

THE WHITE HOUSE

WASHINGTON

December 7, 1993

MEMORANDUM FOR JOE DEAR

FROM: Ellen Seidman 

SUBJECT: OSHA Reform

Thank you for sending over your responses to yesterday's missive. I think we should use them as the basis for discussion this afternoon. I would like to focus on the following items, in this order:

- o Committees requirement
- o Construction
- o State and local government
- o Significant risk criteria

I think all other issues are either being taken care of elsewhere or are essentially off the table.

I am also enclosing a proposed alternative letter that has input from all relevant EOP offices, although I must admit that Pastor's office had signed off on your original. I have attempted to get as close as possible to your original, while responding to some widely and strongly held concerns. The revision also provides additional positive spin to the pro-reform position, including references to NPR, empowering workers, and keeping government bureaucrats out of the workplace. I have also enclosed a computer-generated redline to help you figure out what we've done. I hope it is useful; I have tried to clean it up to keep it as uncomplicated as possible.

My hope is that this revision will be acceptable to you, and that we will NOT have to discuss the letter. If there are major points of disagreement remaining, however, please let me know quickly. If discussion in a crowd of thousands would help, we'll do it, but I suspect that discussing the issues rather than drafting will be more productive.

Fudging vs. Specific Stand

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

Negotiation Posture
needs to be strong

EOP 12/7, 12:40 PM

- strong opening salvo

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 establish a strong basis for reform, and we support many of their initiatives. 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 ^{participate} ~~and~~ ^{to work together}

^{with} management ~~to work together~~ ^{work together} to improve the places in which they work will save lives and tax dollars, and will ^{make} ~~reduce~~ the

~~intrusion of government regulators into business~~ ^{on less burdensome} ~~intrusion of government regulators into business~~. These concepts are the key to a new worksite-based model of injury and illness prevention.

We are therefore pleased to support enactment of legislation that:

* includes comprehensive occupational safety and health programs and joint safety and health committees, and improves whistleblower protection;

* addresses gaps in the protection of public employees;

appearance of
backing down

Justice question

* increases 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;

* places 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

* puts 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 ~~other changes in our law~~ 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.

bill's flexibility
Giving sec flexibility in implementing

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 keeping

~~with the legislation's overall strategy to look for new, less costly and more effective implementation methods, we believe that~~ *it is important*
~~more flexibility with respect to small businesses and State and local governments could be achieved without undermining the effectiveness of the health and safety coverage of their employees.~~ *that have the flexibility to ensure*

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

~~Small workplaces & low hazard workplaces~~

EOP 12/7, 12:40 PM

move ahead promptly with a regulatory effort to require employers to establish comprehensive occupational safety and health 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. Please accept my assurances that you will have our full and active support in your endeavors.

STRONG ENFORCEMENT WILL BE 'CORNERSTONE' OF OSHA PROGRAM,
AGENCY HEAD TELLS BNA

The Occupational Safety and Health Administration will expand the use of criminal sanctions and its egregious case penalty policy as part of a strong enforcement program that will be the linchpin of OSHA's efforts to protect workers, according to Joseph A. Dear, the new head of the agency.

In a Nov. 19 interview with BNA, Dear outlined the broad parameters of the Clinton administration's strategy in the occupational safety and health field, pledging to combine consultation and education programs with a beefed-up enforcement scheme and a more efficient standards process.

In addition to expanding the enforcement program, OSHA will propose new standards on ergonomics and tuberculosis, with the ergonomics proposal due out in the current fiscal year and the TB standard proceeding on a fast track, Dear said.

In a 45-minute question-and-answer session, the new assistant labor secretary for occupational safety and health continually emphasized the need for a blend of programs aimed at penalizing employers who violate OSHA standards while using incentives to encourage fair-minded employers to comply with job safety requirements.

'I think we've got to use all of that,' Dear said. 'An effective enforcement program, a credible enforcement program, is the cornerstone of this. It creates a lot of demand for the voluntary compliance [programs], so you start there. But we have to use all of those methods if we expect to have a major impact.'

Enforcement Strategies

According to the new OSHA chief, the main points of that enforcement program include the following:

- * An increase in the number of instance-by-instance violation cases under its egregious case policy;
- * Expanded use of OSHA's existing penalty authority;
- * More criminal referrals to the Department of Justice when appropriate; and
- * Reinvention of the inspection process to cover more workplaces through better targeting and streamlined inspection procedures.

Many of those points have been discussed previously either in OSHA documents outlining agency goals or in remarks by Dear and other agency officials. However, Dear's remarks on criminal cases mark a departure from previous public comments by administration officials and appear to signal a tougher line on enforcement issues.

'I just want to make it clear that if the extent of the behavior is so bad that it's criminal, then we won't hesitate to use criminal penalties,' he said, adding that 'the problem is so enormous that we can't leave any tools out of the tool box. Criminal sanctions [is] one of the tools.'

A criminal enforcement policy will be one of the elements of a litigation/enforcement strategy to be designed by a joint team of officials from OSHA and the Labor Department's Office of the Solicitor, according to Dear. He said once that policy is refined, OSHA likely will approach the Department of Justice to enlist Justice's help in implementing the policy.

Dear acknowledged that Justice has been reluctant to prosecute alleged OSHA

crimes in the past, but said OSHA would have to prepare strong cases with complete investigations and proper documentation to make those cases more appealing.

Standard-Setting Agenda

While Dear hedged on specifics in other areas, he was clear that OSHA would break new ground in the way it crafts regulations to combat ergonomic hazards and TB.

'We do know we're going to propose a standard on ergonomics this [fiscal] year. We do know we're going to do a fast-track approach to a TB standard,' he stated.

Dear did not fully explain what he meant by the 'fast-track approach,' except to say he will set a deadline and 'challenge' the standards staff to come up with a proposal quickly. He added, however, that OSHA's efforts are dependent on the Centers for Disease Control and Prevention finalizing new guidelines to prevent TB transmission among health care workers.

Ergonomics likewise will be tackled in a different way, Dear said. The department has set up a specific ergonomics standard team to come up with a proposal this fiscal year, he said. The team will be headed by OSHA special assistant Barbara Silverstein, who will report directly to Dear. Other members will include staff from OSHA's offices of safety and health standards, frontline OSHA workers, and labor and industry experts, he said.

OSHA also will adopt a final standard on fall protection, he said, but it will not address steel erection, which will be dealt with in negotiated rulemaking, he said.

Other Issues

In other matters, Dear deferred questions on pending legislation aimed at overhauling the Occupational Safety and Health Act, saying the administration has not announced its position on that issue.

He restated the administration's commitment to have workers participate in matters affecting safety and health on the job and pledged to encourage employers to include workers.

However, Dear declined to say whether OSHA would try to mandate worker participation or whether the administration would support that element in Democratic-sponsored reform legislation (HR 1280, S 575). Mandatory worker participation through joint labor-management committees is a key element of the Democratic legislation, which is backed by organized labor and opposed by major business lobbying groups.

Dear said the administration would make public its views on OSHA reform soon, but he could not say specifically when that would occur. 'I'm very anxious to take a position on OSHA reform and get fully engaged in that debate,' he said.

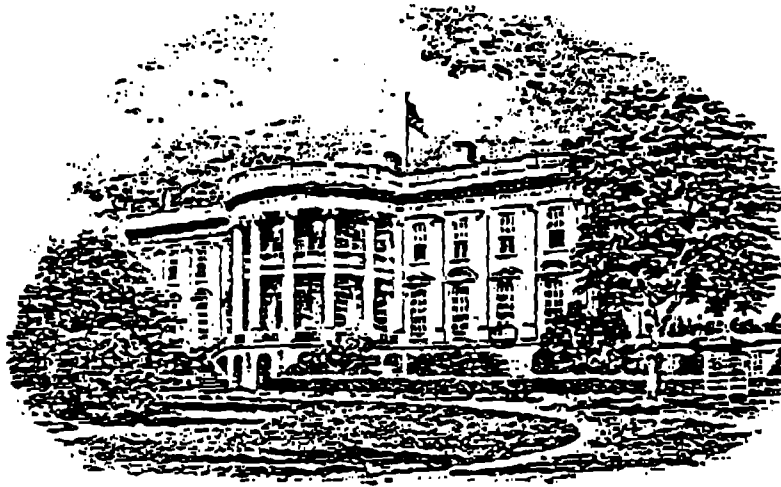
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WHITE HOUSE/NEC

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The National Economic Council The White House

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Phone: _____ FAX: _____

From: Ellen Seidman

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

Date: _____

Time: _____

Pages to follow: _____

THE WHITE HOUSE
WASHINGTON

December 6, 1993

MEMORANDUM FOR EOP OSHA REFORM WORKING GROUP

FROM: Ellen Seidman 
SUBJECT: Revised draft DOL letter

Attached is my best effort to meld together our comments on the DOL letter, while adding some positive spin on issues like reinventing government and keeping bureaucrats off business's back. I have also attached a redline which, for non-Word Perfect aficionados, attempts to show where stuff has been added to and stricken from DOL's original by shading the new things and striking out the old. Unless you're really compulsive, you may just want to read the new version.

Please get back to me (OMB folks, get back to Connie Bowers) with your comments as soon as possible Tuesday morning. Thanks for all your help.

Seidman draft
12/6/93

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 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 establish a strong basis for reform, and we support many of their initiatives. Your bills introduce new ways to "reinvent" regulation of workplace health

Seidman draft
12/6/93

and safety through comprehensive health and safety programs and joint safety and health committees. Empowering workers and management to work together to improve the places in which they work will save lives and tax dollars, and will reduce the intrusion of government regulators into business. These concepts are the key to a new worksite-based model of injury and illness prevention.

We are therefore pleased to support enactment of legislation that:

- * requires employers to establish comprehensive occupational safety and health programs and joint safety and health committees, and that improves whistleblower protection;
- * addresses gaps in the protection of public employees;
- * increases 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;
- * places special 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

Seidman draft
12/6/93

* puts into effect the Permissible Exposure Limits for airborne contaminants promulgated by the agency under the prior Administration.

When the Congress returns from its recess, we will be prepared to testify on the legislation in detail. In addition to discussing the initiatives mentioned above, we will be ready to suggest adjustments 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 keeping with the legislation's overall strategy to look for new, less costly and more effective implementation methods, we believe that more flexibility with respect to small businesses and State and local governments could be achieved without undermining the effectiveness of the health and safety coverage of their employees. 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

Seidman draft
12/6/93

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 all employers to establish comprehensive occupational safety and health programs, and to have those programs and their implementation regularly certified by either private sector experts or suitable employee representatives. We are implementing 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 reinforce 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. Many other actions will be announced soon.

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. Please accept my assurances that you will have our full and active support in your endeavors.

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. I explained that the high costs of workplace fatalities, injuries and illnesses are a significant impediment to competitiveness. Moreover, I expressed my conviction that toleration of such losses has no place in the New American Workplace, in which we must recognize that investment in our workers is the best investment we can all make in our future.~~

~~Since my testimony, we have been working very~~ ~~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

1

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- ~~* requires employers to establish comprehensive occupational safety and health programs and joint safety and health committees, and that improves whistleblower protection;~~
- ~~* addresses gaps in the protection of public employees;~~
- ~~* increases federal criminal felony penalties;~~

~~I am pleased to advise you that the Department of Labor will strongly support your legislation. Among other features of the~~

~~legislation, we will support enactment of:~~

~~* The requirement that all employers establish comprehensive occupational safety and health programs, the requirement that employers of eleven or more employees establish joint safety and health committees, and the improvements the bill would make in whistleblower protection, as the legs upon which our new worksite based model of prevention must stand.~~

~~* Coverage requirements that will close gaps in the protection of public employees.~~

~~* Federal criminal felony penalties, to complement those now available to State authorities, to enable us to appropriately punish those individuals responsible for conduct that is truly criminal in nature. To enable us to appropriately punish both collective and individual conduct that is truly criminal in nature.~~

~~* places special 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 special requirements in the construction industry to ensure coordination of safety and health protection among the many and constantly changing employers on construction projects.~~

~~puts into effect the Permissible Exposure Limits for airborne contaminants promulgated by the agency under the prior Administration.~~ 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.

When the Congress returns from its recess, ~~we will be prepared to testify on the legislation in detail.~~ In addition to ~~discussing the initiatives mentioned above, we will be ready to suggest adjustments that appear to be needed on such matters as employee litigation rights, criteria and procedures (including statutory deadlines) for standards action,~~ we will be prepared to testify on the bill's features in detail, including adjustment and changes that appear to be needed to its provisions on such matters as employee litigation rights, 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.

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~~costly and more effective implementation methods, we believe that~~
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~~employees. We would also like to work with you to ensure that~~
~~our budgetary and personnel policies can accommodate this~~
~~important new initiative.~~ It will also allow us to refine the
resource estimates. In that regard, we note that the bill makes
a start toward covering the added costs its enactment will create
for the government, and we would like to work with you to ensure
that our budgetary and personnel policies can accommodate this
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provide continued technical assistance to your staffs, and to
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have been developed over the last few months and which are
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implementation regularly certified by either private sector

5

experts or suitable employee representatives. We are implementing 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 reinforce 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. Many other actions will be announced soon.

~~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.~~ I want to assure you that my staff and I will be available to work with you as you seek to respond to questions about the legislation raised by other members of the Congress and stakeholders in OSHA reform. Please accept my assurances that you will have our full and active support in your endeavors.

6

OSHA "Caucus" - 11-6-93

- Unfunded Mandates
- Effect on Small Business
 - economic recovery
 - political -- health care

- NPR - recast it as NPR issue

① Make letter acceptable

② Decision Memo to Pres - short
here are issues that supporting
bill raises

→ NPR spin -- better enforcement
of current standards

- not max govt, cost-effective
way

- working w/ state govt

→ make flexible implementation
strategies

- State & Local issues --

- flexibility inherent in sec. exempt
authority

- unfunded mandates } By 5:00 today
- call Keith Mason } ~~for~~ ~~now~~

Date: 12/06/93 Time: 08:48

Clinton aide reportedly may back stronger workplace safety rules

Knight-Ridder

Washington--Dec 6--The Clinton administration may be ready to support controversial legislation that would force companies with 11 or more employees to set up worker-management teams to improve workplace safety, the Wall Street Journal reported today.

In a draft of a letter to Sen. Edward Kennedy, D-Mass., and Rep. William Ford, D-Mich., who are sponsoring the measure, Labor Secretary Robert Reich said his department will "strongly support" the union-backed legislation.

The letter is awaiting approval from the White House Office of Management and Budget, the newspaper said.

In addition to establishing safety and health programs, the bill would increase protection for whistleblowers in job-safety cases and toughen federal criminal penalties for violations.

Businesses oppose the measure, saying it would require them to implement costly safety regulations, the paper said. End

Date: 12/06/93 Time: 08:48

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

November 30, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-935

TO: Legislative Liaison Officer -

COMMERCE - Michael A. Levitt - (202)482-3086 - 324
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
ENERGY - Bob Rabben - (202)586-6718 - 209
HHS - Frances White - (202)690-7760 - 328
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
CEA - - (202)395-5036 - 242
GSA - William R. Ratchford - (202)501-0563 - 237
OPM - James N. Woodruff - (202)606-1424 - 331
SBA - Christine Swedin - (202)205-6702 - 315
EPA - Thomas C. Roberts - (202)260-5414 - 326
NEC - Sonyia Matthews - (202)456-6722 - 429

FROM: JANET R. FORSGREN (for) *Janet R. Forsgren*
Assistant Director for Legislative Reference

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

SUBJECT: LABOR Proposed Report on Comprehensive
Occupational Safety and Health Reform

DEADLINE: 4:00 p.m., Monday December 6, 1993

COMMENTS: The pending legislation referred to in the proposed report is HR 1280 and S 575. Please provide comments on these two bills as well as the Labor draft report.

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:

Howard Paster
Cookie Walden
Mike Schmidt
Kathy Way
* William Dickens
 (CEA)
Greg Simon
Clarissa Cerda
Barbara Selfridge
Larry Matlack

Pam VanWie
John Morrall
Steve Semenuk
Bob Damus
Bill Dorotinsky
Roger Adkins
Ray Kogut
Delphine Motley
Janet Forsgren

Revised, 11/22/93

Changes marked on p.2 to: a) deal with resource issue; and b) delete unnecessary reference to still unpublished NPR.

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 the high costs of workplace fatalities, injuries and illnesses are a significant impediment to competitiveness. Moreover, I expressed my conviction that toleration of such losses has no place in the New American Workplace, in which we must recognize that investment in our workers is the best investment we can all make in our future.

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- * Coverage requirements that will close gaps in the

protection of public employees.

- * Federal criminal felony penalties, to complement those now available to State authorities, to enable us to appropriately punish those individuals responsible for conduct that is truly criminal in character.**

- * Special requirements in the construction industry to ensure coordination of safety and health protection among the many and constantly changing employers on construction projects.**

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encourage worker-management cooperation in the field of safety and health. Many other actions will be announced soon.

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Sincerely,

Robert B. Reich

OSHA Reform Act - 12-3-93

1 am van
Charlotte

DOC did good amount of outreach -- not altogether pleased w/ result

Political

- Business Community has stonewalled issue
- see as extreme, very beatable
- Committees agree that bill won't pass, but need admin support to get parties to table.
- NAFTA set this issue rolling
- Need to start process of mending fences w/ Labor, Labor supports OSHA Reform.
- would be a good show of support to unions
- Pres meets w/ Kirkland on 10+1 - nice to be able to tell him some positive news on Bill
- ~~NAFTA~~ POL wants announcement by Dec 16+1

Public Courage is crucial - MS. Clinton is in negotiations w/ AFSME

3rd Party Issues in UPR - opposed by Political, OMB, DOC, Labor

Cost/Benefit analysis needed on economic effects
OSHA working on

p. 2

\$200 million in increased fines -- assumption used to fund OSHA -- not supported by data or OMB Scoring rules

① Committee Requirements

- 6 states have some form of committee requirements
- SIZE ISSUES ("11 or more" too small?)
- high-risk industries only
- mandatory/voluntary

Size issue

maybe AIP issue -- raise size floor, but allow Sec to require certain hazardous industries to be covered regardless of size.

② State & Local Plans

unfunded Mandate

Cost to ~~the~~ states

- ~~state plan creation and enforcement~~
- Having to fix the problem, compliance

- OSHA Grant program - State picks up half

Benefits

- cover people previously not covered
- Health & safety benefits
- actual cost -- probably pretty big
- Federal costs ↑ as more investigators hired, states drop so-so plans.
- OSHA resources will still be tight, ~~will~~ will have to stretch thin resources even further.
- Federalism issue / Sovereignty issue
- Private Sector is, on a whole, ~~far more~~ far more risky than Public Sector -- if we stretch resources, can cover less Private Sector.

- Cover Categories of Public Sector? - Fire, Hospitals, etc

Creative option -- allow Governor to exempt certain areas -- as Governors decision & responsibility.

AFSCME ~~ISSUE~~ ISSUE
(*) (*)

Federal Employees Coverage

Criminal Penalties

- current penalties are ridiculous
- no one takes seriously - DOJ doesn't even take cases
- DOJ support?

Construction Industry

- each contractor would have to have safety inspector (~~at~~ normally many contractors per site)
- Scope? - too broad
- Logistically Feasible
- Time delays enormous
- Job creation commitment

(14) Standards

- must distinguish between Final & proposed rules
- proposed rules must be put through public comment

~~Law case is~~ Court overturned in 1858

Put proposed out for comment administratively up to
when law is enacted, we can have rules ready to
become final

Immediate issue

letter - which to sign?

need signature soon



U.S. Department of
Transportation

General Counsel

102-09/93,05
Bowers
400 Seventh St., S.W.
Washington, D.C. 20590

August 12, 1993

The Honorable Leon E. Panetta
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Panetta:

The Department of Transportation (DOT) is submitting its views on S. 575, a bill entitled the

Comprehensive Occupational Safety and Health Reform Act.

For the reasons that follow, DOT does not support sections 301, 302, 304, 512 and 1204 of the bill as they apply to the Department. We believe these changes in the law would seriously lessen the effectiveness of our safety and environmental programs. At a time when the President is committed to re-inventing government, by making the government less of a burden and less intrusive upon the general public as well and by shrinking the use of government resources, it would be a mistake to amend the OSH Act to put two agencies in charge of occupational safety and health in areas already covered by DOT agencies. Neither the federal sector nor private sector should be subjected to dual federal agency coverage.

Section 301

Section 301 of the bill would amend the OSH Act to expand Occupational Safety and Health Administration (OSHA) jurisdiction to cover government agencies, including DOT. Currently, Executive Order 12916 (entitled "Occupational Safety and Health Programs for Federal Employees") and 29 C.F.R. 1960 already impose an obligation on federal agencies to comply with occupational safety and health standards. We believe that the Executive Branch is fully capable of assuring worker safety in its own agencies without an inflexible statutory mandate from Congress.

Section 302

Section 302 of the bill would directly affect our safety regulatory agencies' authority to regulate effectively the aviation, railroad, motor carrier, maritime, hazardous materials, and pipeline industries. Section 302 would amend section 4(b)(1) of the OSH Act (29 U.S.C. 653(b)(1)) to grant OSHA final

authority to determine whether the regulations or standards of another Federal agency adequately regulate that agency's target industry with respect to employee safety and health issues. Currently, section 4(b)(1) authorizes each Federal agency with regulatory powers to exercise its own jurisdiction with respect to health and safety issues by promulgating regulations that address those concerns. Where the Federal agency does not exercise its authority to prescribe and enforce health and safety standards, OSHA's jurisdiction and regulations apply.

As proposed, this legislation would cause a fundamental change in the operation of section 4(b)(1) of the OSH Act and the powers of each Federal agency relative to OSHA. Section 302 would permit OSHA to review the existing regulations of other agencies and determine whether they adequately protect the occupational health and safety of employees within the agency's regulatory jurisdiction at least as effectively as pertinent OSHA standards. If OSHA finds the regulations to be adequate, a notice would then be published certifying that OSHA affirmatively cedes jurisdiction to the other agency with respect to the subject matters addressed by those regulations. Any adversely affected person could petition OSHA to rescind such certification and challenge the decision by filing a petition in the federal court of appeals for the circuit where the person resides or does business.

The implication of Section 302 is that an agency lacks exclusive authority to regulate occupational health and safety of employees in the industries within its purview until the certificate ceding jurisdiction has been published, and that OSHA's decision not to certify or to rescind its certification nullifies such authority. This would undercut existing section 4(b)(1) of the OSH Act, obscuring the authority of federal agencies to implement regulations effectively. The resulting jurisdictional confusion could also discourage agencies from acting to supplement or improve their current safety and health regulations.

For example, the Federal Railroad Administration's (FRA's) basic safety statute, the Federal Railroad Safety Act of 1970, provides FRA with authority over "all areas of railroad safety," 45 U.S.C. 431(a). This includes authority to regulate occupational safety and health in the railroad industry. Under existing section 4(b)(1) of the OSH Act, OSHA may not regulate working conditions where another agency has exercised its authority over these conditions. Generally, FRA has limited its exercise of authority in this area to subject matters that are intrinsic to railroad operations and require the specialized expertise of its safety staff. See Policy Statement, 43 Fed. Reg. 10583 (1978). OSHA would have to expend enormous resources to acquire or duplicate the expertise necessary to carryout the rail safety mandate. Comparably, in the case of marine safety programs, OSHA personnel would have to be trained at great cost to acquire necessary skills commensurate with those of Coast Guard personnel.

The enormity of the task OSHA would have to undertake to satisfy section 302 would undoubtedly cause delay and confusion as to whether agency regulations apply or, at least, as to their enforceability. Currently, a federal safety regulatory agency consults with OSHA concerning subjects within OSHA jurisdiction and regularly refers matters as appropriate. Altering this authority by granting final review and approval rights to OSHA would split responsibility between two agencies, instead of ensuring appropriate consultation and coordination (as under the current approach), and thus delay and lessen our ability to protect the safety of employees throughout the transportation industries.

Section 304

Under amendments proposed by section 304 of the bill, it appears that the liability imposed for worker injury and death could be broadly construed against government and private-sector employers. For example, if the Coast Guard had an on-scene coordinator at the site of a pollution spill, the Coast Guard could be held liable for any violation involving contracted-for clean-up personnel. Presently, the Coast Guard requires contractors to comply with OSHA's Hazardous Waste Operations and Emergency Response regulations. However, the "general duty" aspect of section 304 overlooks the fact that, in circumstances such as an oil-spill clean up, government and private-sector employers are not always able to select, and cannot serve as guarantors of, "employment and a place of employment which are free from recognized hazards". In view of this difficulty, we believe section 304 of the bill should include exceptions for such situations. We would defer to the Department of Justice for a definitive interpretation of this provision.

Section 512

Section 512 would impose criminal penalties upon the "employer or any officer, management official, or supervisor having direction, management, control, or custody of any place of employment who willfully violates any standard...." As discussed above, government and private-sector employers may knowingly select a less-than-totally-safe "place of employment". Also, due to the complex structure of large organizations, it is often not clear as to which individuals were the actual decision-makers. Absent adequate evidence of personal wrongdoing, criminal penalties should not automatically be imposed upon the "management official". Therefore, section 512 should specify in detail the criteria that will be used in determining whether a particular individual should be criminally sanctioned.

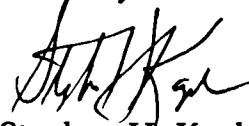
Section 1204

Section 1204 would add a new section 31 to the OSH Act of 1970. Section 31(a)(2) provides that, if more than one general or prime contractor is on a particular construction project, then the owner of the project becomes the "project constructor". The "project constructor" is responsible for complying with subsections 31(b) and (c), which, among other things, require the development and implementation of a construction safety and health plan for the construction project as well as ensuring such plan is implemented and complies with occupational health and safety standards, unless a contractor consents to relieve the "project constructor" from such responsibility.

Section 1204 would shift the responsibility of ensuring compliance with occupational health and safety standards from the contractor, who is the employer of its employees, to the owner of the property. Taken to the extreme, section 1204 would make the owner, as the "project constructor", responsible for occupational health and safety of every person who worked on his property even though the employees were following the direction of their respective general or prime contractor. It seems infeasible to shift such a responsibility upon the owner. Therefore, section 31 should exclude property owners from becoming "project constructors". This new provision could affect the Departments of Interior and Agriculture directly, for example, by making them the "project constructor" in the case of direct public lands highway construction.

We appreciate the opportunity to comment, and we would like to work with other federal agencies, including the Department of Labor, in formulating views for presentation to Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen H. Kaplan", written over a horizontal line.

Stephen H. Kaplan

10:00 Mtg Loretta/Marcia Hable

- Payment to states
issue

- ancient Land claims

Self determination

Per - Capita

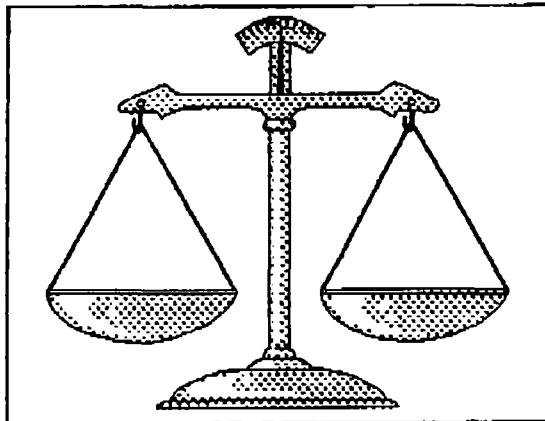
Hilton Hotel - Seattle

503 - 392 - 2000

Tom and Wayne

Kim + 7370

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS



Revised version
that DoL + DOJ
agreed to —

FACSIMILE COVER SHEET

TO: CONNIE BOWERS

FAX NO: 6148 / OMB

FROM: FARAH BURTON

DATE: 10/5

NO OF PAGES: 7 (EXCLUDING COVER SHEET)

CONTENTS: _____

TESTIMONY OF
JOHN C. KEENEY
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE
BEFORE THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON LABOR
ON THE
CRIMINAL PROVISIONS
OF S. 575
THE COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT

OCTOBER 5, 1993

I am happy to be here today to testify on behalf of the Department of Justice on the criminal provisions of S. 575, the Comprehensive Occupational Safety and Health Reform Act. As the agency with responsibility for enforcement of OSHA's criminal provisions, the Department of Justice has a keen interest in ensuring that criminal provisions of the OSHA Act are both appropriate and effective.

I am here today to comment on how the Department of Justice, as the agency responsible for criminal litigation, views the provisions of the bill as fitting into the broad context of Federal criminal law. The appropriateness of these provisions from the point of view of OSHA policy, including its impact on civil investigations, is a matter that remains under review by the Department of Labor.

Specifically, I would like to direct my remarks today to the following provisions of the bill:

- (1) Increases in the maximum period of imprisonment for existing OSHA offenses and changes in the language defining the applicable fines;
- (2) Provisions relating to the potential criminal liability of corporate officials and supervisors who willfully violate OSHA safety standards;
- (3) The proposed new criminal offense for willful violations of OSHA standards which cause "serious bodily injury" to an employee;

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(4) The anti-preemption provision precluding federal preemption of state criminal prosecutions for offenses involving deaths and serious injuries to employees in the workplace.

Increase in Criminal Penalties

S. 575 would increase the penalties for the current criminal offenses under OSHA, particularly the principal OSHA criminal statute, 29 U.S.C. Sec. 666(e). Section 666(e) contains the criminal penalties for a willful violation of an OSHA standard which causes death to any employee. The bill would change the maximum period of imprisonment authorized from six months for a first offense and one year for a repeat offense to 10 years for a first offense, and 20 years for a subsequent offense.

The Department of Justice would welcome an increase in the maximum period of incarceration available for violations of 29 U.S.C. Sec. 666(e). Because both willful conduct and the death of a human being are involved, cases referred for prosecution under this statute are inherently serious. Misdemeanor penalties simply do not adequately reflect the gravity of these offenses. In addition, an increase in the maximum period of imprisonment to a felony level could have the positive effect of increasing the allocation of prosecutorial resources to OSHA prosecutions. For these reasons, the Department of Justice supports an increase in the maximum period of imprisonment authorized for a violation of 29 U.S.C. Sec. 666(e).

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Changes in Fine Language

S. 575 would also change the existing statutory language to provide for a "fine in accordance with section 3571 of title 18, United States Code." Section 3571 of title 18 is the fine provision in the Sentencing Reform Act of 1984, which applies to all federal offenses. This general federal fine statute is currently applicable to OSHA offenses, and provides for fines higher than those specified in the current OSHA statute.

For this reason, the bill would make no substantive change in the applicable fine. It would, however, more accurately reflect the applicable law and eliminate a potential source of confusion. In the interest of clarity, the Department of Justice supports this provision.

Criminal Penalties for Corporate Officials and Supervisors

The present criminal statute at 29 U.S.C. Sec. 666(e) refers to "any employer" who willfully violates a standard. This bill would add the phrase "or any officer, management official, or supervisor having direction, management, control, or custody of any place of employment."

There has been considerable dispute in the courts on whether and under what circumstances culpable individuals may be convicted of violating 29 U.S.C. Sec. 666(e), particularly where the "employer" is a corporation. Our view that culpable individuals who may not themselves be "employers" within the meaning of the OSHA Act are nevertheless subject to criminal

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prosecution under the general aiding and abetting statute (18 U.S.C. Sec. 2), has not prevailed in some federal courts.

We would support a provision which makes it clear that individuals who are responsible for the prohibited conduct are included within the scope of the statute, regardless of whether the individuals are themselves technically "employers" within the meaning of the statute. Otherwise, when the employer is a corporation, the very individuals whose willful conduct caused the corporate employer's violation would themselves be shielded from accountability for their actions under the criminal laws, while an employer who is a sole proprietor would be fully subject to prosecution for precisely the same conduct. Moreover, the sole proprietor would be subject to possible imprisonment, while a corporate violator would not. For reasons of fairness and accountability, we support placing responsibility under the criminal law on those persons in authority, corporate or individual, whose willful violation of OSHA standards causes the harm. We would like to confer with the Subcommittee staff and the Department of Labor about whether the bill's language best achieves this goal.

Proposed "Serious Bodily Injury" Offense

The bill would create 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." The bill also would extend potential criminal liability to individual managers and supervisors who are responsible for willful

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violations which cause such injury. S. 575 would define "serious bodily injury" as

"bodily injury that involves--(A) a substantial risk of death; (B) protracted unconsciousness; (C) protracted and obvious physical disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

A number of federal criminal statutes contain a definition of serious bodily injury. Among these are 18 U.S.C. Sec. 247 (obstruction of free exercise of religious beliefs), 18 U.S.C. Sec. 1365 (tampering with consumer products), 21 U.S.C. Sec. 802 (definition for purpose of the drug abuse statutes), 18 U.S.C. Sec. 1864 (hazardous or injurious devices on federal land), 18 U.S.C. Sec. 831 (prohibited transactions involving nuclear materials), and 18 U.S.C. Sec. 2245 (definition for purposes of statutes governing sexual abuse offenses in areas of federal territorial jurisdiction). These definitions are not all identical, but are reasonably similar to each other and to the definition proposed in this bill. For example, 18 U.S.C. Sec. 2245, is typical and provides as follows:

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty; . . .

18 U.S.C. Sec. 2245 (4).

These existing statutory definitions provide workable standards under which a jury can be instructed and decide the issue of fact. We are aware of no successful challenge to standards of this type on grounds of unconstitutional vagueness.

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Similar legal standards are well established in the case law, see, e.g., United States v. Johnson, 637 F.2d 1224, 1246 (9th Cir. 1980), and present no significant legal problems in criminal prosecutions.

Accordingly, from the standpoint of Federal law enforcement, the Department of Justice would have no difficulty in enforcing a new criminal offense for willful conduct which causes serious bodily injury, with extending criminal liability for that offense to culpable individuals, nor with the definition of "serious bodily injury" in S. 575. However, we must defer to the Department of Labor with respect to how this provision would affect its safety and health programs.

Preemption Issue

S. 575 contains a provision which states that:

Nothing in the Act shall preclude State and local law enforcement agencies from conducting criminal prosecutions in accordance with the laws of such State or locality.

This anti-preemption provision appears to be addressed to a problem which arose in some state criminal cases involving deaths and injuries related to workplace safety. We support the intent of this provision. We would be happy to provide some technical assistance on the language if that would be useful to the Subcommittee.

It has been a pleasure to be with you here today. At this time, I will take any questions.

Mustard

Statement of
Secretary of Labor Robert B. Reich
Before the
Committee on Education and Labor
U.S. House of Representatives

April 28, 1993

Mr. Chairman, Mr. Murphy, Mr. Goodling and Members of the
Committee --

Today marks the twenty-second anniversary of the effective date of the Occupational Safety and Health Act. In 1971, we celebrated this seminal legislative achievement as the centerpiece of a national commitment to end the human and economic toll caused by workplace injuries and illnesses. Twenty-two years later, we take heart that much has been accomplished.

The Act, however, has not fulfilled all of our hopes and aspirations. Our workforce and our economy continue to suffer grievous and unnecessary losses. The law needs to be changed if its promise -- "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" -- is to be realized. April 28, 1993 is therefore a fitting day to pledge to develop a new approach -- in full partnership with all those whose knowledge, creativity and energy are required to meet this challenge. We must preserve the best of the current program, and examine new approaches based upon our collective experience. In this regard, I am mindful that this Committee and its Senate counterpart have taken a leadership role in making these issues a priority concern.

Improved workplace safety and health is an important aspect of this Administration's commitment to better jobs for all Americans. This commitment is entirely consistent with a more productive and more profitable America. In the emerging economy of the 21st century, employers and employees win or lose together; one group cannot gain for long at the expense of the other.

America's most forward-looking companies treat their workers as a key competitive asset to be developed rather than as a cost to be cut. These companies already provide healthy and safe workplaces, just as they continuously improve the skills of their employees and involve them in decisions about how to improve productivity and quality. The challenge we face as a nation is to guide and accelerate these practices throughout the American economy.

We have made progress in providing safer and healthier jobs since the enactment of the OSH Act. According to the Bureau of Labor Statistics, fatality rates have declined since 1971. Moreover, other studies provide evidence that where OSHA has focused its resources on a problem, successful results have been achieved. For example, five years after the agency's lead standard was issued, blood lead levels of workers in certain battery plants decreased by almost fifteen percent. Air lead levels in these plants were reduced by fifty percent. Similarly, OSHA's cotton dust standard has reduced the percentage of cotton yarn workers in the textile industry who suffer from byssinosis

-- commonly referred to as "brown lung" -- from twenty-six percent to less than one percent. In addition, the General Accounting Office reported that almost thirty percent of employers have substituted less hazardous chemicals as a result of the OSHA's Hazard Communication Standard.

Despite this progress over two decades, the toll of workplace deaths, injuries, and illnesses continues at unacceptably high levels. In 1974, the rate of Lost Workday Injuries and Illnesses -- those incidents in which an employee loses, or must be placed on light duty, at least a full day -- was 3.5 per 100 workers. The rate has fluctuated over the years, and in 1991, this rate was 3.9 per 100 workers. Although the fatality rate has declined, the Bureau of Labor Statistics estimated that in establishments of eleven or more employees 2,800 workers were killed on the job in 1991.

Regrettably, these statistics do not describe the full extent of the danger at our workplaces. Workplace fatalities, as measured in the past, have been understated. In comparison to the BLS figures, the National Safety Council reported 9,900 workplace fatalities in 1991. In addition, reputable studies suggest that thousands of deaths resulting from occupational illnesses go unreported each year because we cannot link later disease to earlier workplace exposures.

Our statistical reporting capabilities will soon improve. By this Fall, the Bureau of Labor Statistics expects to release its new Census of Fatal and Occupational Injuries which will

include more comprehensive and accurate fatality data for the nation.

In addition, it must be recognized that today's workplace is in many ways different from that of two decades ago, and new technology and mechanization bring new hazards. Workplace illnesses associated with stresses from repeated motions of wrists and limbs, such as carpal tunnel syndrome, which were barely recognized when OSHA was created, now make up more than three-fifths of all occupational illnesses recorded by employers. In 1983 there were about 27,000 recorded cases of repetitive motion disorder. In 1991, nearly 224,000 repetitive motion disorder cases were reported by BLS. For instance, an ever-growing number of Americans spend their days in front of computer terminals -- entering, manipulating, or retrieving data -- and, therefore, musculoskeletal and nerve ailments to hands, arms, necks, and shoulders are becoming the occupational diseases of the information age.

Other recent workplace health concerns are indoor air pollutants and diseases that can be contracted wherever people are in close contact for long periods of time, such as tuberculosis and hepatitis.

In addition to human suffering, accidents and illnesses on the job also exact a substantial economic toll on society. For example, in one study examining accidents of all types, the Rand Institute for Civil Justice reported that workplace accidents cost the nation \$83 billion annually. This includes \$51.7

billion in lost production -- the equivalent of 2 million work-years annually -- and \$31.5 billion in medical costs associated with injuries. This \$83 billion almost equals the total cost of all non-work-related accidents put together, even though work accidents make up only twenty percent of all accidents. And Rand did not even take into account costs due to workplace illnesses.

Employers are directly saddled with much of this bill, as exemplified by workers' compensation payments of \$52 billion in 1990, the last year for which such data are available. Total employee benefits paid on an annual basis, such as wage replacement and medical costs, increased from \$3 billion in 1970 to \$38 billion in 1990. Compensation per covered employee increased from \$51 to \$402 during that period. Workers' compensation costs now average over two percent of payroll; in some industrial sectors, like construction, however, workers' compensation costs are in excess of fifty percent of payroll. A study of California companies indicates that even business owners in wholesale trades -- a relatively safe industry -- now expend eleven percent of payroll on workers' compensation premiums. Restaurant owners expend over eight percent.

Other studies suggest that the indirect costs are even higher: notably, of lost productivity caused, for example, by damage to plant and equipment. All these costs, much of which are avoidable, impose a significant drain on our nation's capacity to compete in the global economy.

Approximately 12 percent of workers are not covered by any workers' compensation program. Nor do those programs provide consistent coverage for many conditions, including occupational diseases. Lost and diminished employment can result in lost and diminished pensions and other essential, employer-provided benefits. Social Security, Medicare, Medicaid and a variety of other public and private programs pick up some of these costs -- often at taxpayer expense.

Prevention of workplace injuries and illnesses is a sound investment in our economy and our future, and is vastly preferable to the payment of compensation for the suffering caused by injury and disease. The cost of prevention is significantly lower than the cost to employers, workers, and society as a whole of continuing to endure unsafe and unhealthy working conditions.

We can, as a nation, better protect our workforce; it appears that other countries are doing so. While data across countries are not strictly comparable, data reported to the International Labor Organization indicate that Japan and Sweden have a rate of fatal workplace accidents that is about one-half the rate in the United States.

This Committee has devoted considerable time and thought to the question of how to reduce workplace injury and illness, and I salute your continuing commitment to this issue. I also recognize that many of the provisions of the Chairman's bill reflect the careful deliberations of others who have addressed

the questions. A number of its provisions have been drawn from other Federal laws, such as the Federal Mine Safety and Health Act of 1977, state laws, and recommendations of the Administrative Conference of the United States.

Although the Clinton Administration has not yet fully considered the specific provisions of the proposed legislation, I want to assure the Committee that we will do so as soon as possible. I am assembling a team to thoroughly review it, and I look forward to discussing the issues with the Committee and others as we develop the Administration's views and recommendations. Today I would like to share with the Committee a set of principles which will guide our review.

Preventing hazards at the worksite should be our central focus.

One of my goals as Secretary of Labor is to encourage employers and employees to join together in order to achieve mutual gains. Few workplace issues offer as obvious a common ground for meaningful collaboration as safety and health. Workers have an immediate and direct interest in workplace safety and health, for their lives and their livelihoods are at stake. By enlisting that interest, employers can reduce the costs they bear as a result of occupational injuries and illnesses, and increase workplace productivity. I believe that we have an enormous opportunity to foster and build upon this common interest, and to forge a new and lasting partnership for change.

Everyone agrees that there must be active involvement on the part of employers to identify and abate safety and health hazards. Many American firms have reported very successful results with innovative approaches that involve safety and health programs and cooperative efforts between management and labor. The human and economic costs of workplace hazards make it our duty to require that employers implement appropriate and effective injury prevention programs.

We should not ask employers, however, to undertake efforts that add meaningless paperwork or impose costs that will not produce results. At the same time, employers need guidance on the types of prevention initiatives they can adopt that will, in a reasonable period of time, achieve real returns.

It is inconceivable that major improvement in the health and safety of a workplace can occur without the real and active involvement of workers. I nevertheless recognize that determining a method to effectively tap worker knowledge and interest is, in itself, a contentious issue. As I stated at my confirmation hearing, I am intrigued by the legislation's proposed use of joint employer-employee committees as a technique for preventive maintenance which would provide a continuing presence to assure safety and health at the front lines. Stimulating better understanding and broader knowledge of the role of joint committees will be one of my priorities.

In addition, in my view, a necessary first step to viable worksite-based programs is to strengthen the Act's ban on

retaliation against employees who report safety and health hazards. OSHA continues to receive many complaints of reprisal against such employees; "whistleblower" provisions of the law need to be improved and consistency established among Federal safety and health laws.

Better training of employers, employees, and health professionals is an important means of prevention.

Employers and employees must be better educated to detect and prevent workplace injuries. Training in safe and healthy work practices is essential. Employers and employees also must be informed about their mutual responsibilities under the law. The government has a vital role to play in both respects. As Chairman Ford has recognized in his proposal for a revolving fund, we need innovative means for financing additional educational and training services.

Doctors, nurses, and allied public health professionals also can help establish effective prevention programs at the workplace. To do so, health professionals need to be educated to ask patients about their working conditions, and to evaluate the information which is provided.

Incentives to promote hazard abatement need strengthening.

Many businesses experience the cost of the failure of prevention only through the operations of the insurance market. We need to explore with the insurance industry and with employers

how various changes in insurance pricing mechanisms might create greater incentives for employers to prevent injury and illness at the workplace. We also need to explore how the insurance industry might better assist its customers with loss control services, in training and education efforts, and in designing and managing worksite-based safety and health programs.

OSHA's regulatory efforts must be streamlined.

The current standard-setting process needs reform. OSHA rulemaking proceedings take far too long. When this occurs, the provision of worker safeguards is unnecessarily delayed.

I understand the justified frustration of those interested in a particular rulemaking project with the slow pace of action by OSHA. However, I am also concerned that allocating OSHA's limited resources to certain projects by statute or court order jeopardizes other efforts that ultimately may be more urgent. I believe that an important function of a regulatory agency is to use its expertise to establish priorities for action, and that such exercise of delegated power is preferable to either legislative or judicial mandates on a case-by-case basis.

Some of the problems the agency has faced in promulgating rules are the result of rigid judicial interpretations of the current statutory language which impose heavy evidentiary burdens on OSHA. The most recent example is the Federal court of appeals decision striking down OSHA's revised air contaminants standard. I do not believe that the agency should 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.

I am especially eager to find ways to create a non-adversarial climate of rulemaking in which all parties -- employers, employees, government, and others with knowledge -- work together to identify and resolve safety and health problems. The most desirable process is one which results in rules that can be implemented quickly because they have been developed with the full and informed participation of those who must implement them.

OSHA must have penalties which induce compliance.

Prevention and collaboration are preferable. But OSHA also must have a credible enforcement mechanism in order to deter violations of the Occupational Safety and Health Act and its rules and regulations.

Further, the agency must be capable of achieving prompt abatement of hazards. Under current law, if an employer contests a citation or proposed penalty there is no requirement that the employer abate the cited hazard. Some abatement orders take years to become final. Throughout this time, workers may continue to be exposed to serious hazards. We must provide appropriate due process to employers, but we must also ensure that the risks of serious workplace hazards are minimized, if not eliminated.

In addition, those few employers who intentionally neglect or ignore their duties under the law must be dealt with effectively and forcefully. While these employers constitute only a small part of the employer population, the government's limited ability to pursue criminal prosecution of willful violations of the law invites irresponsible behavior.

A third concern is how we assign responsibility for occupational safety and health on multi-employer worksites which have for years been routine for the often-hazardous construction industry; however, they are becoming increasingly common in other parts of the private sector. While existing law attempts to address multi-employer worksites, it may not be fully adequate.

Also, there are good reasons to extend the OSH Act's protection to the over seven million State and local public employees who are not now covered by the Act. Many of these employees, such as fire fighters and sanitation workers, are performing extremely hazardous work. Nevertheless, the decision to expand coverage must be carefully considered, because adding a new population will result in a greater demand on OSHA's resources.

In summary, the status quo is simply unacceptable. A safer and healthier workplace is good for our nation and good for our nation's commerce. Preventing injuries and illnesses before they occur will save significant resources, improve our productivity and capacity to compete in global markets, and enhance our

standing of living. I salute the leadership that this Committee and its Chairman, along with Senators Kennedy and Metzenbaum, have given this issue.

I believe we can build a consensus around the principles I have outlined, and I am committed to doing so. I want to assure you that as we move forward to develop a new and strengthened OSH Act, I am also committed to making the existing statute function as effectively as possible in the interim. I will reach out to the Congress, employer and employee organizations, the State governments, and to department and agencies of this Administration to exchange ideas and promote cooperation in this regard.

As we approach the 21st century, let us together recommit ourselves -- as we did twenty-two years ago -- "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions".

Thank you.

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 *Janet R. Forsgren*)
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



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. 2408, 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

**MEMORANDUM TO ELLEN SEIDMAN
BRUCE REED**

DATE: December 6, 1993
FROM: Charlotte Hayes
SUBJECT: OSHA Reform--DOL Letter Revision

Mike / PJW

For purposes of making the DOL letter consistent with the Administration's reinventing government approach, I suggest an insert at the end of paragraph two, page one:

"In addition, I am committed to the principles of Vice President Gore's National Performance Review, and want to encourage companies to embrace labor-management cooperation and to give employees the tools to humanize the workplace. In this regard, OSHA reform can more effectively implement existing safety requirements for the workplace, where workers need safe conditions."

I have attached the draft memo from Elaine Kamarck which describes the change in the NPR recommendation on OSHA reform with respect to safety inspections by third party entities or non-management employees. I also attach the relevant section of the draft NPR report on DOL for your information.

Revised, 11/22/93

Changes marked on p.2 to: a) deal with resource issue; and b) delete unnecessary reference to still unpublished NPR.

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 Chairman 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 the high costs of workplace fatalities, injuries and illnesses are a significant impediment to competitiveness. Moreover, I expressed my conviction that toleration of such losses has no place in the New American Workplace, in which we must recognize that investment in our workers is the best investment we can all make in our future.

Since my testimony, we have been working very 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. [INSERT]

I am pleased to advise you that the Department of Labor will strongly support your legislation. Among other features of the legislation, we will support enactment of:

- * The requirement that all employers establish comprehensive occupational safety and health programs, the requirement that employers of eleven or more employees establish joint safety and health committees, and the improvements the bill would make in whistleblower protection, as the legs upon which our new worksite based model of prevention must stand.

- * Coverage requirements that will close gaps in the

DRAFT

MEMORANDUM TO THE VICE PRESIDENT

FROM: ELAINE KAMARCK

RE: NPR ACCOMPANYING REPORT - DEPARTMENT OF LABOR

DATE: NOVEMBER 30, 1993

I. The Department of Labor's accompanying report has been reviewed by Larry Matlack at OMB on November 17, 1993 by Tom Glynn, Deputy Secretary of Labor on November 23, 1993. It was sent to Bruce Reed and to Joan Baggett for review on November 23 but we have no response at this time.

II. Known Political Sensitivities.

DOL - 08 - Create one stop centers for career management. This has the potential to be problematic if AFSCME wants to make it so. We negotiated with them on the language in the report prior to our September 7 release and they were satisfied with the addition we made to the report. Doug Ross at the Labor Department continues to work with them to keep them on board. So far so good. This is probably the most innovative and important piece of this report therefore we should continue to be sensitive to AFSCME in order to make sure it happens. However, the most important piece of this recommendation - that these centers be competitively awarded - will never be one with which AFSCME is totally comfortable.

DOL 10 - OSHA reform. This recommendation caused great consternation when the report was published in early September because the synopsis in the report led some to believe that we advocated work-place self inspection by employers. In the months since then Steve Rosenthal of the Labor Department has worked with Sarah Fox on Senator Kennedy's staff to rewrite the recommendation so that it is clear that we mean self inspections by employees and unions and not the Reaganesque notion of self certification by employers. This proposal now tracks work being done in Congress and in DOL on this issue. It should no longer be a problem.

III. Potentially New Political Problems of a General Nature.

DOL 19 - Transfer the Veteran's Employment and Training Service to the Employment and Training Administration. This proposal has the potential to be controversial although it was discussed on page 100 of the Sept. 7 report and elicited little negative comment in the general press at that time.

However, DOL continues to believe that it is a major political problem especially on the Hill where Veterans groups defend their own training service. They are also worried that folding VETS into ETA would look insensitive to the needs of Veterans while downsizing is going on in the military.

DOL 06 - Amend the Erisa Summary Plan description filing requirement. This proposal, supported by both DOL and NPR faces some potential problems on the Hill from staffers who believe that this requirement serves as a deterrent and thus protects pension plan participants. DOL is currently working with hill staff on this problem.

IV. Interagency and lobbying problems.

DOL 9 - The creation of a workforce development council to integrate various federal funding streams for various training programs may be opposed by vocational educational lobbies. However, this recommendation is critical to the VPs vision of a streamlined and more responsive government.

DOL 11 - The Labor Department objects to the proposal to expose 30 federally administered Job Corps sites to a competitive process. We believe competition is a critical NPR principle well applied in this instance.

DOL 15 - The Interior Department opposes a transfer of funds from the Bureau of Mines to the Mine Safety and Health Program for the acquisition of new and improved technology.

DOL10: REFOCUS THE RESPONSIBILITY FOR ENSURING WORKPLACE SAFETY AND HEALTH



BACKGROUND

In October 1970, the U. S. Senate's Committee on Labor and Public Welfare released its report on the Occupational Safety and Health Act (the Act) of 1970. In that report, the Committee recognized "the possibility of limited inspection manpower in the earlier phases of the program" and that "the number of inspections which it would be desirable to have made will undoubtedly, for an unforeseeable period, exceed the capacity of the inspection force."¹ Later that year, Congress passed the Act to protect 60 million U.S. workers, 55 of whom were dying on the job each working day.

Twenty-three years later, on any average working day, at least 40 U.S. workers still die from injuries occurring in the workplace, and about 11,000 are injured seriously enough to lose work time or experience restricted work activity.² Although some organizations estimate that 11,000 U.S. workers are permanently disabled each year as a result of an occupational injury, other organizations calculate that number to be as high as 60,000.³ As for the costs of injuries in dollars, the Rand Institute for Civil Justice reports that workplace accidents cost the nation \$83 billion annually.⁴ To these losses, the costs—

in dollars, productivity, and human life—of long-term occupational diseases must be added. Tens of thousands of workers die prematurely each year as a result of these diseases.

The Department of Labor's Occupational Safety and Health Administration (OSHA) is responsible for enforcing the provisions of the Act. OSHA and approved state programs, which OSHA oversees and partially funds, currently employ just 2,400 inspectors to enforce safety and health standards for 93 million workers at more than 6.2 million worksites.⁵ Consequently, there are only enough federal inspectors to inspect even the most hazardous workplaces every several years.⁶ In addition, OSHA follow-up is minimal. According to fiscal year 1992 data, OSHA follows up on only three percent of all inspections.⁷

A new approach is needed—one that refocuses the responsibility for ensuring worksite safety and health on the workplace.

ACTIONS

1. The Secretary of Labor should issue regulations requiring employers to develop worksite safety and health programs and to conduct inspections for safety and health.

The Secretary should issue regulations requiring employers to develop and implement a worksite safety and health program that includes provisions for the identification and correction of hazards, investigating and recording injuries and illnesses, and training and education. The program should also include one of two options for conducting worksite inspections to ensure compliance with all applicable requirements.

The first option is that employers could be authorized to use certified, private companies to audit their safety and health programs. The specific authorities and responsibilities of OSHA, employers, and the private companies will need to be specified. For example, OSHA responsibilities would include certifying the qualifications of private companies, prescribing inspection and reporting standards, conducting random reviews of private audit reports, and conducting its own on-site inspections. The private companies would take responsibility for reviewing employer safety and health programs, conducting inspections of worksites, obtaining employee participation in the process, and taking other actions needed to evaluate worksite-based programs. They would also provide employers with a safety and health report, including a recommended corrective action plan. Employers would be responsible for developing and implementing the safety and health program, arranging for inspections or audits, and implementing corrective actions.

As an alternative, employers could be authorized to use non-managerial employees of a workplace to audit program operations. Employee participation on safety and health teams or committees could be provided through the use of employee experts for specific inspections, employee-selected safety and health representatives, or employee volunteers. Employees who participate in a safety and health inspection would need to be certified.

The responsibilities of employee teams or committees would include those actions

needed to effectively review an employer's existing safety and health program, such as reviewing incident reports resulting in work-related deaths, injuries, and illnesses; reviewing the employer's work injury and illness records; and conducting inspections of the worksites.

OSHA's role would be to conduct random audits of the team or committee reports, provide technical assistance, and conduct its own random inspections of worksites.

OSHA should have the authority to require certain employers, such as those in the most hazardous industries, to submit the results of their audits to OSHA. A system should be established to charge and collect from employers the costs of providing technical assistance. Through these efforts, employers could determine how well their own safety and health programs are enabling them to comply with applicable safety and health requirements and to take any necessary remedial actions.

2. Establish a sliding scale of incentives and penalties for ensuring workplace safety and health.

This scale should go into effect a year or two after the requirements concerning self-inspections are established. The scale would be used to provide incentives to employers who maintain workplace safety and health. The scale could include reduced inspection and audit frequency for employers who have superior health and safety records, reduced penalties for employers who make a good faith effort, contracting preferences, community right to know about individual employer performance, increased inspection frequency and fines for poor performers, and federal contracting bars. Penalties should bear a reasonable relation to the cost of compliance in order to create an incentive for employers to make the investments necessary to comply with OSHA standards.

IMPLICATIONS

Either option selected by an employer should substantially increase current safety and health inspection and prevention efforts and reduce injuries and time lost on the job.

The first option may create jobs in the private sector as a private inspection industry grows to meet demand. The number of safety and health training programs would also grow because there are currently too few qualified safety and health professionals to provide such services. Although some employers may oppose it because of the costs involved in arranging and paying for inspections, others may welcome a more comprehensive approach to workplace safety that reduces injuries and worker compensation costs.

Under the alternative recommendation, with employee "inspectors" on site daily, the safety and health environment of the establishment could be maintained at a higher level. It is also possible that the strong involvement of both labor and management may help them accept ownership of the problem and have safety and health concerns become a true part of the day-to-day operations.

Both options create the potential for circumvention of the Act's requirements. The agency's previous experience with "record-only inspections" was unfavorable. OSHA would still continue to conduct its own onsite inspections.

The concept of employee involvement with worksite safety and health inspections, specifically through the use of labor-management committees, is promoted in versions of the Comprehensive Occupational Safety and Health Reform Act of 1993 sponsored by Senator Edward

Kennedy (D-Mass.) and Congressman William Ford (D-Mich.). In testimony before the House Education and Labor Committee, Secretary of Labor Robert Reich promised that Labor's OSHA Reform Task Force would carefully review the proposed legislation. This task force has been at work since April 1993, and has met with dozens of business, labor, and professional groups. It completed its initial work in September. An administration position on the legislation is expected soon.

FISCAL IMPACT

At this time, without knowing which options may be chosen to implement this audit requirement, the potential costs and savings involved with these recommendations cannot be determined.

Endnotes

1. U.S. Congress, Senate, Subcommittee on Labor of the Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970* (June 1971), p. 152.
2. National Safety Council, "Accident Facts 1992 Edition," p. 37; and U.S. Department of Labor, Bureau of Labor Statistics (BLS), *Occupational Injuries and Illnesses in the United States by Industry, 1991*, Bulletin 2424 (Washington, D.C., 1992), p. 40. BLS estimates that there were nearly 2.8 million lost workday cases resulting from injuries in 1991. Therefore, 2,800,000 lost work days/250 work days = 11,200 lost work days/day.
3. Estimates by OSHA's Office of Statistics based on information provided by the National Council on Compensation Insurance (NCCI).
4. Rand Institute for Civil Justice, *Compensation for Accidental Injuries in the United States: Executive Summary*, 1989, p. 13.
5. Department of Commerce, Bureau of Census, *County Business Patterns*, Bulletin CBP-90-1, (Washington, D.C., 1990), p. 3.
6. Estimate provided by OSHA's Office of Statistics.
7. Data provided by OSHA's Integrated Management Information System.



UNITED STATES DEPARTMENT OF LABOR
FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

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CONFIRMATION: 202/219-6141

TO: Ellen Seidman

DEPARTMENT/COMPANY:

FACSIMILE NUMBER:

FROM: Ross Eisenbrey, Joe Woodward

NUMBER OF PAGES INCLUDING
COVER:

FACSIMILE REPLIES:

CONGRESSIONAL AFFAIRS 202/219-5120

INTERGOVERNMENTAL 202/219-5736
AFFAIRS

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THE ASSISTANT
SECRETARY

Message: Please circulate to E.O.P.

OSHA team.

Thanks!

OCIA

Coverage Thresholds for Titles I and II

In Titles I and II, the bill's sponsors seek to legislate a limited form of workplace democracy. They seek to give every employee a legal right to have a say about the health and safety of her workplace. In the smallest businesses, those with 10 or fewer employees, employees are given the right to participate directly in the implementation of the employer's health and safety program, which involves identifying hazards, investigating accidents, correcting hazards, and training in safe work practices. In larger firms the employees are given the right to choose a representative to conduct inspections, monitor exposures, and meet with management to recommend improvements.

The sponsors believe that employee participation will make the workplace safer, because no one has a keener interest or more intimacy with safety problems than the workers themselves. The employees are given a right to point out hazards and make recommendations to management about how to correct them. Management, which has control of the resources and has responsibility for directing operations, is left with all decision-making authority and the right to screen out futile, unnecessary or unduly expensive employee recommendations.

In addition, the sponsors believe that every workplace would benefit from a comprehensive safety and health program because every workplace has potential hazards -- if not inherent in the work itself, then from the possibility of a building catching on fire, the violence of the public, or infectious diseases carried by coworkers or customers. And the fewer the hazards, the less involved, time-consuming and expensive the safety program.

It is possible, however, that the benefits of employee participation and employer safety programs are less than the costs for certain classes of employers. Congress has already determined that the benefits of routine OSHA inspections are outweighed by the cost and disruption they entail for small businesses with 10 or fewer employees in low hazard industries.

It is likely that Congress -- with or without the help of economic analysis -- will decide that employers who fall below certain thresholds should not be saddled with extensive new responsibilities. In deciding what sort of thresholds make sense, it is instructive to examine what the states have done, since they have almost 50 years of experience in regulating safety and health programs and committees.

The states have used three kinds of thresholds, sometimes in combination:

1. employer size
2. industry hazard
3. firm experience

- 2 -

1. Employer size

(a) Universal coverage -- Montana, Alaska, California, Hawaii, Nevada, and Washington require every employer to have a safety and health program. Nebraska requires every public and private employer covered by its workers' compensation law to have a safety committee and requires the committee to "adopt and maintain an effective written injury protection program."

(b) 5 or more employees -- Montana limits its safety committee requirement and the more elaborate version of its program requirements to employers of 6 or more.

(c) 11 or more employees -- only Oregon has limited its program requirement to employers of 11 or more, but Washington has limited its safety committee requirement similarly. North Carolina applies its committee requirement to employers of 11 or more that have an Experience Rate Modifier greater than 1.5. And Florida limits its committee requirement to employers of 11 or more and employers in high hazard classifications.

(d) 25 or more employees -- Connecticut requires safety committees for all employers of 25 or more and any employer with a higher than average injury and illness rate. Minnesota requires committees for employers of 25 or more and employers whose lost workday rate is higher than the average for its industry classification.

2. Industry Hazard

(a) Michigan limits its program requirement to the construction industry.

(b) Minnesota requires programs in SIC codes with higher than average LWDI rates or incidence rates. Employers in those high-hazard SIC codes must also have safety committees, as must employers with 25 or more employees.

(c) Florida requires employers to have a safety committee if they have 11 or more employees or if they are in a designated high hazard industry.

3. Firm experience

(a) Oregon requires employers of 10 or fewer to have a safety committee only if their LWDI rate is in the top 10% for their industry or their workers' compensation premium rate is in the top 25% of all rates.

- 3 -

(b) North Carolina requires employers with a workers' compensation experience rate modifier of 1.5 or greater to have a written safety program and -- if they also have 11 or more employees -- a safety and health committee.

(c) Connecticut requires every employer whose incidence rate exceeds the state average to have a safety committee, as well as all employers of 25 or more.

(d) Tennessee requires employers to have a safety committee if their workers' compensation experience rate modifier is among the highest 25% for their premium.

There are at least four possible rationales for exempting small firms from the program requirement:

1. Small firms are less dangerous, on average, than large firms.

[In fact, however, the evidence is contradictory. Firms employing 1-19 employees have a lower LWDI rate than larger firms do, on average. but 43% of OSHA death investigations occurred in firms with 10 or fewer employees, even though they employ only 13.2 million people -- about one-seventh of the total. The smallest firms' share of OSHA fatality investigations is, thus, about 3 times greater than expected.]

2. Congress has already exempted small firms from routine inspections if they are not in hazardous industries and have 10 or fewer employees. Congress has made the political judgment that OSHA should leave the smallest firms alone unless they have a serious problem. (But only farms have actually been exempted from standards and enforcement).

3. OSHA doesn't have the resources to inspect even a small fraction of the 4.6 million smallest firms. And most of those firms can't afford to have their safety programs audited and certified by a third party. The requirement will be unenforceable and meaningless.

[This is also the argument for applying the program requirement. Because OSHA can't visit these small worksites, the employees themselves must join with the employer to identify and correct hazards.]

4. Small businesses can't afford to take people from their regular duties to assume responsibility for writing, implementing, and documenting a safety program. They have no middle management and no margin.

-4-

[Somehow, though, firms in California, Hawaii, Washington, and Alaska have managed to survive similar state laws that require all businesses, no matter how small, to have programs.]

Obviously, the rationale for a small business exemption improves if it is coupled with a test based on industry hazard or firm experience (once such data become available), like the laws in Oregon, North Carolina, Connecticut, Minnesota, and Florida. The exemption then becomes a more justifiable exemption for small, low hazard employers. Thus, for example, very dangerous small foundries would not be exempt based merely on their size while larger but safer retail stores were covered.

PROGRAM REQUIREMENT MODIFICATIONS

The House and Senate bills require all employers to establish and implement written safety and health programs. The bills prescribe a number of elements that such programs must contain. These include "methods and procedures for identifying, evaluating, and documenting safety and health hazards"; and methods and procedures for correcting such hazards, for investigating and recording work-related injuries and illnesses, for providing emergency first-aid and other occupational health services, for employee participation in the program, and for employee safety and health training. The Secretary is directed to issue regulations specifying required employee training, including training upon hire, annual refresher training, and training upon changes in conditions.

The bills grant limited authority to the Secretary to modify these requirements by regulation for "classes of employers." The Senate bill authorizes modifications "where the Secretary determines that, in light of the nature of the risks faced by such employer's employees, such a modification would not reduce the employees' safety and health protection." The House bill provision is the same, except for a minor wording change in the final clause, which provides for modification where "such a

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health." The pertinent provisions appear in section 101 of the bills, a copy of which is appended.

Two features of the Secretary's modification authority merit attention. First, the classes of employers for whom modifications may be made are described solely in terms of the nature of the risks their work involves. There is no explicit authorization to take employer size into account by, for example, prescribing simplified requirements for the smallest employers. Second, the provisions can be read to allow modification only where it would result in absolutely no diminution in employee protection. If this is the standard, it would be difficult for the Secretary to make the necessary findings. Alternatively, it is possible to read a significant risk concept into the language, so that modifications may be made where they should not have a significant impact on health or safety.

The question is whether the provisions in the bills are appropriate or whether it would be desirable to amend them to grant the Secretary more flexibility to make modifications, particularly for small employers.

The following considerations favor retaining the modification provisions as written. The bills' requirements for programs are reasonable and are similar to provisions in OSHA's voluntary guidelines for such programs. They are stated in broad,

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performance terms that have built-in flexibility to adjust to the varying circumstances of employers. The class of small employers includes many who are engaged in dangerous work or who otherwise have poor safety and health records. As a general rule, OSHA standards apply to all employers regardless of size, because they are designed to establish a legal minimum of protection against hazards that exist regardless of employer size. There is no reason to give risky small employers who cut corners a competitive advantage over safer larger employers.

The following considerations support altering the current provisions to give the Secretary more flexibility. Smaller employers have reduced expertise and resources to do the kind of formal self-analysis the bills envision. In practice, they may respond to detailed requirements with canned boilerplate purchased from a vendor or supplied by a trade association. In any event, the bills' requirements may create an unnecessary paperwork burden. The smallest employers can more readily communicate informally with their employees, and they may be able to operate safely without the formal structure and written rules a large business requires. Lacking a separate safety or personnel department, it is more burdensome for them to prepare a written program in which they describe "methods and procedures" they will use to "evaluate" and "document" potential hazards. These considerations have more force when the employer is engaged in low hazard work, such as much office work.

Some OSHA requirements do vary with employer size. At present, employers with ten or fewer employees are exempt from most recordkeeping requirements. The House and Senate bills would require safety and health committees only for employers of 11 or more. Most state program requirements apply only to employers of a given size or in certain industries.

In addition to arguments on the merits, there are questions of legislative strategy. It has generally been assumed that at some stage compromises would be necessary for enactment of legislation. Variations in, and thresholds for application of, the program requirement are a natural subject for discussion. This raises a familiar question: at what stage should the Administration publicly advert to changes in the legislation that it considers desirable or acceptable?

Assuming it is considered desirable to give the Secretary the flexibility to take small size into account in appropriate ways in tailoring modifications to the general provisions for programs, it is necessary to formulate suitable legislative language. There are several kinds of possible approaches. A narrow approach is to add to the bills' modification provision authorization to establish simplified requirements for small employers. For example, the provision could read as follows:

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The Secretary may by regulations issued under subsection (c)(1) modify the requirements of this section with respect to classes of employers where the Secretary determines that, in light of the nature of the risks faced by the employers' employees, such modifications will not adversely affect employee safety and health. The Secretary may prescribe simplified requirements for employers with fewer than eleven employees who are engaged in work found by the Secretary to be comparatively nonhazardous.

This provision is the same as the House bill with the addition of the underscored language.

Another approach is to substitute much looser language in the modification provision, allowing broader deviations from the statutory provisions based on risk and employer size. For example, the legislation could provide that the Secretary may make appropriate modifications to the statutory requirements where he determines that

in light of the nature of the risks faced by such employers' employees, and the employers' size, such requirements are not reasonably necessary and appropriate to protect employee safety and health.

This approach would maximize the Secretary's flexibility, but would also require the greatest effort and judgment in devising the regulations, and would mark the greatest deviation from the

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principle that all employers regardless of size are subject to the same requirements.

A final alternative is to support a statutory threshold for application of the program requirement, e.g. 11 or more employees, possibly with authorization for the Secretary to conduct rulemaking proceedings to extend the requirement to smaller employers as appropriate (the Secretary already has such authority under current law). This approach avoids difficult issues of rulemaking principle by settling them by legislative fiat. While a solution of this sort may ultimately emerge in the legislative process, considerations of strategy counsel strongly against taking such a position at this stage.

ALTERNATIVES

1. Support current modification provision

Pros

- * General program requirements are reasonable and flexible
- * Allows modifications based on risk
- * Small employers are just as hazardous as larger ones

Cons

- * Takes no account of smallest employers' lack of resources and expertise
- * Full set of formal requirements appears unreasonable for employer with, e.g., one part-time employee

* May not be politically palatable

2. Support provision authorizing simplified requirements for very small employers

Pros

* Retains basic framework of current bills, while adding needed flexibility

* Economies of scale in preparation of program make it reasonable to modify requirements for smallest employers

* As practical matter, many of smallest employers may be unable to implement complex program requirement

Cons

* Small employers are just as hazardous as larger ones

* Built-in flexibility in bills makes it unnecessary to add special provision based on employer size

* Departs from principle that all employers should be subject to same general rules

3. Support broad authority to modify requirements based on degree of risk and employer size

Pros

* Allows varying requirements to fit varying circumstances, in theory maximizing benefits while reducing burdens

* Increases Secretary's authority and flexibility

Cons

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- * Bills' provisions are already flexible, performance-oriented
- * Imposes rulemaking burden on Secretary
- * Marked departure from principle that all employers should be subject to same general rules

4. Support size threshold for program requirements

Pros

- * May prove politically necessary
- * Solves small business burden problem

Cons

- * Premature to take this position now
- * Small employers are just as hazardous as larger ones

MODIFICATIONS TO COMMITTEE REQUIREMENT

The House and Senate bills require employers of 11 or more to establish joint labor-management safety and health committees at each of their worksites, with limited exceptions. The bills provide that the employee members of such committee shall be selected by the employees themselves, including by the union where it is the authorized employee representative. The bills prescribe a minimum number of employee members based on the number of employees at the worksite. For example, if there are fewer than 50 employees, there shall be at least one employee representative on the committee, and if there are between 50 and 100 employees at the worksite, there shall be at least two employee representatives on the committee. The employer may name up to an equal number of management representatives.

The bill enumerates rights of the committees, which may exercised at the members' option. Basically, these are rights to gather information about safety and health in the workplace, to make recommendations to the employer, and to receive responses to the recommendations. The bills make it clear that the committees' functions are advisory only, and the employer retains full authority in the workplace, including responsibility for safety and health.

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Specifically, the bills give the committee rights such as the right to review the employer's safety and health program, the right to review injury and illness records, the right to conduct safety and health inspections of the workplace at least every three months and in response to employee complaints, the right to hold meetings, and the right to observe the measurement of employee exposure to toxic substances or harmful physical agents. In addition, the committee, and any individual member of the committee, has the right to make recommendations to the employer, and to receive a response from it, regarding improvements in the employer's safety and health program or corrections of workplace hazards. Committee members are not to forgo their normal pay on account of time spent on committee work.

The Secretary is given authority to promulgate regulations to flesh out the details of these provisions, including addressing the functioning of committees with respect to worksites with fewer than 11 employees of covered employers and multi-employer worksites.

The Senate bill contains no provision allowing for modification of these provisions. The House bill contains a provision recognizing alternative mechanisms for employee participation (new Sec. 28(g) of the amended OSH Act, added by Sec. 201 of the reform bill). Under the House bill, upon application of the employer, the Secretary may approve an alternative mechanism that

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"differs in form" from the committee if the alternative ensures meaningful employee participation in safety and health at the worksite. The Secretary may not approve the application unless he finds that the employee participants in the mechanism will be selected by the employees themselves and that they will be able to exercise the rights enumerated in the bill for committees.

The question we have been asked to address is whether the bills provide adequate authority to modify the committee requirement where appropriate and to ameliorate the impact on small business.

Taking the second question first, the committee requirement applies only to employers with at least 11 employees, so the smallest businesses are unaffected. Moreover, only a single employee participant is required for worksites of up to 50 employees. This is hardly onerous. (With respect to very small worksites of fewer than 11 employees of employers who are covered because they have, in toto, 11 or more employees, the Act gives the Secretary broad authority to prescribe rules for the selection of employees and the functioning of committees; an evident purpose is to allow the Secretary to provide for a single representative for multiple worksites. This too should cushion the impact on small employers.)

Moreover, committees have no real powers. Their function is purely advisory to the employer, who may, moreover, appoint half

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the committee's membership. The committee requirement should not be particularly burdensome for small businesses.

With respect to the other question, the short answer is that the committee structure established in the bills is sufficiently loose and general, and the apparent alternatives sufficiently dubious administratively, that there is little need for authority to modify the requirement. The House bill allows for approval of alternative mechanisms, but as critics have observed, those mechanisms closely resemble committees. The key characteristics of committees under the bills is that the employee members are selected by and from among the employees themselves and that they may exercise certain enumerated rights. The "alternative mechanisms" allowed by the House bill share these same characteristics. The principal apparent difference is that the alternative does not prescribe specific numbers of employee participants. While that is a desirable administrative flexibility, it is not a big deal, particularly since the numerical requirements of the committee provisions are not harsh.

Would it be desirable to have the flexibility to vary the other aspects of the committee provision as well? The requirement that the employee members be selected by the employees themselves, rather than picked by management, is the heart and soul of the committee requirement. It is the provision that is designed to foster a genuine employee "voice" in the committee. Flexibility

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should not extend so far as to sacrifice the core principle underlying the provision.

The bills are flexible, however, in the means employees may use to exercise their right of selection. Selection through volunteering, discussion and consensus, election, or rotation would appear to be permitted. The Secretary is authorized to issue regulations on employee selection.

The committee's rights are limited to gathering information about workplace safety and health, making recommendations to the employer, and receiving responses. Stated in these general terms, each of these is fundamental, and none could be waived without impairing the function of the committee. One can take issue with some of the details in the bills. For example, it may not be necessary that the committee be able to meet and to conduct inspections every three months as compared with at some other interval. But this is quibbling. The provisions are reasonable and should not be burdensome for the employer. There is little point in seeking authority to vary the few details that are debatable. It may be better to settle such matters clearly by statute rather than spend administrative resources considering applications to vary from them.

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Committees are designed as a structure for employee participation, which all agree is critical to improving workplace safety and health. The principal theoretical alternative to committees is a broad performance standard that requires meaningful employee participation. The problem with this alternative is that it is too amorphous to be administratively workable. Accordingly, it is not a desirable standard for use in variance applications.

None of this is to say that the committee requirement is not a point of sharp controversy, or that there are not legitimate policy differences as to whether, or in what circumstances, committees should be required. As the legislative process unfolds, it would be unsurprising if such matters as a higher size threshold for the committee requirement, or restricting it to hazardous industries, were raised. Such matters will be resolved through political choices. The current provisions need not be changed, however, to serve administrative flexibility.