponsors believe serious negotiations will begin only if the Administration takes a position supporting, at least in principle, the critical parts of the bills (committees, coverage, whistleblower protection), recognizing that compromises will be made during the legislative process. DOL also believes that support for the bills' critical elements is important to the Administration's broader agenda with labor and the two committee chairmen.

A story concerning a draft letter from the Secretary "strongly supporting" the bills appeared in the Wall Street Journal on Monday. That letter would have committed the Administration to supporting the actual language of the bills in the critical areas, not just the principles involved. The Labor Department and White House policy offices (NEC, OMB, CEA, DPC, OVP) have developed a revised DOL letter, at Tab A, that endorses principles, not provisions, and that all support.

The White House policy offices that worked on the letter, as well as Intergovernmental Affairs, are convinced of the need for OSHA reform, and the general validity of the bills' central principles. However, they are concerned that the bills' sponsors have not adequately addressed the cost of the bills as currently drafted to business (including in particular small businesses) and to state and local governments. They therefore strongly recommend that in your meeting with Mr. Kirkland you not commit to support specific provisions of the bills. Legislative Affairs and Political Affairs would be inclined to be more explicitly supportive of the bills, especially the provisions requiring labor/management committees and extending coverage.

Tab:

Tab A - Draft DOL letter

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

The Honorable William D. Ford
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Kennedy and Ford:

In testimony before the House Education and Labor Committee in April of this year, I stated that the time had come to reform the Occupational Safety and Health Act. I explained that improved workplace safety and health is an important aspect of this Administration's commitment to better jobs for all Americans in the New American Workplace. In a highly competitive global economy we cannot tolerate the high costs of workplace fatalities, injuries and illnesses. We must recognize that investment in our workers is the best investment we can all make in our future. As we have stated in Vice President Gore's National Performance Review, this Administration is committed to encouraging companies to embrace labor-management cooperation and to giving employees the tools to humanize the workplace.

As I committed to you in my testimony, we have been working diligently to explore the concerns of labor, management, the insurance industry, safety and health professionals, and the public with the framework of a law that has not been changed in more than twenty years. We held dozens of meetings with stakeholders, and staff have carefully considered technical issues. We have listened carefully to all, and explored avenues for reaching consensus. I have personally had meetings with several groups representing key stakeholders, and my senior staff and I have spent time considering both the individual questions presented and our overall approach to this issue.

The Department of Labor now joins you in support of rapid legislative action. Your bills introduce new ways to "reinvent" regulation of workplace health and safety through comprehensive health and safety programs and joint safety and health committees. Empowering workers to participate in safety and health activities and encouraging employees and management to cooperate to improve the places in which they work will save lives and tax dollars, and will make government regulation less burdensome. These concepts are the key to a new worksite-based model of injury and illness prevention.

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- * establish comprehensive occupational safety and health programs and joint safety and health committees, and improve whistleblower protection;
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In the context of our active support for OSHA reform, we see no need to wait when we can take action administratively. The recent confirmation of Joe Dear as Assistant Secretary will allow us to move quickly ahead on a number of initiatives that have been developed over the last few months and which are consistent

with the legislative initiative. By way of example, we intend to move ahead promptly with a regulatory effort to require employers to establish comprehensive occupational safety and health programs, and explore ways to have those programs and their implementation regularly certified by either private sector experts or suitable employee representatives. We are exploring a new approach to data collection that will allow us to target our limited compliance resources much more effectively. We have plans underway to increase the efficiency of inspectors through streamlining the inspection process, and to otherwise strengthen our enforcement efforts. We are also looking for ways to work with employers to encourage worker-management cooperation in the field of safety and health.

I want to assure you that my staff and I will be available to work with you as you press forward with OSHA reform legislation. You will have our full and active support in your endeavors.

Sincerely,

Robert B. Reich

December 8, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BOB RUBIN

SUBJECT: Approval of Proposed Letter from Secretary Reich to Senator Kennedy and Chairman Ford Supporting their OSHA Reform Bills

I. ACTION-FORCING EVENT: Lane Kirkland will meet with you on Friday, December 10 and will want to know the Administration's position on OSHA Reform. Senator Kennedy and Chairman Ford have been pressing Secretary Reich since April to take a "clear" position on their OSHA reform bills to enable them to move in this Congress. A story concerning a draft letter from the Secretary "strongly supporting" the bill appeared in the Wall Street Journal on Monday. The Labor Department and White House policy offices (NEC, OMB, CEA, DPC, OVP) have developed a revised DOL letter, at Tab A, with the only remaining area of disagreement the specificity of support for provisions of the Kennedy and Ford bills.

II. BACKGROUND/ANALYSIS: The Occupational Safety and Health Act has not been amended in 20 years. Substantial concerns have been raised about its efficacy, cost, and coverage. In March, Senator Kennedy and Chairman Ford introduced essentially identical bills that would, among other things:

- o Require all employers (subject to limited Secretarial exemptive authority) to establish comprehensive occupational safety and health programs, and all employers with more than 10 part- or full-time employees to establish joint safety and health committees at each worksite;
- o Increase whistleblower protection;
- o Expand OSHA coverage to public employees in 27 states not currently covered by approved state plans and to all federal employees (except congressional employees);
- o Increase federal criminal penalties and establish individual criminal liability for willful violations that cause serious bodily injury;
- o Put into effect a 1989 OSHA regulation concerning Permissible Exposure Limits for approximately 500 airborne substances that had been overturned by the Supreme Court because individual risk determinations were not made for each substance.

DOL estimates that compliance will cost the private sector approximately \$13 billion annually, state and local governments approximately \$1.8 billion, and non-OSHA federal agencies \$200 million. They estimate that over 1,000 fatalities and 1.4 million injuries will be prevented, and that over \$13 billion will be saved in reduced medical costs, workplace disruption and other related areas.

The most controversial areas are the requirement for joint worker-management committees and the coverage of state and local employees. Labor generally has made support of committees the litmus test for support of the bill; business has been equally adamant on the other side because of both costs and prospects that committees would be used to organize workers. AFSCME has made coverage of state and local employees -- many of whom work in very hazardous conditions -- one of its top priorities.

As outlined by Secretary Reich in his memo to you (Tab B), attempts by both DOL and congressional committees to bring labor and business together to find a bill both can support have failed. Labor, DOL and the bills' sponsors believe serious negotiations will begin only if the Administration takes a position explicitly supporting the critical parts¹ of the bills (committees, coverage, whistleblower protection), even though all parties know compromises will eventually be made. DOL also believes that explicit support for these elements is very important to the Administration's broader agenda with labor and the two committee chairmen. Legislative Affairs and Political Affairs support this position.

While the White House policy offices that have worked with DOL on the letter are convinced of the need for OSHA reform, and the general validity of the bills' central principles, they are concerned that the bills' sponsors have not adequately addressed the cost of the bills as currently drafted to business (including in particular small businesses) and to state and local governments. Whatever the estimated eventual savings, expanded coverage would be an unfunded state mandate. They are also concerned that the Administration will be open to charges of backing away from its initial position as the bills move through Congress. NEC, OMB, CEA, DPC, and OVP therefore support language less directly tied to the precise provisions of the bills.

¹ Not even the bills' sponsors expect endorsement of the bills as a whole. There are a number of issues on which the letter reserves judgment, including, for example, the continued authority of the Department of Transportation to regulate safety conditions in the transportation industries.

III. OPTIONS:

- o Option 1 -- Approve the letter with the DOL language -- "support enactment of the provisions of your legislation that would:" -- at the bottom of page 1
- o Option 2 -- Approve the letter with the policy offices' language -- "support enactment of legislation that would:" -
- at the bottom of page 1

IV. DECISION:

____ Option 1 (DOL) ____ Option 2 (policy offices) ____ Don't
send letter

Tabs:

Tab A - Draft DOL letter

Tab B - Memo from Secretary Reich

Hearing Preparation Schedule: Tentative
DRAFT January 11, 1994

1/10	1st draft Secretary's testimony to working group
	technical meetings with committee staff begin
1/11	letter dissemination begins
1/12	meet with EOP on regs
1/13	meet with EOP on unfunded mandates
1/14	drafts of testimony (Secretary & Dear) to staff for input

1/17	Q and A recirculation to staff (Hill briefings may start this week)
1/18	due date all staff input on testimony
1/19	draft of testimony to Lewis/Donahue/Katz/Manley & staff meet with EOP on criminal penalties
1/20	1st briefing of Dear meet with EOP on small business burden
1/21	draft of testimony to Glynn

1/24	Q and A recirculation to staff
1/25	draft of testimony to Secretary 2nd briefing of Joe Dear
1/26	1st briefing of Secretary (unconfirmed) ?? meet with EOP on 4(b)(1), federal coverage
1/27	?? meet with EOP on funding
1/28	draft of testimony to NEC working group

1/31	staff level resolution efforts on testimony final Q and A recirculation to staff
2/1	resolution of remaining issues by principals 3rd briefing of Joe Dear
2/2	formal clearance of testimony inside DOL
2/3	submit testimony to OMB for formal clearance 4th briefing of Joe Dear
2/4	2nd briefing of Secretary (unconfirmed); give him Q and A for weekend review

2/7	resolve clearance problems with OMB
2/8	final briefing of Secretary (unconfirmed)
2/9	Secretary's Senate Testimony (note: budget release date)
2/10	Dear's House Testimony
2/11	Congressional recess begins

DRAFT KEY OSHA REFORM ISSUES - 9/10/93

ISSUE	ISSUE STATEMENT	S.575/H.R.1280	MINORITY BILL	LABOR	BUSINESS	POSSIBLE DOL POSITION	NOTES:
1. COMMITTEES	Should employers be required to establish committees? How should the employee members be selected? What rights do the committees have?	Mandates committees for employers with 11+ workers. Selection by and among employees. Rights to conduct inspections, have access to records, and to meet with employer and make recommendations.	No provision. Amend NLRA to permit committees.	Strongly support. AFL-CIO regards these provisions as key to OSHA reform.	Strongly oppose mandatory requirements; promote voluntary incentives.	Support; permit more flexibility. <i>at least "meet & confer"</i>	<i>Still working on this - NPR Report T10-1A</i>
2. STATE AND LOCAL COVERAGE	The OSH Act excludes State/local govt. workers (State OSH programs cover only 7 of 15 Million). Should OSHA cover all State/local workers?	Extends OSHA coverage to State and local government workers.	Extends coverage to State and local govt. workers after 3 years.	Support.	Private sector supports; State/local govt. employers oppose as an <u>unfunded</u> Federal mandate. <i>(P)</i>	Support full coverage after 3 years. Encourage State public-employee-only plans.	
3. CRIMINAL PENALTIES	Should the Federal government's authority to seek criminal penalties for willful violations by employers of OSHA standards be expressly reaffirmed and be stiffened by increasing the penalty in cases involving death from a misdemeanor to a felony; imposing individual liability on culpable managers; and extending criminal liability beyond death cases to willful violations that result in serious bodily injury?	Provides longer sentences; liability for culpable managers; covers serious bodily injury.	Provides longer sentences only, but narrows definition of criminal conduct.	Support.	Oppose "serious bodily injury" and manager liability.	Support, but narrow definition of "serious bodily injury."	<i>Responsible party narrow def</i>
4. GAPS IN PRIVATE SECTOR JURISDICTION	Should OSHA have more authority/jurisdiction to protect private sector workers covered by other agencies? In particular, should OSHA assume jurisdiction over DOE nuclear weapon sites?	H.R. 1280, no provision on general issue; would cover DOE sites. S.575 would give OSHA jurisdiction over all private sector workers unless ceded to other agencies; DOE transfer would be permanent.	<u>Requires report to Congress on jurisdictional problem.</u>	Support.	Oppose.	Transfer DOE authority to OSHA; Make several technical fixes to current law, but otherwise support minority bill approach.	<i>Staff ↑ needed?</i>
5. EMPLOYEE LITIGATION RIGHTS	Should employees have increased rights to participate in and to block settlements between OSHA and employers?	Grants workers significantly increased rights; grants Review Commission authority to disapprove settlements.	No provision.	Support.	Oppose.	<u>1) Oppose or</u> <u>2) limit to participation</u>	<i>Why stretch OSHA resources even further?</i>

Can object to an abatement date. No supposed to consult before settling

individual employees!

Draft Key OSHA Reform Issues

ISSUE	ISSUE STATEMENT	S.575/H.R.1280	MINORITY BILL	LABOR	BUSINESS	POSSIBLE DOL POSITION	NOTES:
6. ABATEMENT DURING CONTEST	Should employers be required to abate hazards even while contesting?	H.R. 1280 Requires abatement unless stayed by Commission. S.575 requires abatement in most cases and authorizes expedited review.	No provision.	Support either H.R. 1280 or S.575.	Oppose.	Contest tolls abatement until ALJ decision, which shall be expedited upon DOL request, except that immediate abatement if contest only classification or penalty issues.	Separate from "imminent danger" circuitry
7. COMPLAINTS	Current law only requires OSHA to make on-site inspections of signed worker complaints. Should OSHA inspect all worker complaints?	Requires all complaints be inspected.	No provision.	Support.	Oppose.	Amend law to give agency discretion to either "investigate" or to "inspect" whether signed or not.	
8. PROGRAMS	Should all employers be required to establish a comprehensive safety and health program? Should compliance be by certified recognized professionals?	Mandates comprehensive programs for all employers. No provision for certification.	No provision. 25% Penalty credit if employer has any program.	Support program mandate. No position on certification.	Oppose mandate; support incentives or voluntary adoption.	Support. Consider size thresholds in statute. Permit OSHA to vary requirements. Examine feasibility of mandating that periodically employers obtain third party or committee certification of programs.	worker participation 10+ m of hazards control training - b. good costs
9. INCENTIVES	Should various incentives for employer compliance be legislated?	No provision; agreement to add one.	Fee-funded award. Several defenses vacate citations for employers: 25% penalty credit for written programs, 25% penalty credit for exemplary record, codifies VPP program, etc.	Oppose concept.	Support concept.	Support fee-funded award, contract preference, codification of VPP program funded by fees. Support study of risk-based OSHA. Explore possibility of penalty credits for consultation fees.	Compliance incentives needed
10. Construction: PROJECT REQUIREMENTS	Should the law require construction projects to have a project safety and health plan and onsite safety specialist?	Mandates plans and specialist for all construction projects.	No provisions.	Support.	Oppose the requirements.	Support. Consider size threshold limits in statute. Permit OSHA to vary requirements.	
11. Construction: AGENCY REQUIREMENTS	Should the law establish a Deputy Assistant Secretary for construction safety and health? Should the law establish minimum experience requirements for OSHA construction inspectors?	Establish Deputy Assistant Secretary for Construction. Establishes 5-year experience requirement.	No provision on construction. Requires all OSHA inspectors to be qualified for specific industries/hazards.	Support.	Support.	Oppose.	is construction particularly injury-prone

Draft Key OSHA Reform Issues

ISSUE	ISSUE STATEMENT	S.565/H.R.1280	MINORITY BILL	LABOR	BUSINESS	POSSIBLE DOL POSITION	NOTES
12. STANDARDS CRITERIA	Should a requirement for "significant risk" be codified, and what should it be? Should a requirement for "feasibility" be codified for safety standards, and what should it be? Should burden on agency to establish feasibility be shifted in some cases?	H.R.1280 codifies requirement to find significant risk before regulating, and authorizes OSHA to regulate risks as low as one in a million. It also codifies that for safety standards, just as is currently required for health standards, the risk must be reduced to the maximum extent feasible. No change to rule that burden is on the agency to demonstrate feasibility for each risk.	No definition of significant risk. Imposes cost-benefit requirements on both health and safety standards. No change in agency burden to establish feasibility for each industry.	Support H.R. 1280.	Support minority bill.	Support H.R. 1280 on definition of significant risk, but seek to clarify that one in a million level is a floor only. Support H.R. 1280 in codifying feasibility requirement for safety standards. Advocate provision that if OSHA establishes feasibility for core industries, burden shifts to employers to show non-feasibility for other industries.	<del>Per ^{was} ~~standing~~</del>
13. STANDARDS DEADLINES	Should judicially enforceable deadlines be legislated for standards actions?	Sets enforceable deadlines for petitions, proposed and final standards.	No provision.	Support.	Oppose.	Oppose.	
14. SPECIFIC STANDARDS	Should Congress require OSHA to adopt specific standards?	Puts final and proposed PELs into effect. Requires OSHA to issue ergonomics and medical surveillance standards.	No provision.	Support.	Oppose.	Support putting final and proposed PELs into effect. Support Congressional requirement on ergonomics and medical surveillance due to special circumstances/ oppose specific deadlines.	A
15. JUDICIAL REVIEW of STANDARDS	Should the courts give OSHA more deference on standards?	No provision.	No provision.	Prefer status quo.	Prefer status quo.	Support changing standard for judicial review from "substantial evidence" to "arbitrary and capricious."	On the record
16. RESOURCES	How can OSHA obtain adequate resources for its current program and for new duties under OSHA reform?	Allow OSHA to keep money from any new fines for non-enforcement purposes, and charging fees for consultation.	No provision.	Support.	Oppose.	Support, but also seek explicit authorization level. Examine feasibility of chargebacks for FECA.	

Important

1. Much cheaper!
 2. Example:
 3. Standards
 4. St L for 2 yrs
 5. Paymen

DATE: January 12, 1994
TO: Ellen Seidman, Bill Dickens, John Morrall, Steve Semenuk
FROM: Mike Schmidt (DPC), Pete Galvin (OSHA)
RE: Issue Paper for Tomorrow's OSHA Reform Working Group Meeting

Attached is the issue paper for tomorrow's meeting on unfunded mandates (14 pages + attachments). The meeting will be in Room 476 OEOB at 10:00. If you have any questions about the paper or are missing any pages, please give either of us a call (Mike: 456-7777; Pete: 219-6140).

Working Group

OSHA Reform Group 12-22-93

Purpose

- What are the critical issues
- what do we need to understand about those issues to take administration position
- provide 2nd outlet for visits with interest groups (Labor, Small business groups, large bus. groups)
 - political
 - substantive (learn what we need to know)

- want to take strong positions on key issues
- Timing issues
- Move issue rather than reacting

- Hearings in February
- problem - OOC already down the road on PRRCA!
Strategy of backing Kennedy (Good Bill) --
push strong negotiating tactic to
get better deal out of final product.

Need to get Kennedy folks engaged?

Bill (or close approximation) will pass House -- Senate is where action is

DOL Time frame Commitments

- send letter today
- Reich public announcement by Jan 15

House {
- House Hearings 1st week in Feb
- Markup in House in March
- Spring Passage in House

- Senate Hearings sometime in Feb(?)
- Senate action after House passage (Kennedy strategy)

① Admin technical working group may want to weigh in during House Markup in March

▷ DOL guess -- Bill will fall way short in co-sponsorship in Senate, Force Kennedy to sit down (with our help?) to figure out where bill should go to get more support.

- ongoing regular (weekly) sessions with Kennedy & Ford staff to compare notes
- need positions on ^{major} issues by Feb

Economic Cost Analysis

- goal is to have set of credible numbers so we can defend if necessary

① Internal exercise: re-think critical assumptions (short term) that were made in original figures, make adjustments, expand analysis

② 3 Areas of Interest/Review (med. term)

a) Analysis of Benefits of changes in compliance

b) Analysis of program, Minny experience where elements already exist

c) Analysis of Benefits inspection / injury / illness

③ Develop Paper on Costs of doing nothing

④ 6-8 case studies where programs / committees are in effect

unfunded Mandates - State Flexibility - gov^{mt} exemptions
burden on small business -- costs? (compliance costs)
size?

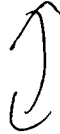
PHOTOCOPY
PRESERVATION

OSHA Reform Wk Group 1-12-99

(10 min late)
I. Judicial Review

- "substantial evidence" → "arbitrary & capricious"

- OSHA would like change to "arb & cap" standard (more common standard)
- easier to promulgate regs - not as many red-tape hoops to jump through



(b) exhaustion requirement linked to @ -- would force more important than @ Judicial Review

recommendation

Push for Full Exhaustion, settle for limited
Push for arb/capricious (check w Hill)

Mine Safety Act has Exhaustion, "arb & cap" provisions

we could agree that we are supporting consistency - later, better Act

II Criteria For Safety Standards

Health St. - (b)(5)

Based on ~~rule~~ zone, Cotton Post Soap Ct. Rulings

reduce hazard to extent Feasible

Feasible: ① Technologically

② Economically

other Cost/Benefit analysis does not apply

(b)(5) only applies to Toxic Health St.

Safety Standards

no such test as (a)(5)

Some courts ruled OSHA given to much
freeway

cost effectiveness test: - use most economical method
to get to required level of
safety

OSHA does not consider act forcing application
of strict cost/benefit analysis

House 659 bill would extend (b)(5) standard to
safety standards

Different sets of criteria for health & safety standards
causes problems for OSHA

Very important issue - may be key
to OSHA reform

① Support B:11

② use OSHA Lockout/Tagout standards (safety standards)

③ status quo

④ = strategic alternative - what is best path
to take -- certainly not advancing
it 1st or early

Criteria must be consistent either way



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF INFORMATION
AND REGULATORY AFFAIRS

TRANSMITTAL TELECOPIER SHEET

DATE: 1.12.94

TO: Ellen Seidman, Mike Schmidt, Bill Dickson

FROM: John Morrell ROOM NO. _____

TELECOPIER NO. _____

VERIFICATION NO. _____

NUMBER OF PAGES SENT (INCLUDING TRANSMITTAL SHEET) 8

OUR FAX NUMBER: (202) 395-5167 -- (NEOB - ROOM 3001)

MESSAGES:

* For this morning's 10 AM mtg.

This paper discusses issues related to (1) judicial review of OSHA standards, and (2) the criteria that safety standards must meet.

I. Judicial Review

A. Standard of Review. Generally, courts review legislative rules promulgated by agencies under the standard that a rule will be upheld unless it is "arbitrary or capricious" or not in accordance with law. As a result of a legislative compromise, however, OSHA standards are reviewed under the stricter test that they must be supported by "substantial evidence on the record considered as a whole," the standard that normally applies to review of agency adjudications. Neither the House nor the Senate bill would change the current standard of review.

Although some court decisions have found little difference between the two standards of review when they are applied to the essentially legislative decisions at issue in rulemaking challenges, there is also authority that the substantial evidence standard provides for a more rigorous judicial scrutiny. Altering the standard of review, with an appropriate legislative explanation, could convey the message that the Secretary's regulatory determinations should be given more deference than has historically occurred, and could also help reduce the time needed to promulgate standards by allowing the agency to prepare a less detailed justification in the preamble to the rule. At present, the practice is to prepare massive preambles to support rules against legal challenge, and this is a factor in the slow pace that characterizes OSHA rulemakings.

Alternatives

1. Change the standard of review to arbitrary and capricious

Pros

- * Is generally considered a more appropriate test for review of legislative rules
- * May result in the courts giving greater deference to the Secretary's policy decisions
- * Could reduce number of remands, thereby allowing the Secretary more latitude to establish and carry out OSHA regulatory priorities
- * Could tend to encourage shorter rulemakings

Cons

- * May be perceived as allowing OSHA to promulgate lower quality standards
- * May not make it significantly easier to defend rules
- * Neither business nor labor is likely to support, because each wants to preserve ability to challenge OSHA's rulemaking decisions

2. Status quo (OSHA must justify standards by substantial evidence)

Pros

- * Aids perception that those OSHA standards that are upheld are of high quality

Cons

- * Continues to allow courts to believe they have a congressional mandate to provide especially strict scrutiny of OSHA standards

B. Exhaustion Requirement. The Senate bill also contains a provision precluding challenges to the feasibility of a final rule unless the objection, with evidence supporting it, had been raised during the rulemaking proceeding. Under the current Act, any party claiming to be adversely affected or aggrieved by an OSHA standard can seek review of any aspect of the standard under section 6(f), whether or not the issue was raised in the rulemaking. The provision was apparently limited to claims of infeasibility because worker advocacy groups feared that they would not have the resources to discover all potential problems with a rule before promulgation.

Either this provision or an even broader exhaustion requirement could be of assistance to OSHA in completing timely rulemakings, in getting the information it needs to make the necessary rulemaking findings, and in prevailing in rulemaking challenges. This issue was not specifically addressed in the Secretary's letter to Sen. Kennedy and Rep. Ford, but may be encompassed within the suggestion in the letter that changes in the procedures for standards action are appropriate. It is also consistent with the Secretary's testimony to the House Education and Labor Committee on April 28, 1993, that OSHA should not be required "to perform detailed and time-consuming analyses of issues over which there is no reasonable basis for dispute, and which in fact are not actively disputed by parties to the rulemaking." Testimony at 11. A proviso could be added allowing a challenge if the court finds there was good cause excusing the failure to raise the issue during the rulemaking.

Alternatives

1. Prohibit judicial review on any ground unless the issue being challenged was raised, and evidence supporting the challenger's position introduced, during the rulemaking
 - a) provide good cause exception

b) no good cause exception

Pros

- * Could help streamline OSHA rulemaking by allowing agency to focus its efforts during rulemaking on issues that are truly controverted
- * Could increase OSHA's success rate in rulemaking challenges because record and discussion should be more focussed on issues that are later challenged
- * Could improve the overall quality of rules by providing an incentive for affected parties to provide useful information

Cons

- * Could prevent valid objections from being raised if party was unable to participate at an early enough stage to introduce evidence supporting its contention
 - * Might result in preserving some poorly considered regulatory provisions
2. Support limited exhaustion requirement (e.g., limited to claims of infeasibility, as in current Senate bill)
- a) provide good cause exception
 - b) no good cause exception

Pros

- * Could contribute somewhat to streamlining rulemaking
- * Could increase OSHA's success rate in challenges
- * Limited provision in Senate bill may be more likely to attract labor support

Cons

- * To extent requirement appears to apply to some types of challenges more than others (i.e., precludes more industry than labor claims), it may appear inequitable
- * Streamlining effect is reduced if not all issues are included

3. Oppose any exhaustion requirement

Pros

- * Preserves maximum legal rights for affected parties
- * Exhaustion requirement could encourage parties to raise unnecessary issues in

rulemaking so they won't forfeit right to bring legal challenge later if they decide to

Cons

- * Requires agency to develop evidence and conduct analyses to support findings on issues that are not disputed in the rulemaking
- * Allows parties to withhold evidence on an issue, yet challenge the agency's treatment of the issue as insufficient

II. Criteria for Safety Standards

The OSH Act provides that standards shall prescribe conditions that are "reasonably necessary or appropriate to provide safe and healthful employment." The courts have held that all OSHA standards must meet certain criteria. A standard must substantially reduce, or eliminate, a "significant risk" of harm, and compliance must be economically and technologically feasible.

Section 6(b)(5) of the Act applies to standards directed at hazards caused by "toxic materials or harmful physical agents." These are commonly referred to as health standards. The Supreme Court has held that standards issued under Section 6(b)(5) must reduce significant risk to the maximum extent feasible. Because Congress has established this rule in the Act, cost-benefit analysis may not be used to issue a health standard at a different, less protective, level.

Standards not subject to Section 6(b)(5) are commonly referred to as safety standards. No explicit provision in the Act specifies the degree to which safety standards shall be protective. In a recent decision, a panel of the D.C. Circuit ruled that OSHA's safety standards authority may be unconstitutional because the Act gives the agency so much discretion that it may not satisfy constitutional standards for delegations of legislative authority. The court held, however, that the agency might be able to cure this problem by adopting a suitably limiting interpretation of the statute. The court stated that requiring safety standards to be based on cost-benefit analysis would save the Act's constitutionality, and that there might be other permissible interpretations as well.

On remand, OSHA clarified its interpretation of the Act, enunciating several criteria it had applied historically to safety standards that limit its discretion. The agency construed the statute as requiring that safety standards be highly protective, without threatening the viability of regulated industries. According to OSHA, a safety standard must

substantially reduce or eliminate a significant risk of harm, the standard must be economically and technologically feasible, and it must be cost effective in the sense that the standard achieves the intended level of protection in the most economical way available. In response to an apparent misapprehension on the court's part, the agency clarified that a standard is economically feasible for an industry if compliance does not threaten the industry's profitability or competitive structure. In addition, under Section 6(b)(8) of the Act, a standard must be at least as protective as an existing "national consensus" standard (i.e., a voluntary standard issued by certain expert industry-based organizations) that addresses the same hazard.

These criteria, and certain general principles of administrative law, OSHA asserted, sufficiently constrain its discretion to satisfy constitutional standards. The agency noted that it would not apply formal cost-benefit analysis to safety standards. It maintained, however, that the criteria it had enunciated had resulted in standards that produced substantial benefits at a reasonable cost.

The validity of this interpretation is at present under challenge in the D.C. Circuit. The court has not scheduled argument yet.

The House and Senate bills would amend the Act by extending the rule set forth for health standards in Section 6(b)(5) to safety standards as well. There are substantial advantages to establishing uniform criteria for health and safety standards. In principle, it is difficult to justify applying different criteria to the two. In addition, the present distinction creates serious practical problems, because it is not always clear whether a danger should be classified as a safety hazard or a health hazard. Recent rulemakings involving chemical process safety management, confined spaces, and ergonomics have raised vexing questions on this score. If there is a material difference between the criteria applicable to health standards and safety standards, and a reviewing court concludes that the agency has misclassified the hazard, the court is likely to strike down the rule.

The issue for the OSHA Reform group is whether there is a countervailing consideration. If the criteria presently applied to safety standards are superior to the Section 6(b)(5) health criteria, that might justify retaining separate criteria. As enunciated in response to the court decision described above, the safety standards criteria are quite similar to the health criteria, but the agency retains a greater degree of discretion in safety rulemakings.

Alternatives

1. Support House and Senate bill provisions extending health standards criteria to safety standards

Pros

- * Health standards criteria have been authoritatively interpreted in court opinions, provide clear grounds for rulemaking decisions, and have resulted in workable standards that are protective
- * There is no principled basis for distinguishing between the criteria that should apply to safety standards and to health standards
- * Applying different sets of criteria creates practical classification problems
- * Bills' proponents consider this issue fundamental

Cons

- * Current safety standards criteria leave agency more discretion
- * Section 6(b)(5)'s prohibition against reliance on cost-benefit analysis is controversial; minority has introduced bill requiring use of cost-benefit analysis for all OSHA standards
- * Current criteria are workable

2. Support retaining current criteria for safety standards

- a) codify in statute agency's interpretation of criteria
- b) do not amend statute

Pros

- * Current criteria recognize value of agency discretion
- * It is possible to state a test to distinguish between safety standards and health standards
- * May create common ground with business and minority

Cons

- * Retains problematic distinction between criteria applicable to safety and health standards
- * Results in classification problems
- * Court has not yet ruled, but could strike down present criteria as giving agency unconstitutional degree of discretion
- * In practice, there is little if any difference between Section 6(b)(5) and the criteria applied to safety standards, so the cleanest way to avoid legal problems is to make it explicit that all standards are subject to a uniform test

3. OMB proposes the following alternative for consideration: Support criteria for issuing regulations enunciated in E.O. 12866 for both health and safety standards

Pros

- * Makes the OSH Act consistent with the President's regulatory principles
- * Would increase agency discretion and allow increased use of cost-benefit comparisons
- * Would avoid the practical problems of different criteria for health and safety
- * Reduces the chance that the courts will strike down the safety criteria as giving the agency an unconstitutional degree of discretion

Cons

- * Establishes new criteria for health standards that are generally less protective of employees
- * Will be perceived as major opposition on fundamental issue by the bill's sponsors
- * Would create uncertainty until the new criteria were authoritatively interpreted by the courts
- * May give the appearance of relaxing our efforts to increase health and safety

Date: 01/12/94 Time: 16:23

Unions Pleased By Clinton's Job Safety Plans; Employers Wary

WASHINGTON (AP) The Clinton administration is winning praise from organized labor after announcing its support for a plan to revamp federal worker safety laws.

But a spokesman for a manufacturers group said some provisions go too far by requiring joint employer-employee safety committees.

Unions have pushed for many of the changes contained in legislation sponsored by Rep. William D. Ford, D-Mich., chairman of the House Education and Labor Committee, and Sen. Edward M. Kennedy, D-Mass., chairman of the Senate Labor and Human Resources Committee.

AFL-CIO President Lane Kirkland said in a statement Wednesday that his organization ``welcomes the Clinton administration's support'' of the bills.

``Reform of the nation's job safety law is a life-and-death issue for American workers,'' he said.

Labor Secretary Robert Reich, in letters to Ford and Kennedy, endorsed the legislation. The measure ``introduces new ways to `reinvent' regulation of workplace health and safety through comprehensive health and safety programs and joint safety and health committees,'' Reich wrote.

Reich's letters were dated Dec. 22 but not made public until late Tuesday.

The requirement that employers to create joint labor-management safety committees causes concern among some employers.

``There is no evidence that the prescribed labor-management committees ... would increase safety in the workplace,'' Mark Stuart, associate director of risk management for the National Association of Manufacturers. ``There is evidence, however, that employee involvement increases safety in the workplace, but employers must be free to choose the best method for their own unique workplace.''

Reich has been an advocate of such committees, but the National Labor Relations Board ruled last June that committees set up by DuPont Co. bypassed the union and were therefore illegal.

Stuart said such committees are part of a growing trend among employers and that businesses are not opposed to employee involvement in safety issues.

``But labor feels that unless it's their way only that it won't work properly,'' he said. ``That fails to acknowledge what's happening in today's workplace. Different employers do things differently.''

The legislation also would require employers to have written safety and health plans and would give the Occupational Safety and Health Administration more authority to set standards for workplace toxins. In addition, it would provide greater protections for so-called whistle-blowers, employees who report violations of laws and regulations.

The legislation would bring 7.5 million state and local government workers under federal health and safety laws for the first time, a provision hailed by the American Federation of State, County and Municipal Employers.

``Public employees do the most unpleasant and most dangerous work that our society demands to make the lives of Americans relatively safe and enjoyable,'' said Gerald McEntee, president of the union. ``In return, we are treated as second-class citizens, without the right to a safe workplace, without the right to call an OSHA inspector and without the right to refuse unsafe work.''

APNP-01-12-94 1624EST

THE WHITE HOUSE

WASHINGTON

December 15, 1993

MEMORANDUM FOR OSHA REFORM WORKING GROUP*

FROM: Ellen Seidman 

SUBJECT: Next steps

As we discussed at our meeting on last week, the Reich letter is only a first step in the legislative OSHA reform process. Because it was just a first step, we were able to reach consensus relatively easily. At the same time, the process brought into the open areas of substantial concern with the provisions of the Kennedy-Ford bills. If the issue had been not whether this was an acceptable place to start, but rather whether the bill should be signed into law, consensus would have been far harder to achieve.

There are a multitude of issues, some cited in the letter as open, some relating to the five bulleted points in the letter, and some (such as standards for judicial review) not mentioned at all, on which the Administration will need to develop positions both at the start of and during the legislative process. As we go through the process, there will also be tactical decisions to be made, and tradeoffs to be evaluated. We will want to understand more about burdens -- including costs -- and benefits of alternative formulations.

The bulk of the effort must and will be carried out by the Labor Department. However, we have agreed to form an EOP team to work with Labor -- and, together, with congressional offices and stakeholders as appropriate -- to develop a top-notch bill that creatively responds to the problems we all know exist in the OSH Act and increases employee health and safety at, hopefully, a minimum net cost to the economy, and, moreover, can be enacted.

I would like to start the process by meeting with Labor to develop a list of critical issues, and by debriefing Labor on what they learned during their study process (and in other ways) about the effectiveness and impact of the current proposals, issues and problems raised by those proposals, potential alternatives, and the positions of various parties. From there, we can work on development of Administration positions on various issues, including, where necessary, gathering more factual or positional information.

* Bill Dickens, John Morrall, Mike Schmidt, Pam VanWie

CONFIDENTIAL SECRET

- 2 -

I have asked my assistant, Gaylen Barbour, to take on the unenviable task of working out meetings for yet another NEC task force. However, she's very good at it, and we'll be in good hands. I'd like to get one meeting in before we scatter for the holidays, and Gaylen will be calling around to set a time. I look forward to working on this project.

cc: Bob Rubin
Carol Rasco
Laura Tyson
Sally Katzen
Belle Sawhill
Tom Glynn, DOL
Joe Dear, DOL

Agenda
OSHA Reform Working Group
December 22, 1993
2:30 p.m.

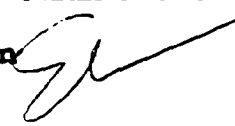
1. Introductions
2. Purpose of Working Group and Operating Procedures
3. Status Report on OSHA Reform Rollout
 - DOL Strategy
 - Communications
 - Political Support
4. Identify Critical Issues
5. Other

THE WHITE HOUSE

WASHINGTON

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December 6, 1993

Issues raised in connection with proposed DOL letter on OSHA Reform Act

1. Focused on bullet points on first and second pages of letter, as these are areas where letter appears to give unconditional support. There are questions and concerns about other parts of the bill that need to be resolved as the Administration takes a position in the legislative process.
2. With respect to requirement on committees, questions were raised concerning the desirability of an across-the-board requirement for committees at all workplaces of employees with eleven or more part- or full-time employees, rather than limiting the requirement further by sectors of the economy in which workplaces are more dangerous and/or a larger size trigger, as to employer or worksite or both, with perhaps an ability of the Secretary to impose the requirement elsewhere.

Requested that DOL provide assessment of costs and benefits of this requirement to the economy, including among costs: (i) the cost to set up committees, training, etc.; (ii) lost worker time; and (iii) the additional costs of hazard mitigation measures that probably would be required as a result of this structure. Special attention should be given to the impact on smaller businesses. The assessment of benefits should take into account the fact that OSHA does not have the resources to fully enforce the OSH Act through direct inspection and enforcement and that greater worker involvement can reasonably be expected to result in greater self-enforcement. (DOL should provide any empirical evidence of this from, e.g., states with committee requirements.)

3. With respect to coverage of state and local government employees, the major issue raised was the problem of a new unfunded state mandate in the context of recognition that many jobs of state and local public sector employees are particularly hazardous, including health, transportation, maintenance and construction as well as police and fire. In addition, there appear to be federalism concerns with a federal requirement that state and local governments open their books and records to their employees. Again, the question was raised whether the requirement might be limited to dangerous occupations or worksites, perhaps by permitting governors or mayors publicly to opt out.

Requested that DOL provide an assessment of the costs to state and local governments of the extended coverages, including compliance and mitigation costs, and the benefits of extended coverage. This should take into account expectations concerning the intentions of current and prospective state plan states.

4. With respect to the special construction provisions, issues were raised concerning (i) the impact on small businesses; (ii) the need for contractor-specific (in contrast to site-specific) inspectors at all sites; (iii) the delay

December 6, 1993

engendered by the pre-notification provision for high-risk projects; and (iv) the scope of the provision, which is understood to be so broad that it covers, e.g., occasional painting and repairs on properties of occasional landlords.

Requested that DOL provide an analysis of costs and benefits, including in particular costs associated with delays arising out of pre-notification requirement. (NOTE: subsequent conversation with DOL indicates that construction may proceed after pre-notification; there is no requirement that it await OSHA response or inspection. This mitigates concern, but does it remove it?)

5. With respect to the 1989 final PELS that were overturned, there is no disagreement. There is concern that legislative adoption of the PELS that had previously only been proposed for the maritime, construction and agriculture industries sets a very bad precedent of legislating regulations that have not had full public notice and comment. Suggest that DOL consider (i) immediately putting the proposed regulations out for notice and comment and (ii) supporting legislation that would allow group rulemaking in general, with the intention that the maritime, construction and agriculture PELS would be the first regulations adopted under this new authority.

6. On the issue of standards, concern was expressed that the bills could be read to require, rather than authorize OSHA to regulate to a one-in-a-million standard.

7. Questions were raised as to the factual validity and scoring of the proposal to fund the bill largely through increased penalties.

NOTES TO EOP OFFICES: These comments were passed on to DOL on Friday, December 3. Attached is a preliminary DOL cost/benefit analysis, prepared last July. DOL is reviewing it in light of the above comments, particularly as to inclusion of any increased costs of mitigation in the private and state/local sectors, both generally and with respect to construction. DOL will contact OIRA directly on issues 5&6, and OMB Budget on issue 7. Please let Ellen Seidman (phone: 456-2802; fax: 456-2223) know of any resolutions of outstanding issues.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



December 6, 1993

MEMORANDUM FOR ELLEN SEIDMAN

FROM: Joe Dear 
SUBJECT: OSHA Reform

The attached information should respond to each of the issues you raised in your December 6 memo. Please call me if you have any questions.

I am looking forward to meeting with you and the other EOP staff tomorrow.

Committees

* There is no basis for discriminating on the basis of size or on the basis of industry.

Economic impact on smaller firms?
* The goal here is employee empowerment. There is no particular rationale for distinguishing among companies in this regard.

* Bill gives Secretary the authority to allow use of alternative method of employee involvement for particular employers, thus providing flexibility for those employers who use a total quality management approach.

* No good data yet for distinguishing safe from unsafe firms in particular industries, and small firms can be among the most dangerous.

* It is true that some states with committee requirements set higher thresholds than those in the Ford/Kennedy bill; but some of these states do cover below-threshold employers in particularly hazardous occupations or with particularly bad experience ratings.

* Washington and Oregon have across-the-board requirements that have been in place for some time.

* State requirements have been generally well-received by business. No adverse effects were reported to Task Force despite repeated requests to business to check in these and other states with such requirements. In fact, as the attached letter from the Associated Oregon Industries indicates, business groups who have seen what such approaches can do are among the strongest supporters of cooperative efforts.

* Those effects reported are generally positive: cuts in worker compensation costs, stronger employee interest in working safely, better focus by State on real problems in workplace identified by committees

* Other states (including most recently Florida) are now following suit.

* The OSHA reform task force estimated the cost of the bill's requirements on the private sector at \$1.788 billion annually. This estimate includes calculations for different sized committees based on establishment employment size, as specified by the bill. Labor costs include time for meetings (2 hours monthly) and inspections (4 hours per quarter), using an average nonsupervisory wage rate of \$12.50 per hour (Employment Policy Foundation estimate), and an average supervisory wage rate of \$20.00 per hour (based on 1992 BLS data). Costs of hazard mitigation were not included, as it was assumed that these were

But this is where true cost is

required under existing OSHA standards.

* In addition, the cost for state and local governments was estimated to be \$486 million annually, and the costs for Federal employers was estimated to be \$66 million. The public sector generally has higher rates of current compliance than the private sector; the cost of maintaining committees in the public sector was calculated by assuming that the average cost on a per employee basis would be equal to that in the private sector.

THE WHITE HOUSE
WASHINGTON

December 15, 1993

Mike
Schmidt

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FROM: Ellen Seidman 
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Tom Glynn, DOL
Joe Dear, DOL

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Legislative Reference Division
Labor, Welfare and Personnel Branch
Washington, DC 20503

SPECIAL***Facsimile Transmission***

Sender's FAX Number (202) 395-6148

Sender's Phone Number (202) 395-3803

TO:	AGENCY:	FAX Phone	Recipient's Phone
Ellen Seidman	NEC		
Bill Dickens	CEA		
Charlotte Hayes	OVP		
Tracey Thornton	LA		
Jennifer Palmieri	OMB/LA		
Sally Katzen	OMB/OIRA		
Mike Schmidt	DPC		

FROM: *Connie J. Bowers*

DATE: Fri Dec 10, 1993 3:17pm

No. of Pages (including transmittal sheet): 7

COMMENTS:

OSHA Reform -- JUSTICE Report

The attached draft report on S. 575, comprehensive OSHA reform, was circulated to the agencies and EOP in June. At that time, we advised Justice that we could not clear it until a general Administration position, to be conveyed to the Hill by Labor, is cleared. Now that the Labor letter is approved, Justice is pressing for clearance of this letter. Labor and other agencies have signed off. Please review and call me asap with your response -- 395-3803. Thanks

- Called in
OK

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

SPECIAL

June 23, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-712

TO: Legislative Liaison Officer -

HHS - Frances White - (202)690-7760 - 328
LABOR - Robert A. Shapiro - (202)219-8201 - 330
COMMERCE - Michael A. Levitt - (202)482-3086 - 324
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
ENERGY - Bob Rabben - (202)586-6718 - 209
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
CEA - Francine Obermiller - (202)395-5036 - 242
EPA - Thomas C. Roberts - (202)260-5414 - 326
GSA - William R. Ratchford - (202)501-0563 - 237
NEC - Sonia Mathews - (202)456-6722 - 429
OPM - James N. Woodruff - (202)606-1424 - 331
SBA - Christine Swedin - (202)205-6702 - 315

FROM: JANET R. FORSGREN (for *Butt. Turner*)
Assistant Director for Legislative Reference

OMB CONTACT: Connie BOWERS (395-3803)
Secretary's line (for simple responses): 395-7362

SUBJECT: JUSTICE Proposed Report RE: S 575,
Comprehensive Occupational Safety and Health
Reform Act

DEADLINE: WEDNESDAY June 30, 1993

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Barbara Selfridge
Larry Matlack
Pam VanWie
Angela Antonelli
Steve Semenuk
Vince Foster
Bob Damus
Greg Simon
Kathy Way
Jennifer Palmieri
Delphine Motley
Janet Forsgren

← TO



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 575, the "Comprehensive Occupational Safety and Health Reform Act." We have both constitutional and policy concerns about the bill.

Section 404 of S. 575 would require the Department of Labor to make public "all written comments and communications and a summary of all verbal communications with parties outside the Department of Labor (including communications with executive branch officials but not including communications with the President)" regarding the development of occupational safety and health standards. (Emphasis added.) Requiring public disclosure of Executive Branch deliberations on rulemaking could chill innovation and the candid exchange of ideas. The requirement raises constitutional concerns because it could encroach on the President's authority to protect the confidentiality of Executive Branch deliberations. See, United States v. Nixon, 418 U.S. 683, 708 (1974).

Section 1003 would add to 29 U.S.C. § 667 the following subsection:

(i) In the event a State, within 6 months after the promulgation of a safety and health standard by the Secretary . . . fails to adopt or promulgate a standard which is at least as effective as the Secretary's standard, the State shall enforce the Secretary's standard until a State standard which is at least as effective as such standard is in effect.

We recommend replacing the words "the State shall enforce" with the words "as a condition of approval or non-withdrawal of approval of the State's plan submitted under this section, the State shall adopt." This change would serve two purposes.

First, the "shall enforce" language appears to require the states to enforce federal law. In general, the enforcement of federal law is a federal executive function which state officials cannot perform because they are not appointed in a manner consistent with the Appointments Clause of the Constitution (art. II, § 2, cl. 2). See, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (holding that "any appointee exercising significant authority pursuant to the laws of the United States" is an officer of the United States who must be appointed in accordance with the Appointments Clause). Our proposed language would resolve this concern by requiring that the states adopt the federal standard, so that their enforcement efforts would be in furtherance of state law.

Second, section 1003 raises concerns under the Tenth Amendment to the Constitution because it appears to "offer[] a state government no option other than that of implementing legislation enacted by Congress." New York v. United States, 112 S.Ct. 2400, 2429 (1992); see id. at 2420-21, 2424 (1992) (Congress cannot compel states to enact and enforce a federal regulatory program, but it may offer states a choice of regulating activity according to federal standards or having state law preempted by federal regulation; the Occupational Safety and Health Act is an example of the latter). Our proposed language would alleviate this concern by making it clear that (i) coverage under section 1003 extends only to states that have "assume[d] responsibility for development and enforcement . . . of occupational safety and health standards" under the statute (29 U.S.C. § 667) and (ii) section 1003 is not a blanket directive to the participating states, but rather is merely an additional condition that the states must meet under 29 U.S.C. § 667 in order to preempt federal standards concerning worker safety and health.

Section 1211 of S. 575 would require the Secretary of Labor to submit to certain committees of the House and Senate "recommendations regarding legislative changes . . . required to make the safety records . . . of persons bidding for [certain] contracts . . . a criterion to be considered in the awarding of such contracts." We read this language as requiring only that the Secretary report to Congress to aid in drafting future legislation. However, the language might be read to require the Secretary to submit proposed legislation. If so, we would be concerned because we believe that such a requirement would be an infringement of the President's exclusive authority, vested in him by Article II, section 3 of the Constitution, to recommend for legislative consideration "such measures as he shall judge necessary and expedient." To make it clear that the Secretary is being asked only to provide assistance in drafting legislation and not to submit a legislative proposal, we recommend that the words "recommendations regarding legislative changes" be revised to read "a report regarding what legislative changes would be required."

In addition to our constitutional concerns, we note that S. 575 creates a new criminal offense for a willful violation of an OSHA standard which causes "serious bodily injury to any employee but does not cause death to any employee." Section 512(a). While we generally support the bill's criminal provisions, as a matter of drafting, it may be prudent to make it clear that the words "does not cause death to any employee" refer to the same employee who suffered serious bodily injury. As presently drafted, the provision is open to the admittedly ludicrous interpretation that it does not cover a violation that causes serious bodily injury to one employee and death to another. We would suggest referring to a violation that causes "serious bodily injury to any employee but does not cause that employee's death," or "serious bodily injury to any employee but does not cause said employee's death."

We also note that section 512(c) of S. 575 states that nothing in the Act shall preclude state and local law enforcement agencies from conducting criminal prosecutions in accordance with state or local laws. This provision appears to be addressed to a problem noted in the report of the House Committee on Government Operations entitled "Getting Away with Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations." In this report, the Committee found that in some cases in which state and local law enforcement officials have used the historical police powers of the states to prosecute employers for acts which are general crimes under state laws, state courts have overturned the convictions on the grounds that federal workplace safety laws preempt a state from pursuing criminal actions.

Since the publication of this report, the highest courts of three states have rejected the preemption arguments and affirmed the state convictions. In light of these decisions, there may no longer be a need for legislative clarification of this issue. Nevertheless, the Department of Justice has no objection to an explicit provision that state laws generally applicable to all citizens, such as those prohibiting manslaughter and criminal battery, are not preempted by the Occupational Safety and Health Act.

The anti-preemption provision in S. 575, however, may go beyond the issue of state laws of general applicability. The provision would appear to permit prosecution under state and local workplace regulations, regardless of whether those regulations conform to the Occupational Safety and Health Act or to a state plan adopted under the Act. Under current law, states wishing to assume responsibility for occupational safety and health standards with respect to any issue on which a federal standard has been promulgated may do so only pursuant to a federally approved state plan. 29 U.S.C. § 667. To avoid undermining the policies represented by the statutory requirement that state jurisdiction over issues addressed by Occupational

Safety and Health Act standards be undertaken only pursuant to a federally approved plan, some limiting language in the anti-preemption provision may be advisable.

Section 302(2)(b)(1) seems intended to apply to situations in which the Occupational Safety and Health Administration may cede jurisdiction to agencies that already have regulatory jurisdiction over certain private sector employees, but perhaps this could be made clearer. The administrative procedure set up by section 302(b)(2) requires the Secretary of Labor to review his own decision to cede jurisdiction. In our view, this procedure may be unnecessarily burdensome. If the Secretary has to publish a notice in the Federal Register detailing why he has ceded jurisdiction, it would seem that judicial review could follow from that act, without requiring more agency time and expense. Finally, section 302(b)(3) appears to authorize persons to sue when the Secretary determines that another agency is already regulating or protecting a class of employees in an industry. We question whether an individual could be injured by such a decision in the abstract. An individual might claim, after suffering a particularized injury, that the Secretary of Labor had breached a cognizable statutory right by failing to regulate properly. Such a case, though, would stem from the specific injury and the alleged failure to regulate. We question whether a determination by the Secretary that another agency was properly regulating a particular industry could give rise to an injury that would confer standing to sue. We respectfully urge that this provision be reconsidered.

We look forward to working with you further on this matter. If we may be of further assistance, please do not hesitate to call on us.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

M. Faith Burton
Acting Assistant Attorney General

ASSOCIATED
OREGON
INDUSTRIES



July 6, 1993

The Hon. Bill Lockyer
Senator, State of California
Room 4039
State Capitol Building
Sacramento, CA 95814

Dear Senator Lockyer:

I discussed with Neil Burraston recently our association's experience with "mandatory safety committees." Neil has requested me to share my thoughts about the subject with you.

Quite frankly, when the workers' compensation reform legislation of 1990 was passed, there was considerable trepidation felt by a number of our members relating to the safety committee requirements. In some quarters of the employer community, it was close to paranoia!

However, the administrator of OR-OSHA, Jack Pompei, relieved some of the apprehension by wisely doing two things:

Firstly, delaying implementation of any enforcement activity for at least six months; and

Secondly, offering safety committee seminars to groups of employers throughout the State of Oregon.

I can personally attest to the success of the second strategy. Our association sponsored one of the early seminars in Salem. It was a "standing-room-only" affair with our folks coming away from it greatly relieved. These seminars were continued over the following months -- using the state's Ed-Net system to hit the smaller communities -- with great success.

I doubt that there are very many employers in Oregon who are not aware of the safety committee requirements at this time. Just recently the Oregon OSHA Training Section has created and is offering a new workshop, SC 111 - Safety Committee Problem Solving.

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The Hon. Bill Lockyer

July 6, 1993

Page 2

How successful has the mandatory safety committee program been? It is difficult to quantify, Senator. However, Oregon has enjoyed three consecutive years of double-digit decreases in overall rates. I personally believe that any true reform movement of a state's workers' compensation law must involve focusing on "loss prevention," as well as "loss control." And most certainly, the creation of a program involving mandatory safety committees is a vital ingredient of "loss prevention."

If you desire additional information relating to this subject, please feel free to contact me.

Sincerely,



Karl Frederick

Vice President and Director of Legislation

KF:kas

State and Local Coverage

We disagree that there are special federalism concerns with respect to the requirements that state and local governments "open their books and records to their employees." The "books and records" at issue would be only injury and illness logs, exposure monitoring data, and other health and safety-related data kept pursuant to federal regulations.

We do not believe the committee requirements for public sector employers should differ from those that apply to the private sector. Public employees work in the same range of occupations and face the same hazards as private sector workers, and their injury and fatality rates reflect that fact. As noted earlier, the committee requirement in the House bill, which DOL supports, provides a variance procedure to allow the Secretary to tailor the employee involvement requirements to the size, industry, and other characteristics of the employer. The need for and benefits of employee empowerment and involvement do not depend on the nature of the worksite, though the most effective form they might take might vary.

With respect to the "unfunded mandate" issue, we believe that the net effects of the legislation on state and local governments will be positive, even without assuming productivity gains or monetizing the value of the lives that will be saved. In addition to the task force cost-benefit analysis, we are attaching a recent report prepared for AFSCME by a private consultant, which suggests that the legislation will lead to net cost savings for public employers of \$600 million a year.

State and local governments generally have some kind of safety and health program that covers their employees. The task force estimated that the average non-state plan state would have to dedicate approximately \$10 million, or \$35 per employee, to bring employee protection up to current federal OSHA standards.

But it still is an unfunded mandate in short run (savings come in long-term).

Governors will scream on this one.

Does DOL have staff to do this?

Summary only -
will distribute whole
rpt at 3:00.

**OSHA COVERAGE FOR PUBLIC EMPLOYEES
IS COST-EFFECTIVE**

FOR

AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES

DECEMBER 1993

Prepared By

**Ruth Ruttenberg & Associates, Inc.
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EXECUTIVE SUMMARY

OSHA COVERAGE FOR PUBLIC EMPLOYEES IS COST-EFFECTIVE

December 1993

Extending OSHA coverage to public employees would save state and local governments across the United States more than \$600 million a year. It would also save the lives of hundreds of public employees and spare thousands of workers and their families the pain and suffering that comes with disability and death.

Employees of state and local governments are excluded from coverage under the federal Occupational Safety and Health Act of 1970, even though the Act promises safe and healthful working conditions to every working man and woman. This exclusion is not because government jobs are less dangerous. Actually, public employees suffer 3.5 times as many work-related deaths as private sector workers and 25 percent more injuries. And, when they are injured, their injuries, on average, are more severe.

A dual standard exists in the United States. Even though a nurse in a privately-owned hospital is protected by OSHA regulations, a nurse doing exactly the same job in a publicly-owned hospital, in most states, has none of these protections. An individual repairing pipes in the confined space of a private concern must be equipped with a life saving respirator and monitoring equipment; not so most workers who repair pipes in the confined space of a city or state facility.

So, why not extend OSHA coverage to all employees? Some public officials argue that OSHA coverage would cost too much -- that financially strapped city and state governments simply can not take on any new obligations. Concerns include both administrative costs and costs associated with correcting dangerous work place conditions. But these concerns are unfounded.

This study shows that the overall cost of extending OSHA coverage to public employees are small in absolute terms and dwarfed by the economic benefits that would accrue. In fact, the nation could save more than \$600 million a year if public employees were protected by the federal Occupational Safety and Health Act. The savings could be as high as \$2.1 billion nationwide.

In fact, for every dollar spent on administrative costs (and this includes federally funded research and evaluation as well as costs of compliance officers and inspections to state and local government), jurisdictions will save more than \$10. As for compliance costs, a 1980 study done in New York State, when legislation was pending to provide health and safety protection to

public employees, found the costs to be far lower than the dollar savings that would result from safer work places. The estimate of one-time expenditures required to meet basic safety and health standards ranged from \$50 to \$5,000 per facility visited, and the average cost per facility was approximately \$2,000, or less than \$3,900 in 1992 dollars.

Just one on-site inspection at one work site in Philadelphia found over two dozen safety violations -- violations which would cost perhaps a total of \$1,500 to correct, but which could save lives and potentially millions of dollars in city liabilities. At least three workers from that site are on permanent disability and there have been other serious injuries -- finger tip amputations, lower back and knee injuries, and a multitude of other problems. The \$1,500 for hazard abatement could be paid with less than one month of disability pension to just one disabled worker.

Prevention is better policy than compensation. It saves lives and suffering; it also saves money.

How Much Would Public Sector OSHA Coverage Cost?

Administrative Costs

The Congressional Budget Office, in a 1992 analysis, estimated that the FY94 total administrative outlays required to cover all public employees -- federal, state, and local -- would be \$59 million, with 40 percent of this outlay, or \$23.6 million, needed to cover state and local employees.

In FY85, after New York State undertook coverage of public employees, its total administrative and enforcement costs were \$3.8 million, of which the federal government funded half. New York's cost to cover 900,000 employees was \$1.9 million per year, or approximately \$2.10 per worker per year. In FY92 dollars this would be equivalent to \$2.5 million.

Compliance Costs

If the average cost to a government jurisdiction would be \$3,900 per facility, that would amount to only 16 percent of the average medical claim for one back sprain or 12 percent of the average cost of one occupational illness or more than \$1000 less than the average cost of one hospital stay.

OSHA Coverage Makes A Difference in Worker Safety and Health

In North Carolina, from 1975 (just after OSHA coverage for public employees began) until 1983 there was an overall decrease of 24 percent in injuries to public sector workers.

A cost-benefit analysis done by the New York State Department of Labor showed substantial reductions in illness and injury statistics in states adopting state OSHA programs -- on average almost 18 percent.

Another review of the experiences of several states that extended OSHA coverage to public employees found a subsequent reduction of 8 percent in work place accidents and illnesses.

How Much Would OSHA Coverage Save?

empirically dubious
A National Estimate. Work accidents in the United States cost \$115.9 billion in 1992. If the cost of public sector work place accidents was proportionate to the 15 percent portion that public employees comprise in the national work force (and indications are that it was higher), then public sector employee work accidents cost the nation \$17.4 billion. If 8 percent of this cost, in states not covered by OSHA, had been eliminated as a result of OSHA coverage, then more than \$695 million would be saved.

An Estimate for the State of Pennsylvania. In 1985 at least 44 Pennsylvania public employees were killed on the job and there were at least 19,651 lost work-day injuries. If there had been an 8 percent decline in lost work-day injuries in that year, then there would have been 1,572 fewer injured workers. At \$15,000 average cost per lost work time injury, the jurisdictions of Pennsylvania would have saved \$23,580,000 -- approximately \$6 million accruing to the Commonwealth and \$17.6 million to political subdivisions. This is the equivalent to \$30.7 million in 1992 dollars.

An Estimate for the City of Philadelphia. In 1988, the 5,613 lost work time injuries of public employees in Philadelphia are estimated to have cost the city over \$84 million. An 8 percent reduction in lost work injuries upon compliance with OSHA standards would mean 449 fewer injuries, and at \$15,000 per lost work injury, the city would have saved \$6.7 million, or \$7.6 million when expressed in 1992 dollars.

As of February 1993, there were 2,610 service-connected disability pensioners in Philadelphia. This suggests annual pension costs of well over \$36 million per year. If OSHA coverage could have reduced this number over the years by 8 percent, the savings would have been \$2.9 million.

Just the medical costs payable by the city and associated with work place accidents, cost the City of Philadelphia \$10.5 million in FY92. An eight percent decline would have saved the City \$840,000.

Appendix I

States That Cover Public Employees
Through OSHA-Approved State Plans

- | | |
|----------------|--------------------|
| 1. Alaska | 13. New Mexico |
| 2. Arizona | 14. New York |
| 3. California | 15. North Carolina |
| 4. Connecticut | 16. Oregon |
| 5. Hawaii | 17. South Carolina |
| 6. Indiana | 18. Tennessee |
| 7. Iowa | 19. Utah |
| 8. Kentucky | 20. Vermont |
| 9. Maryland | 21. Virginia |
| 10. Michigan | 22. Washington |
| 11. Minnesota | 23. Wyoming |
| 12. Nevada | |

States Covered By Federal OSHA

- | | |
|-------------------|-------------------|
| 1. Alabama | 15. Montana |
| 2. Arkansas | 16. Nebraska |
| 3. Colorado | 17. New Hampshire |
| 4. Delaware | 18. New Jersey |
| 5. Florida | 19. North Dakota |
| 6. Georgia | 20. Ohio |
| 7. Idaho | 21. Oklahoma |
| 8. Illinois | 22. Pennsylvania |
| 9. Kansas | 23. Rhode Island |
| 10. Louisiana | 24. South Dakota |
| 11. Maine | 25. Texas |
| 12. Massachusetts | 26. West Virginia |
| 13. Mississippi | 27. Wisconsin |
| 14. Missouri | |

Source: U.S. Department of Labor, Occupational Safety and Health Administration

Construction

(i) Construction is inherently difficult for OSHA to regulate and inspect. It is characterized by small, transient employers that generally work on multiemployer sites where the responsibility for avoiding and correcting hazards is confused. In addition, the work is often extremely dangerous and work crews are often transient and unfamiliar with each other. Special rules are needed for construction, and if they were to exclude small businesses, they would fail to cover many of the most dangerous employers and workplaces.

(ii) The requirement to have a "competent person" (not a site-specific inspector) on the job at all times is not the burden it at first seems to be. This is a requirement that already applies to the 25% of construction that is federally funded or assisted. A "competent person" is merely one who can identify existing or predictable hazards and who has authority to correct them. (29 CFR 1926.32(f)) This requirement does not mean that employers must hire additional employees, just that their supervisory employees be sufficiently well trained that they can recognize hazards, and that in their absence, a well-trained employee be given authority to correct hazards when found. The bill's requirement that the competent person "engage in inspections..." mirrors the current rule for federally funded or assisted construction. (29 CFR 1926.20(b)(2))

(iii) The pre-notification provisions should not delay the commencement of construction projects. No approval process follows the notification. The information (date of commencement and termination, names of contractors and owner, type of work to be performed) is intended only as a way to let OSHA know where to target its inspection activity.

(iv) The scope of the construction provisions does cause concern. Although work contracted for by a residential homeowner is excluded from coverage, on most other construction work, regardless of how few employees are working, each project would be required to have a written health and safety plan.

(v) Our preliminary cost estimate for the construction safety provisions of the bill is \$152 million annually. This estimate includes the cost of notification requirements (based on 10 minutes of supervisor time at \$20 per hour), and the cost of developing a safety plan (based on 2 hours of supervisory time). No delay in the initiation or completion of construction projects is anticipated.

A Rosey Scenario

Regulatory Concerns

The concerns expressed focus on page 2 of Labor's proposed letter to Chairmen Kennedy and Ford, on a bullet point that currently reads as follows:

"Among other features of the legislation, we will support enactment of:.....* Placing into effect the Permissible Exposure Limits for airborne contaminants promulgated by the agency under the prior Administration, and revision of the definition of "significant risk" to clarify OSHA's authority to regulate cancer risks that are as low as one in a million."

There is no disagreement that there is a need to legislatively adopt the PELs for general industry that were overturned by the courts.

Concerns were expressed, however, about two other issues:

- a) Proposed PELs for construction, agriculture & maritime - There is a desire not to set a precedent of enacting into law what is only a proposal. It is suggested Labor put the proposal out for further comment, while trying to get a legislative fix for the problem that the court decision on the general industry PELs created
- b) Definition of significant risk for purposes of carcinogens - The reservation quoted above may not clearly enough object to a reading of the bill that might require us to regulate any risk as low as one in a million

Response on Proposed PELs

* We agree that proposed PELs need to be treated differently than those which agency actually promulgated and which courts overturned.

* Our letter is limited to endorsing the ones "promulgated" by the agency. If further clarification is needed, we suggest inserting the words "in general industry" before the word "promulgated."

* We have several ideas about how we might actually approach this problem once we begin to talk about details of the legislation.

* DOL would welcome input on ideas. The OSHA reform Task Force came up with a few ideas to take care of problem created by the courts, but it's not clear they are workable.

* There are some special solutions that may solve the narrower issue of applying general industry standards to the construction industry. See the attached suggestion from

House staff.

* House staff agree the proposed solution is not appropriate for five PELs proposed for construction that were not proposed for general industry. These will have to be issued through the regular rulemaking process.

Response on Definition of Significant Risk

* Our goal in seeking a clarification is the same: to make it clear that bill authorizes does not require us to set risks at that level.

* If the language we proposed is too vague, lets try something like this....

" ...and revision of the definition of "significant risk" to clarify that OSHA has the authority to regulate, but is not required to regulate, cancer risks that are as low as one in a million."

Application of the 1989 PELs to Construction

A separate rulemaking to establish PELs for construction industry, as a practical matter, would be limited to determining feasibility in construction. So long as OSHA permits respirator use in construction, feasibility is not a significant factor.

Construction PELs are identical to those in general industry. OSHA measures significant risk for each hazard and the hazard facing construction workers is identical (as similar levels of exposure) to the risk facing other workers. Significant risk has been established for PELs.

OSHA's compliance strategy for construction recognizes that respirators play a significant role in reducing employee exposures. OSHA's recognition of the prominent role of respirators in PEL compliance makes feasibility less of an issue.

The Housing and Community Development Act of 1992 mandated that OSHA adopt, without notice and comment, a lead standard for the construction industry which paralleled the existing lead standard for general industry. The Committee on Education and Labor which drafted this provision noted in its report: "that construction work sites differ from factories and that far fewer feasible engineering controls are available to control lead emissions in construction work than can be employed at fixed work sites." (page 16)

Delaying adoption of the construction PELs would create a two tiered system under which construction workers would suffer. Traditionally, OSHA promulgates general industry health standards, and promises to publish a separate construction standard later. Unfortunately, the construction rulemaking is never concluded. Therefore, construction health standards are far more out of date than are general industry standards. To place the general industry PELs into effect, but require rulemaking for the construction industry would continue this two-tracked approach which fails to protect construction workers and taxes OSHA's limited resources.

Two alternative approaches are possible:

1. Copy the approach in the Housing bill. Require that the general industry PELs go into effect immediately and require that the construction industry PELs be placed into effect 6 months later. During that 6 month period, the Secretary would be authorized to consider compliance strategies necessary to adapt the PELs to construction (i.e., construction specific feasibility issues) and could, but would not be required to, solicit comment

from affected industry.

2. Place the construction industry PELs into effect immediately as an interim standard, but recognize the prominent role of respirators in construction industry compliance in the report. Give DOL 1 year to finalize PELs after notice and comment.

responsibility at the State equipped than day care product the activities required is about lead hazards. States to inspect for lead ng is available for such ac and provide assistance for ailable to cover the entire a State receives \$1 million required to do \$1 million to, the EPA regulations rection and abatement proce required to take action. In and dust, the State is the State, according to cri likely to have lead poison is in these areas first. It is be defined narrowly, en an individual school or ility. Funds are distributed on the number of children e. These funds are for the gs housing covered schools less of whether they are re funds are not appropri spect for lead paint, soil or

at funds distributed to the to perform the inspections under section 422(c) cover ls and covered day care fa

g Water

paint, soil, and dust, the quirement for testing for m schools and day care fa the State level. States are ing water when appropri on, and States are only re g activities to the extent s entire cost of such activi way of a formula based on 17 that reside within the d remediation of the build- l day care facilities regard e. In any fiscal year where re not required to test.

ittee on Energy and Com- cilities to inspect for lead loyees of any lead hazard at committee, does not re-

quire abatement or remedying of lead hazards, but funds are authorized to assist schools and day care facilities in inspecting for and abating lead hazards. Similarly, the Committee amendment does not require abatement, but allows States to expend funds for abatement activity. The Committee envisions that States would first conduct abatement activities in schools and day care facilities with the worst lead hazards, as determined through the inspection and testing provisions.

Notification

The Committee amendment clarifies that a school or a day care facility would not be required to notify parents of the results of the inspection for lead paint, soil, and dust if the entity takes appropriate action to address the lead hazard through abatement, encapsulation, or in-place management and then conducts a reinspection. While the bill, as reported from the Committee on Energy and Commerce, refers to "abatement" (which, as defined, includes encapsulation and in-place management), the Committee felt it was necessary to clearly state that, in certain situations, encapsulation and in-place management are viable and safe options in mitigating a lead hazard.

Report

The Committee amendment requires States to submit an annual report to the Administrator of EPA describing how States used the funds provided; a count of the number of day care facilities and schools that are affected; an estimate of the number of children served by the affected schools and day care facilities; and an estimate of the future efforts required.

Public Information Campaign

The Committee believes that the Environmental Protection Agency should mount an immediate and aggressive campaign to generally inform the public of the dangers of lead hazards. The campaign should be multi-lingual and multi-media and should inform the public of where potential lead hazards exist, who is most vulnerable, what steps can be taken to mitigate the hazard. Such campaign should also provide written material to every school and day care facility that will be affected by this Act, informing the owners and operators of such facilities of the dangers of lead ingestion by young children. The Committee believes that a public information campaign that is particularly designed to educate parents about the dangers of lead would be a first and important step in eradicating lead as the number one health threat to children.

WORKER PROTECTION

Background

Since the passage of the Occupational Safety and Health Act of 1970 (OSH Act), the Secretary of Labor (Secretary) has regulated worker exposure to inorganic lead. In 1971, pursuant to section 6(a) of the OSH Act, the Occupational Safety and Health Administration (OSHA) adopted a permissible exposure limit (PEL) for lead of

200 micrograms per cubic meter of air ($\mu\text{g}/\text{m}^3$); this limit was applicable to all employers covered by the OSH Act.

In 1975, OSHA proposed to lower the PEL for lead from 200 $\mu\text{g}/\text{m}^3$ to 100 $\mu\text{g}/\text{m}^3$. 40 Fed. Reg. 45934 (Oct. 3, 1975). Based on the record from that rule making, OSHA concluded that the hazards of lead were so severe that a PEL substantially lower than 100 $\mu\text{g}/\text{m}^3$ was warranted to protect employee health.

On November 14, 1978, OSHA promulgated a final standard governing occupational exposure to lead. The standard limited employee exposure to lead to 50 $\mu\text{g}/\text{m}^3$, required that the PEL be achieved through reliance on a combination of engineering, work practice and administrative controls, and included provisions relating to medical surveillance and medical removal protection for lead exposed workers, mandated separate change rooms and lunch rooms to prevent lead contamination, and required hygiene facilities and exposure monitoring. See generally, 43 Fed. Reg. 52952 (Nov. 14, 1978); 29 CFR § 1910.1025 (1992).

OSHA's lead standard was based on extensive evidence that occupational exposure to lead at levels above 50 $\mu\text{g}/\text{m}^3$ could result in "profoundly adverse effects on the health of workers in the lead industry." 43 Fed. Reg. 52954. Workers are exposed to lead dust, fumes and mist when they breathe work place air contaminated with lead or when they ingest food, beverages or tobacco products on which lead dust has settled. Overexposure to lead can damage the nervous, urinary and reproductive systems and inhibit synthesis of heme, the molecule which transports oxygen through the bloodstream. See generally, 43 Fed. Reg. 52954-52960 (Nov. 14, 1978) (describing the health effects of lead among occupationally exposed workers).

But, the construction industry was exempt from OSHA's 1978 lead standard. See 29 C.F.R. § 1910.1025(a)(2). While the PEL for lead in general industry was reduced to 50 $\mu\text{g}/\text{m}^3$ in 1978, today the PEL in construction remains at 200 $\mu\text{g}/\text{m}^3$. Furthermore, medical surveillance programs which monitor the lead intake of general industry workers and require that workers with elevated blood lead levels be removed from jobs involving lead exposure do not apply in the construction industry.

OSHA's decision to exempt the construction industry from the 1978 lead standard was challenged by the Oil, Chemical and Atomic Workers Union. See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1809 (D.C. Cir. 1980). The United States Court of Appeals for the District of Columbia Circuit agreed that "OSHA would be shirking its statutory responsibilities if it made no effort to protect workers in the construction industry from lead exposure." 647 F.2d at 1810. The Court was persuaded, however, by "OSHA's assurance that it will take reasonably prompt steps to fashion this protection." *Id.*

Fourteen years have now passed since OSHA assured the Court that it would promptly protect construction workers from the health hazards associated with occupational lead exposure, but OSHA has failed to promulgate a lead standard applicable to construction work. Indeed, while OSHA has repeatedly acknowledged the need for increased protection against lead hazards in the construction industry, there is little chance that a proposed lead stand-

this limit was appli-

from 200 $\mu\text{g}/\text{m}^3$ (1975). Based on the fact that the hazards of over than 100 $\mu\text{g}/\text{m}^3$

final standard govern limited employee PEL be achieved through, work practice relating to action for lead exposure and lunch rooms facilities and 52952 (Nov. 14,

evidence that occupational $\mu\text{g}/\text{m}^3$ could result workers in the lead exposed to lead dust, air contaminated or tobacco products can damage and inhibit synthesis through the 52960 (Nov. 14, occupational

OSHA's 1978 While the PEL for μm^3 in 1978, today Furthermore, medical intake of general with elevated blood exposure do not

industry from the Al, Chemical and ers of America v. The United States Circuit agreed that abilities if it made industry from lead loaded, however, by prompt steps to

assured the Court workers from the lead exposure, but applicable to construction industry acknowledged is in the construction lead stand-

ard will be published until late spring of 1993. A final standard likely would not be issued before 1996.

No one seriously disputes the fact that exposure to lead at exposures of 200 $\mu\text{g}/\text{m}^3$ can cause irreversible health impairment among construction workers. Since 1978, reports of severe lead poisoning among general industry workers are infrequent, but reports of lead poisoning among construction workers have risen at alarming rates. The National Institute of Occupational Safety and Health (NIOSH) recently received reports that 42 construction workers at 8 sites were suffering from lead poisoning. Lead Poisoning in Construction Workers (NIOSH 1992), but NIOSH believes far more construction workers suffer from lead poisoning. Chronic health damage from lead is far more extensive than acute lead poisoning.

In the absence of a comprehensive OSHA lead standard protecting workers in the construction industry, several efforts have been made to provide alternate forms of protection to construction workers. The most significant of these are guidelines, published by the Department of Housing and Urban Development, to guide HUD contractors in providing protection to lead-based paint abatement workers. The HUD guidelines are "intended to provide, at a minimum, the level of protection afforded by the [OSHA] general industry lead standard." OSHA actively assisted HUD in drafting these guidelines. Under current policy, OSHA may cite employers who fail to comply with the HUD guidelines under the general duty clause. 29 U.S.C. § 654(a)(1).

Interim Standard

The Committee believes that OSHA has delayed publication of a revised, comprehensive standard regulating occupational exposure to lead in the construction industry for far too long. Accordingly, the amendment requires the Secretary of Labor to promulgate an interim final regulation governing the exposure of construction workers to lead within six months after enactment. The interim final regulation published by the Secretary must provide safety and health protection for employees that is at least as protective as that which would prevail if affected employers complied with the Department of Housing and Urban Development guidelines published in volume 55 of the Federal Register at page 88973 on September 28, 1990. The amendment provides that the interim final regulation will be effective immediately upon publication.

The Committee requires that the lead abatement guidelines developed by HUD serve as the basis for OSHA's interim final regulation. In developing the interim final regulation, the Secretary may alter the provisions of the HUD guidelines, so long as the interim regulation provides workers with health and safety protections which are equally as effective.

The HUD guidelines are based on, and in most respects mirror, OSHA's general industry lead standard at 29 CFR § 1910.1025. Where the guidelines differ from OSHA's standard, the differences are intended to reflect the unique circumstances of the construction industry. By relying on the HUD guidelines as the basis for the Secretary's interim final regulation, the Committee expects that construction workers will gain the same benefits available to

general industry workers under the lead standard, i.e., a PEL of 50 $\mu\text{g}/\text{m}^3$, medical surveillance, medical removal protection, etc. The Committee recognizes, however, that construction work sites differ from factories and that far fewer feasible engineering controls are available to control lead emissions in construction work than can be employed at fixed work sites. The HUD guidelines recognize that compliance with a 50 $\mu\text{g}/\text{m}^3$ PEL in the construction industry likely will require greater reliance on respirator use than is accepted in general industry.

The Committee amendment provides the Secretary six months to promulgate the interim final regulation. This timetable is intended to ensure that a revised lead standard is quickly put into place—after a fourteen year delay—in the construction industry. During this six month period, the Secretary will have an opportunity to evaluate whether modifications to the HUD guidelines are appropriate. So long as the interim final regulations adopted by the Secretary require employment and places of employment as protective of employee health and safety and those which would prevail under the HUD guidelines, the Secretary is free to make modifications to the provisions of the guidelines.

The Committee amendment creates a new provision, not a part of either the OSH Act or the Toxic Substances Control Act, which directs the Secretary of Labor to issue an interim final regulation governing lead. The interim regulation is not an occupational safety and health standard as that term is defined in section 3(8) of the Occupational Safety and Health Act of 1970. As the Secretary has previously recognized, the distinction between an interim regulation and an occupational safety and health standard is legally significant because it means that the procedural requirements of section 6 of the OSH Act do not apply to the promulgation of the interim final regulation. Nor, as the Secretary has previously recognized in publishing an interim final regulation governing hazardous waste operations, do the notice and comment provisions of the Administrative Procedures Act apply. See Fed. Reg. 45654, 45663 (Dec. 19, 1986).

Although the Secretary is not required to follow any specific notice and comment procedures before issuing the interim final regulation, it is the Committee's hope that the Secretary solicit input from and consider the views of affected industry and labor representatives as well as public health and industrial hygiene experts in fashioning an interim lead regulation for the construction industry. The Secretary is free to select whatever method she feels is best suited to obtain public input into the development of the interim final regulation, so long as the procedures she selects do not have the effect of delaying publication of the regulation. The six month deadline for promulgation of the interim final regulation leaves the Secretary plenty of time in which to seek input from the public.

H.R. 5730 also requires the Administrator of the Environmental Protection Agency to publish regulations governing lead-based paint abatement activities and these regulations may overlap with OSH Act requirements. The Committee believes that EPA and OSHA must coordinate their regulatory activities to avoid the imposition of duplicative or conflicting regulatory obligations.

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Budget Concerns

Some questions have apparently been raised in connection with the budget materials submitted by the Secretary of Labor to the Director of OMB. As the Department is in the middle of a budget exercise for FY95, it is recommended that any questions about these materials be resolved directly with Deputy Secretary Tom Glynn through budget office channels.

THE WHITE HOUSE

WASHINGTON

December 7, 1993

MEMORANDUM FOR OSHA REFORM GROUP

FROM:

Ellen Seidman 

SUBJECT:

Draft letter and memo to the President

Attached are the final draft letter, with the disputed language in bold at the bottom of page 1 (note to DOL - I also made an editorial change in the last sentence of the letter), and the proposed memo to the President. We want to staff the memo to the President around the White House as soon as possible tomorrow, so please get your comments back to me quickly.

Once again, thanks for your help.

December 8, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BOB RUBIN

SUBJECT: Approval of Proposed Letter from Secretary Reich to Senator Kennedy and Chairman Ford Supporting their OSHA Reform Bills

I. ACTION-FORCING EVENT: Lane Kirkland will meet with you on Friday, December 10 and will want to know the Administration's position on OSHA Reform. Senator Kennedy and Chairman Ford have been pressing Secretary Reich since April to take a "clear" position on their OSHA reform bills to enable them to move in this Congress. A story concerning a draft letter from the Secretary "strongly supporting" the bill appeared in the Wall Street Journal on Monday. The Labor Department and White House policy offices (NEC, OMB, CEA, DPC, OVP) have developed a revised DOL letter, at Tab A, with the only remaining area of disagreement the specificity of support for provisions of the Kennedy and Ford bills.

II. BACKGROUND/ANALYSIS: The Occupational Safety and Health Act has not been amended in 20 years. Substantial concerns have been raised about its efficacy, cost, and coverage. In March, Senator Kennedy and Chairman Ford introduced essentially identical bills that would, among other things:

- o Require all employers (subject to limited Secretarial exemptive authority) to establish comprehensive occupational safety and health programs, and all employers with more than 10 part- or full-time employees to establish joint safety and health committees at each worksite;
- o Increase whistleblower protection;
- o Expand OSHA coverage to public employees in 27 states not currently covered by approved state plans and to all federal employees (except congressional employees);
- o Increase federal criminal penalties and establish individual criminal liability for willful violations that cause serious bodily injury;
- o Put into effect a 1989 OSHA regulation concerning Permissible Exposure Limits for approximately 500 airborne substances that had been overturned by the Supreme Court because individual risk determinations were not made for each substance.

- 2 -

DOL estimates that compliance will cost the private sector approximately \$13 billion annually, state and local governments approximately \$1.8 billion, and non-OSHA federal agencies \$200 million. They estimate that over 1,000 fatalities and 1.4 million injuries will be prevented, and that over \$13 billion will be saved in reduced medical costs, workplace disruption and other related areas.

The most controversial areas are the requirement for joint *worker-management* committees and the coverage of state and local employees. Labor generally has made support of committees the litmus test for support of the bill; business has been equally adamant on the other side because of both costs and prospects that committees would be used to organize workers. AFSCME has made coverage of state and local employees -- many of whom work in very hazardous conditions -- one of its top priorities.

As outlined by Secretary Reich in his memo to you (Tab B), attempts by both DOL and congressional committees to bring labor and business together to find a bill both can support have failed. Labor, DOL and the bills' sponsors believe serious negotiations will begin only if the Administration takes a position ~~explicitly supporting the critical parts~~¹ of the bills (committees, coverage, whistleblower protection), even though all ~~parties~~ know compromises will eventually be made. DOL also believes that explicit support for these elements is very important to the Administration's broader agenda with labor and the two committee chairmen. Legislative Affairs and Political *Affairs* support this position.

While the White House policy offices that have worked with DOL on the letter are convinced of the need for OSHA reform, and the general validity of the bill's central principles, they are concerned that the bill's sponsors have not adequately addressed the bill's burden on small businesses and on state and local governments. Whatever the estimated eventual savings, expanded coverage would be an unfunded state mandate. They are also concerned that the Administration will be open to accusations of backing away from its initial position as the bill moves through Congress. They therefore support language less directly tied to the precise provisions of the bills.

III. OPTIONS:

- o Option 1 -- Approve the letter with the DOL language -- "support enactment of the provisions of your legislation that would:" -- at the bottom of page 1

¹ Not even the bills' sponsors expect endorsement of the bills as a whole.

- 3 -

- o Option 2 -- Approve the letter with the policy offices' language -- "support enactment of legislation that would:" -
- at the bottom of page 1

IV. DECISION:

____ Option 1 (DOL) ____ Option 2 (policy offices) ____ Don't
send letter

Tabs:

Tab A - Draft DOL letter

Tab B - Memo from Secretary Reich

The Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

The Honorable William D. Ford
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairmen Kennedy and Ford:

In testimony before the House Education and Labor Committee in April of this year, I stated that the time had come to reform the Occupational Safety and Health Act. I explained that improved workplace safety and health is an important aspect of this Administration's commitment to better jobs for all Americans in the New American Workplace. In a highly competitive global economy we cannot tolerate the high costs of workplace fatalities, injuries and illnesses. We must recognize that investment in our workers is the best investment we can all make in our future. As we have stated in Vice President Gore's National Performance Review, this Administration is committed to encouraging companies to embrace labor-management cooperation and to giving employees the tools to humanize the workplace.

As I committed to you in my testimony, we have been working diligently to explore the concerns of labor, management, the insurance industry, safety and health professionals, and the public with the framework of a law that has not been changed in more than twenty years. We held dozens of meetings with stakeholders, and staff have carefully considered technical issues. We have listened carefully to all, and explored avenues for reaching consensus. I have personally had meetings with several groups representing key stakeholders, and my senior staff and I have spent time considering both the individual questions presented and our overall approach to this issue.

The Department of Labor now joins you in support of rapid legislative action. Your bills introduce new ways to "reinvent" regulation of workplace health and safety through comprehensive health and safety programs and joint safety and health committees. Empowering workers to participate in safety and health activities and encouraging employees and management to cooperate to improve the places in which they work will save lives and tax dollars, and will make government regulation less burdensome. These concepts are the key to a new worksite-based model of injury and illness prevention.

We are therefore pleased to support enactment of [DOL - the provisions of your legislation] [Policy Offices - legislation] that would:

spell out?

- 2 -

* establish comprehensive occupational safety and health programs and joint safety and health committees, and improve whistleblower protection;

* address gaps in the protection of public employees;

* increase Federal criminal felony penalties, to complement those now available to State authorities, to enable us to appropriately punish both collective and individual conduct that is truly criminal in nature;

* place additional requirements on the construction industry to ensure efficient coordination of safety and health protection among the many and constantly changing employers on construction projects; and

* put into effect the Permissible Exposure Limits for airborne contaminants in general industry adopted by the agency under the prior Administration.

When the Congress returns from its recess, we will be prepared to testify on your legislation in detail. In addition to further explaining our position on the initiatives mentioned above, we will be ready to suggest changes that appear to be needed on such matters as employee litigation rights, criteria and procedures (including statutory deadlines) for standards action, changes to section 4(b)(1) of the Act, and administrative organization. This will give us time to ensure that other agencies which have expertise on particular technical features of the legislation have an opportunity to work with us.

We will also be able to refine our estimates of the resource needs, compliance costs, and benefits for Federal, State, and local government entities and the private sector. In so doing, we will take into account the bills' provisions granting the Secretary flexibility with respect to small worksites and low hazard employment, including, where appropriate, state and local government worksites and employment. We would also like to work with you to ensure that our budgetary and personnel policies can accommodate this important new initiative. In the interim, we would be pleased to provide continued technical assistance to your staffs, and to work with you to develop incentives to promote compliance that meet our goals.

In the context of our active support for OSHA reform, we see no need to wait when we can take action administratively. The recent confirmation of Joe Dear as Assistant Secretary will allow us to move quickly ahead on a number of initiatives that have been developed over the last few months and which are consistent with the legislative initiative. By way of example, we intend to move ahead promptly with a regulatory effort to require employers to establish comprehensive occupational safety and health

- 3 -

programs, and to have those programs and their implementation regularly certified by either private sector experts or suitable employee representatives. We are exploring a new approach to data collection that will allow us to target our limited compliance resources much more effectively. We have plans underway to increase the efficiency of inspectors through streamlining the inspection process, and to otherwise strengthen our enforcement efforts. We are also looking for ways to work with employers to encourage worker-management cooperation in the field of safety and health.

I want to assure you that my staff and I will be available to work with you as you press forward with OSHA reform legislation. You will have our full and active support in your endeavors.

Sincerely,

Robert B. Reich

OSHA Mtg 12-7-83

12 hrs mtg
40 hrs / memb / 12.50

300 Fatalities avoided

~~min~~ minimum - 4 inspections, 4 meetings

- Smaller Businesses - - more informal process

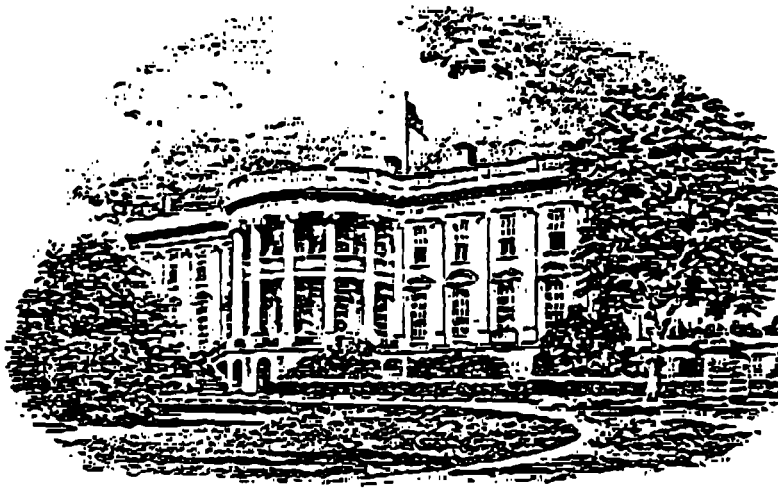
2 types of Mitigation

- ① Violations that are covered under law
- ② " " " " are gray area

If you're going to count, as benefits, injuries saved/reduced, you should count costs of voluntary (and mandatory) hazard mitigation.

GAO Report - on States

Most States Have Public Safety Programs



FAX TRANSMISSION

The National Economic Council The White House

Janet Forsgren 395-6148
John Morrell 395-5167
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Mike Schmidt 456-7028
Bonnie Deane 456-2223
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To: _____

Phone: _____ FAX: _____

From: Ellen Seidman

Phone: 202-456-2802 FAX: 202-456-2223

Date: _____

Time: _____

Pages to follow: _____

PRELIMINARY ECONOMIC ANALYSIS
of the
COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT

Prepared by the
Office of Regulatory Analysis
OSHA

July 30, 1993

364-7194
219-6141

**ECONOMIC IMPACT OF THE
COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT
(1993 HOUSE BILL)**

TITLE / REQUIREMENT	COST (\$ MILLIONS)			BASIS OF ESTIMATE
	Private Sector	State & Local Government	Federal Govt. (Non-OSHA)	
I. Safety and Health Programs - Identifying/Correcting Hazards - Emergency Response - Employee Participation - Training - Employer Representative - Multi-employer Worksites	\$7,745	\$1,043	\$77	6.2 million private sector establishments are affected; costs per establishment are based on the number of supervisory, clerical and other labor hours associated with each requirement, depending on the industry division and employment size of the establishment; costs for government sectors are based on costs in non-manufacturing; all costs reflect current compliance rates (varying by industry and size), averaging about 50 percent for programs and 15 percent for committees.
II. Safety and Health Committees	1,788	486	66	(see above)
III. Extension of Coverage		250		OSHA coverage required for 7.8 million additional employees in 25 non-state plan states. Costs of compliance with existing federal OSHA standards is estimated at \$10 million per state on average.
IV. Promulgation of Standards - Revised PELs	497			Costs are based on estimates published with the 1989 final rule and the 1992 proposed rule, reduced by 50 percent to reflect current compliance.
- Medical Surveillance / Exposure Monitoring	1,500			Preliminary cost estimates exceed \$1 billion.
- Ergonomics	1,500			Preliminary cost estimates exceed \$1 billion.
V. Enforcement				
VI. Discrimination Protection				
VII. Technical Assistance and Training				
VIII. Recordkeeping and Reporting				
IX. NIOSH			48	Congressional Budget Office estimate of funding requirements.
X. State Plans				
XI. Victim's Rights				
XII. Construction Safety	152			Costs are based on 2 hours of supervisory time to generate a project-specific safety plan for each of 2.4 million construction projects; ten minutes of supervisory time are added for high hazard jobs to satisfy notification requirements. Other potential employer costs are still to duplicate requirements in either Title I or 29 CFR 1926.20-21.
XIII. Workers' Compensation Study			5	For two years, 15 appointed commission members receive executive compensation plus reimbursement for travel and other expenses; in addition, \$1 million in contractor funds are included.
XIV. Administrative				
XV. Effective Date				
TOTAL	\$13,182	\$1,779	\$195	

Source: Office of Regulatory Analysis, OSHA, U.S. Department of Labor.

**BENEFITS ASSOCIATED WITH THE
COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT
(1993 HOUSE BILL)**

TITLE / REQUIREMENT	BENEFIT	BASIS OF ESTIMATE
I. Safety and Health Programs - Identifying/Correcting Hazards - Emergency Response - Employee Participation - Training - Employer Representative - Multi-employer Worksites	300 fatalities prevented 446,000 injuries / illnesses prevented	Estimates are based on a 10 percent reduction in injury and illness rates published by BLS, and a 10 percent reduction in fatalities reported by NIOSH/NTOF; reductions are applied to 50 percent of employees to reflect current compliance. GAO (1992) reported reductions of 13 percent in Hawaii and Alaska following the adoption of safety and health program requirements.
II. Safety and Health Committees	(Included in benefits of Title I above)	
III. Extension of Coverage	12 fatalities prevented 60,000 injuries / illnesses prevented	Assumes a 10 percent reduction in the injury/illness rate among 7.8 million employees in non-state plan states.
IV. Promulgation of Standards - Revised PELs	350 fatalities prevented 300,000 illnesses prevented	Based on published estimates associated with the PELs rulemaking, adjusted for current compliance.
- Medical Surveillance / Exposure Monitoring	100 fatalities prevented 200,000 illnesses prevented	Assumes benefits are achieved through earlier identification and prevention of adverse health effects among employees.
- Ergonomics	150,000 illnesses prevented Significant productivity gains	Assumes prevention of half of reported ergonomic injuries. Potentially large productivity gains realizable through workplace modifications addressing ergonomic stressors.
V. Enforcement	150 fatalities prevented 228,000 injuries / illnesses prevented	Illustrative figure assuming 3 percent reduction in total cases (5,000 fatalities, 7.6 million injuries / illnesses).
VI. Discrimination Protection	Increased employee morale and empowerment.	
VII. Technical Assistance and Training	Facilitate compliance and awareness of hazards.	
VIII. Recordkeeping and Reporting	Improved efficiency and effectiveness of enforcement and future rulemaking.	
IX. NIOSH	Increased research and awareness of accident prevention.	
X. State Plans	Ensures equal protection in all states.	
XI. Victim's Rights	Increases fairness and involvement of victims.	
XII. Construction Safety	100 fatalities prevented 60,000 injuries / illnesses prevented	Illustrative figure assuming 10 percent reduction in total cases (1,000 fatalities, 600,000 injuries / illnesses).
XIII. Workers' Compensation Study	Improve the efficiency and effectiveness of the Workers' Compensation system.	
XIV. Administrative	---	
XV. Effective Date	---	
SUMMARY	• 1,012 fatalities prevented. • 1.4 million injuries / illnesses prevented. • \$8.3 billion cost savings associated with injuries, including reduced medical costs, hiring/training costs, investigation/litigation costs, administrative costs, workplace disruption, and property damage. • \$5-10 billion reduction in medical and other costs associated with illnesses. • Higher employee morale. • Increased productivity. • Creation of "high performance" workplaces and improved competitiveness and innovation through incorporation of employee safety and health into production process design.	Based on 10% reduction in cost of work-related injuries, estimated by RAND at \$83 billion. [Note: RAND estimate does not include recent increases in Workers' Compensation costs or long-term health care costs.] Total cost savings assumed to be equivalent to that for injuries. Productivity gains result directly from injury/illness prevention and from workplace and process changes made in response to hazard assessment and management.

POTENTIAL OSHA REVENUE SOURCES

REVENUE SOURCE	POTENTIAL REVENUES (\$ MILLIONS)		BASIS OF ESTIMATE
	House Bill	Options	
Reduce Budget for Consultations After First Year	\$30		Funds saved by discontinuing funding for consultation program, currently involving 28,000 visits annually.
		2.8	\$100 fee per consultation, no reduction in number of consultations.
		7.0	\$500 fee per consultation, 50% reduction* in number of consultations.
		2.8 - 5.6	\$1,000 fee per consultation, 80 - 90% reduction* in number of consultations.
\$1,000 Minimum for Serious Penalties; Excess over FY1992 Levels to OSHA	40		Number of serious violations in FY1992 was 89,807; of these, 63,345 violations involved penalties of less than \$1,000, averaging about \$380 each. If the number of serious violations is assumed to remain unchanged, and if penalties under \$1,000 were increased to \$1,000, then the total amount of funds collected in penalties would increase by about \$40 million.
		71	\$1500 minimum penalty for serious violations with excess revenues to OSHA.
Occupational Risk Reduction Fee		480	1 percent surcharge on Workers' Compensation premiums.
TOTAL	\$70	\$558	

* Reductions in consultations may have a negative impact on the number of occupational injuries and illnesses recorded.

Source: Office of Regulatory Analysis, OSHA, U.S. Department of Labor.

DETAILS OF ECONOMIC ANALYSIS OF OSHA REFORM BILL

TITLE	COST (\$ Millions)					BENEFITS
	Private Sector	Government				
		State & Local		Federal		
		Non-State Plan States	18b States	Other Agencies	OSHA	
I Safety and Health Programs SEC. 101 Safety and Health Programs "SEC. 27(b) REQUIREMENTS"						
Includes:						
(1)&(2) Identifying, Evaluating, Documenting and Correcting Safety and Health Hazards	\$3,788	\$246	\$192	\$9.8		
(3) Emergency Response First-Aid	\$613	\$51	\$40	\$10.2		
(4) Employee Participation	\$939	\$40	\$32	\$8.0		
(5) Safety & Health Training & Education	\$1,177	\$149	\$117	\$29.7		
(6) Designating Qualified Employer Representative	\$62	\$10	\$7	\$1.9		
(7) Multi-Employer Worksite	\$948	\$65	\$50	\$12.8		
"SEC. 27(c)(2) TRAINING AND EDUCATION"	\$220	\$24	\$19	\$4.8		
TOTAL Safety and Health Programs	\$7,745	\$588	\$457	\$77.3		(Potential benefits, in combination with Title I) o 300 Fatalities Avoided (1) o 448,000 Injuries Avoided (1)

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS

Industry Analysis: Commerce Department data indicate 93 million employees in 6.2 million private sector establishments would be affected by this bill. OSHA assumed that of those, 23 million employees in 1.8 million private establishments (real estate, insurance and finance; half of the service sector) would receive a special classification under the bill (under (c)(1)) for low-hazard situations. OSHA grouped affected industries into 3 sectors: Manufacturing, Nonmanufacturing, and Construction. These sectors were, in turn, grouped into employers with 19 or fewer employees, and those with 20 or more. For manufacturing, establishments with 250 or more employees were examined separately.

Current Compliance: OSHA utilized data from its 1991 nationwide Medical Surveillance survey to estimate the prevalence of aspects of health and safety programs in industry, in order to establish the baseline of current compliance for the various subparts of Title I.

Assumptions for estimating costs of specific subparts are discussed on the page.

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS (continued for Title I)

Subparts (1) & (2): OSHA's estimates are based in part on its experience with process safety management. For small nonmanufacturing establishments, OSHA estimated 40 supervisory hours, with 16 hours of nonsupervisory support annually. Estimated supervisory time was increased in larger establishments, and in construction and manufacturing, to account for the greater complexities and sheer volume of potentially hazardous situations. For manufacturing employees with more than 250 employees, it assumed that 700 hours of supervisory time would be required, with 60 hours of nonsupervisory assistance. As with all other subparts, it was assumed that "low-risk" establishments would be allowed to adopt less intensive safety and health programs, at one-fourth the cost of other non-manufacturing establishments. Supervisory hourly compensation was estimated at \$20. Nonsupervisory hourly compensation, including clerical, was estimated at \$12.50 per hour.

Subpart (3): Will require one day of supervisory time (for First Aid training) in small establishments, larger establishments will require two days, plus clerical support for half that time. Hourly compensation, including clerical, is estimated to be \$10.

Subpart (4): Workers will spend 20 hours participating in program development in small establishments, 75 hours in large manufacturing establishments.

Subpart (5): For the development of training programs and to educate those in charge of training: 20 hours of supervisory time and 10 hours clerical in small establishments; large establishments are estimated to require 80 hours supervisory, 40 hours clerical. Employee training was costed under Sec. 27(c)(2) (see below).

Subpart (6): Small employers will designate a current employee to be safety manager (1 hr supervisory, 1/2 clerical); some larger employers will conduct a search for a regular safety manager (average of 6 hrs managerial, 3 hours clerical).

Subpart (7): "Primary" employers may be forced to bear some costs of compliance for subordinate employers. Costs are estimated to range from \$250 for small non-manufacturing employers to \$1500 for large construction employers. This includes labor time for supervisors to coordinate with other employers, and potentially supervise their employees.

Sec 27(c)(2): One hour of training per employee is assumed necessary to meet this requirement.

State and local employees: The cost to employees in state and local governments is based on per employee costs in nonmanufacturing. The average cost per noncompliant nonmanufacturing establishment for this Title is \$2709. The average employment size of noncompliant nonmanufacturing establishments is 10.6. Therefore, the per employee cost for these elements is estimated to be \$256. There are 7.6 million state and local employees in non-state plan states, 7.6 million in 16b states. Half of governmental establishments are estimated to have programs currently in non-state plan states, 60 percent in state-plan states. One-half of those government establishments currently without programs are assumed to fall in the "low risk" category.

Other Federal: DOE controlled establishments are generally considered to provide health and safety programs currently. For the 3.1 million civilian federal employees under OSHA regulations by Executive Order 12196, it is assumed per employee costs would be the same as private non-construction. It was also assumed that 75 percent of such establishments already had health and safety programs, and that 50 percent of those without would fall into the "low hazard" group.

Private Sector	Current Compliance	Cost per Establishment*
Manufacturing:		
1-19	43%	\$3,125
20-249	68%	\$11,500
250+	84%	\$24,400
Nonmanufacturing:		
1-19	33%	\$2,375
20+	57%	\$5,350
Construction:		
1-19	46%	\$3,125
20+	61%	\$6,850

*for establishments other than "low risk"

(1) Based on a 10% nationwide reduction in fatalities reported by NIOSH/NTOF, and a 10% reduction in injuries and illness rates as published by BLS, after accounting for current compliance. Alaska and Hawaii had experienced 13-16% reductions following the adoption of safety and health program requirements. [GAO, "Worksite Safety and Health Programs Show Promise", GAO/HRD-92-69, May 1 |

DETAILS OF ECONOMIC ANALYSIS OF OSHA REFORM BILL

BENEFITS	COST (\$ Millions)					BENEFITS
	Private Sector	Government				
		State & Local		Federal		
		Non-State Plan States	18b States	Other Agencies	OSHA	
1) Safety and Health Committees and Safety and Health Representatives	\$1,788	\$246	\$240	\$65.5		(Listed in combination with Title I)

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS

Employees and employers have equal number of committee members.

Hours required: Committee work requires 12 2-hour meetings and four 4-hour inspections annually, or 40 hours for each committee member per year.

Estimates of the number of establishments affected was based on the medical surveillance survey. OSHA notes that 8 states already have state laws that require safety programs (some require committees) and about half of all union contracts provide for such committees. Based on this information it was estimated that 15 percent of firms have committees currently.

Cost estimates for state and local governments (both 18b and non-state plan) are based on per-employee costs for private sector establishments; 25 percent compliance is assumed (based on states requiring committees currently).

Other Agencies: DOE nuclear facilities and other federal agencies are assumed to be 50 percent in compliance currently. Cost estimates are based on per-employee costs in the private sector.

DETAILS OF ECONOMIC ANALYSIS OF OSHA REFORM BILL

TITLE	COST (\$ Millions)					BENEFITS
	Private Sector	Government				
		State & Local		Federal		
		Non-State Plan States	18b States	Other Agencies	OSHA	
III Coverage	-	\$250	-	-	-	o 12 fatalities prevented o 60,000 injuries/illnesses prevented

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS

The cost of the average non-state plan state to bring their employees into compliance with existing federal OSHA standards has been estimated at \$10 million.

Benefits estimate based on a 10 percent reduction in injuries and illnesses among 7.8 million employees in state and local government establishments in non-state plan states.

DETAILS OF ECONOMIC ANALYSIS OF OSHA REFORM BILL

TITLE	COST (\$ Millions)					BENEFITS
	Private Sector	Government				
		State & Local		Federal		
		Non-State Plan States	18½ States	Other Agencies	OSHA	
IV Health and Safety Standards						
Sec. 402 – Occupational Safety and Health Standard	*	*	*	*		
Sec. 406 – Exposure Monitoring and Medical Surveillance	\$1,500*	*	*	*		o 100 fatalities prevented o 300,000 illnesses prevented
Sec. 407 – Standard on Ergonomic Hazards	\$1,500*	*	*	*		o 150,000 illnesses/injuries prevented o potentially significant productivity gains
Sec. 409 – Air Contaminants	\$497	—		—		o 352 fatalities avoided o 260,000 lost workdays avoided

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS

Sec. 402: The house bill would require the Agency to eliminate "significant risk" for carcinogens down to 1 in a million, to the extent feasible. It would also require that safety standards eliminate significant risk to the extent feasible.

Sec. 406: Preliminary cost estimates of such a standard exceed \$1 billion. Distribution of the costs between public and private sectors being developed. Benefits estimates assume earlier identification and prevention of adverse health effects among employees.

Sec. 407: Preliminary cost estimates of such a standard exceed \$1 billion. Distribution of the costs between public and private sectors being developed. Benefits estimates assume prevention of half of reported ergonomic injuries. Potentially large productivity gains realizable through workplace modifications addressing ergonomic stressors.

Sec. 409: The cost (and benefits) to the private sector are taken from the Regulatory Impact Analysis for the general industry PEL rulemaking (1989), and the Preliminary Regulatory Impact Analysis for the construction, agriculture and maritime PELs (1992). It is assumed that half of general industry has come into compliance since 1989.

DETAILS OF ECONOMIC ANALYSIS OF OSHA REFORM BILL

TITLE	COST (\$ Millions)					BENEFITS
	Private Sector	Government				
		State & Local		Federal		
		Non-State Plan States	16b States	Other Agencies	OSHA	
XII Construction Safety	\$152	*	*	-		o potential 100 fatalities, 60,000 injuries/illnesses prevented

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS

Many of these elements duplicate either Title I or CFR 1926.20. However, OSHA estimates that an additional 2 hours of supervisory time will be required per worksite to meet the requirements of Sec. 1203. There is an average of 1.2 million new construction projects annually. An additional 1.2 million commercial renovation/alteration projects are assumed to be performed annually. In addition, an estimated 10 percent of employers (those with high injury rates or a pattern of noncompliance, or those with accidents) will need to take an additional 10 minutes to notify OSHA during a project.

*It is assumed that most construction work for state and local governments is generally contracted out to private contractors.

Benefits estimates are illustrative, assuming 10 percent reduction in total construction cases (1,000 fatalities, 600,000 injuries/illnesses).

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DETAILS OF ECONOMIC ANALYSIS OF OSHA REFORM BILL

TITLE	COST (\$ Millions)					BENEFITS
	Private Sector	Government				
		State & Local		Federal		
		Non-State Plan States	18b States	Other Agencies	OSHA	
V Enforcement	.	-		-		o potential 150 fatalities, 328,000 injuries/illnesses prevented
VI Protection of Employees from Discrimination						o Improved employee morale and empowerment
VII Technical Assistance and Training						o Facilitate compliance and awareness of hazards.
VIII Recordkeeping and Reporting						o Improved efficiency and effectiveness of enforcement and future rulemakings.
IX NIOSH				\$48		o Increased research and awareness of accident prevention
X State Plans						o ensures equal protection in all states
XI Victim's Rights						o Increases fairness and involvement of victims
XII Construction Safety (discussed elsewhere)						
XIII Worker's Compensation Study				\$5		o Improved efficiency and effectiveness of Workers' Compensation system
XIV Administrative						
XV Effective Date						
TOTAL (of all titles)	\$13,162	\$1,082	\$697	\$195		see summary sheet

DETAILS/ASSUMPTIONS BEHIND ECONOMIC ANALYSIS

Title V:

* Only non-compliant employers will incur greater costs as a result of these provisions. OSHA estimates that if current levels of non-compliance continued, it would cost employers \$40 million in direct fines. However, if Title V, along with other provisions of the bill, enhance compliance with existing regulations, these projected fines would be lower. Costs of litigation by employers (included in the total cost estimate of the Employment Policy Foundation) have not been estimated here.

Title IX: Congressional Budget Office estimate.

Title XIII: The compensation for 15 GS-18 for 2 years, plus an additional \$1 million for contractor funds.

Critique of the Employment Policy Foundation's Cost Estimates for OSHA Reform

1. Safety and Health Programs

The Employment Policy Foundation (EPF) estimates that private sector costs associated with requirements for safety and health programs would amount to \$19.9 billion annually. The EPF figure is based on an average cost per establishment of \$3,000, representing two weeks of a middle manager's time (\$2,000) annually for the administration of a program and \$1,000 per establishment for providing emergency response first aid and other occupational health services.

The EPF figures overestimate the impact of the requirements for safety and health programs for many establishments. First, EPF makes no allowance for current compliance with the requirements. Alaska, California, Hawaii, and Washington currently require all employers, regardless of size or industry, to develop and implement comprehensive safety and health programs; Minnesota and Oregon also require programs for some employers. OSHA has issued and strongly recommends compliance with voluntary guidelines for establishing programs. In addition, safety and health programs are common throughout industry even in the absence of legal requirements for their implementation. OSHA estimates that current compliance with the Bill's requirements for safety and health programs averages about 50 percent.

Second, the average cost per establishment is likely to be less than \$3,000. Over 75 percent of establishments have fewer than 10 employees and millions of establishments involve only an office environment or other low-hazard circumstances; many of these establishments may be able to implement less rigorous programs.

Third, EPF overestimates the costs associated with emergency response first aid and other health services. EPF assumes that all employers would be required to provide new or additional health units at all work places. The Bill requires that the safety and health program include "methods and procedures for providing emergency response first aid and other occupational health services". Current OSHA standards require employers to have procedures for emergencies, rescues, or medical surveillance; these standards often allow the procedures to incorporate (and allow the employers to rely on) outside sources to provide the necessary services. Thus, this component of the requirements for safety and health programs is unlikely to involve the significant additional costs for employers envisioned by EPF.

2. Safety and Health Training

EPF assumes that all employees would require two hours of training over and above what is presently provided, at a total cost of \$6.2 billion. The Bill requires the safety and health program to include methods and procedures for providing safety and health training and education to employees. Throughout existing regulations, the current OSHA standards require both general and specific training for employees, and the Bill does not substantially expand the current requirements for training. Safety and health training is common practice throughout industry, and

most employers may not require any increase in the extent of training provided. Furthermore, the extent of safety and health training necessary would correspond to the degree of hazards present; in many establishments the training would not need to be nearly as extensive as that envisioned by EPF.

3. Safety and Health Committees

EPF estimated that the total annual cost of this requirement would be \$10.4 billion. The cost estimates assume that each committee member would spend over 105 hours annually engaged in committee work. This assumption seems excessive considering that 40 hours per committee member would allow for 12 two-hour meetings and 4 four-hour inspections annually. EPF also fails to make any allowances for current compliance; about half of all union contracts provide for committees, and at least three states (Alaska, Oregon, and Washington) currently require committees with both employee and employer representatives. Additionally, EPF includes billions of dollars in costs for such items as administrative and clerical support which do not appear to be justified by the language of the bill. Finally, EPF's estimates of total labor costs appear to be greater than can be explained given the assumptions EPF presents.

4. Recordkeeping and Reporting

EPF claims that the total annual cost associated with new requirements for recordkeeping and reporting imposed by the Bill would be \$3.32 billion. This estimate is based on the assumption that on average every establishment would require one additional week of clerical time annually. The requirements of the Bill do not impose any significant new burdens on employers; the requirements are primarily directed at government agencies. Current regulations already require employers to maintain a complete and accurate log of occupational injuries and illnesses, and much of this data is already collected from employers. Current initiatives are already underway to modify and improve the data collection and management systems. Even if data collection efforts were to be expanded, it is unlikely that additional burdens on employers would be anywhere close to those envisioned by EPF. Reform of recordkeeping and reporting requirements may also involve efficiencies and streamlining that could reduce overall burdens to employers.

5. Litigation Costs

EPF estimates \$11.4 billion in increased litigation costs due to the Bill. These are largely speculative. Estimates of these costs are not straightforwardly related to requirements of the Bill and cannot be claimed as burdens imposed by the Bill. Furthermore, employers in compliance with OSHA regulations would presumably not incur additional litigation costs. Employers facing potentially large litigation costs can choose to comply with OSHA regulations and reduce their overall costs as a result.