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FOLDER TITLE:

OSHA Reform: Coverage of Public Employees

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OSHA Reform: Coverage of Public Employees

PHOTOCOPY
PRESERVATION

THE WHITE HOUSE

WASHINGTON

January 20, 1994

MEMORANDUM FOR CAROL RASCO

FROM: Mike Schmidt

SUBJECT: Occupational Safety and Health Act (OSHA) Reform and
Unfunded Mandates

As you know, I am currently a member of the OSHA Reform Working Group that is examining the Kennedy/Ford OSHA reform bills and will be making recommendations on Administration positions on various sections of the bill. During the course of the group's work, the issue of unfunded mandates has become quite significant, especially as they apply to mandatory OSHA coverage of public sector employees. I have attached a paper on the subject that I adapted from a longer Issue Paper that DOL prepared for the working group on unfunded mandates and OSHA reform. You will have a chance to review and approve the working group's recommendations sometime in the next few weeks. However, I thought that you might be interested in taking a closer look at the issue of unfunded mandates in OSHA reform and how it applies to the Administration's overall position on the issue.

Current Working Group Strategies

At the last meeting of the Working Group, we discussed strategies that could be used to deal with the questions about "unfunded mandates" that we are certain will be raised during the course of the OSHA reform debate. At this point, the group agreed on the following strategy in preparing drafts of testimony and Q&As for Secretary Reich's and Undersecretary Deer's upcoming testimony on OSHA reform in early February:

- **Avoid taking the issue head-on:** in testimony and Q&A sessions, we will neither attempt to declare public sector coverage to be a mandate, or deny that it is one.
- **Focus on OSHA reform as a different kind of mandate:** in addition to the equity arguments that the Secretary has been making, we will focus on elements suggesting that if coverage is a mandate, it is different than other mandates (and pretty small as well) for a number of reasons, namely:

- a very large number of public sector workers are already covered, in both state Plan and non-Plan states;
- health and safety requirements will apply to the states and localities in their capacity as employers, rather than as governments;
- OSHA provides the enforcement unless states decide to become state Plan states;
- OSHA regulations will be implemented under an Executive Order that requires special consideration for and local governments, and;
- hopefully, we will have numbers to show that OSHA reform has a positive payback for the entities covered (in terms of reduced injury and illness rates).

Unfortunately, it is likely that CBO will score OSHA reform as an unfunded mandate. If this proves to be true, OMB and OSHA will determine what we can do to (i) change their minds, and (ii) keep the numbers small.

OSHA REFORM AND UNFUNDED MANDATES

BACKGROUND

After several months of study and outreach by the Occupational Safety and Health Administration, capped off by a period of White House review and comment, Secretary Reich released a letter to Chairmen Kennedy and Ford indicating the Administration's support for the rapid enactment of OSHA reform legislation that would, among other things, "address gaps in the protection on public employees."

The case for doing so was compelling for a number of reasons. First, at the present time, less than half of the states (24) provide OSHA safety and health protection for their employees¹. This leaves more than 7 million state and local public employees uncovered by OSHA, although a number of states do provide some protections to employees under their own laws. The hazards facing public employees are no less serious than those facing their counterparts in the private sector, and the argument that the public sector should comply with laws imposed on the private sector is a powerful one. Moreover, coverage of public employees is strongly backed by public employee unions. Also, a number of governors and mayors in state Plan states who want the support of public employee unions may support the change. Finally, closing the gap in employee coverage is also included in the only OSHA reform bill introduced by the minority (albeit with an effective date delay several years longer than in the majority bills), and all minority members who spoke on this subject last year supported public sector coverage. This fact somewhat immunizes the issue from partisanship.

Having decided to "address gaps" in OSHA coverage, the problem for the Working Group is how to best square this commitment with the institutional concern of state and local officials that we not create another "unfunded federal mandate." This is a serious concern; many cities, towns, and villages have run out of the capacity to raise taxes. Accordingly, when the Federal government imposes a new duty, it may force them to cut back on police, fire, and other vital services. More generally, it forces them to reset their priorities -- not only differently than they would like, but sometimes without much warning.

¹ These States have chosen to work with the Occupational Safety and Health Administration to become State Plan states, which allows them to take over enforcement of OSHA requirements and tailor federal regulations to meet their State's needs.

Many of those concerned about the mounting impact of unfunded mandates have argued that if a new Federal mandate is necessary, it should be fully funded out of the Federal taxbase. Those who have expressed this point of view (i.e. the 53 co-sponsors of the Kempthorne Bill) argue that exceptions not be made to this general principle. Thus, if OSHA reform is viewed as an unfunded mandate, they would argue that any costs associated with that mandate should be fully funded by the Federal government. Obviously, this creates some appropriations problems.

Other state and local officials take a more flexible view of the situation. They accept the fact that some unfunded Federal mandates will always be necessary. However, they demand that the Federal government make sure that all such mandates be scientifically valid and necessary, build in state and local participation up-front, and allow as much flexibility as possible in implementation. This approach, which will be addressed later in this paper, is similar to the Administration's current approach to the issue.

Accordingly, the Administration is presented with three general questions to consider:

- How does support for OSHA Reform fit with the Administration's current position on unfunded mandates in general?
- Is OSHA Reform an unfunded mandate?
- Given our position on unfunded mandates, how can we justify supporting OSHA reform?

This paper will consider these three questions in detail.

DOES OSHA REFORM FIT WITHIN THE ADMINISTRATION'S CURRENT POSITION ON UNFUNDED MANDATES?

The Administration has clearly taken a strong public stand against the Federal government's imposition of unfunded mandates on state and local governments. Aside from a number of informal public statements on the issue, four examples stand out in this regard:

- **The National Performance Review.** Both in substance and in tone, the NPR called for a reduction in unfunded mandates. In addition to its recommendation that the "President should issue a directive limiting the use of unfunded mandates by the administration," the report also called for reviewing all agency regulations with the goal of eliminating half of them, and giving

cabinet secretaries and agency heads the authority to grant states and localities waivers from federal regulations or mandates.

- **Unfunded Mandates Day.** The President observed "Unfunded Mandates Day" (October 27, 1993) by meeting with Governors, Mayors, and other public officials to discuss the issue of unfunded mandates and their increasing burden on state and local governments. He also signed Executive Order 12875 on unfunded mandates (discussed below).
- **Executive Order 12866 -- Regulatory Planning and Review.** Through this Order, the President created a regulatory planning and review process that is more streamlined and will ensure that agencies regulate only when necessary and promulgate regulations that are cost-effective and sensible. Among other things, the Order requires each agency to consult with appropriate state and local officials before imposing regulatory requirements that significantly affect those entities, and asks agencies to strive to minimize regulatory burdens on state and local governments.
- **Executive Order 12875 -- Enhancing the Intergovernmental Partnership.** This Executive Order, also known as the "Unfunded Mandates" Order, attempts to reduce the imposition of Federal regulatory mandates on state and local governments and streamline the application process for discretionary waivers.

It is important to note that the unfunded mandates that the two Executive Orders listed above are referring to are **specifically limited to those regulations that are not required by law**. This is an important point, but is one that is not well understood. In the minds of most people, including Members of Congress and state and local officials, the Administration has taken a strong stand against unfunded mandates in general.

Given this perception, the danger inherent in supporting any kind of mandated coverage of state and local employees is that it may be viewed as contradicting the Administration's previous statements and actions on unfunded mandates, and therefore cut the Administration's credibility on the issue. This danger is especially worrisome given the current political environment surrounding unfunded mandates, including:

- **S-993 -- The Community Regulatory Relief Act (The "Kempthorne Bill"):** Senator Kempthorne's bill, which would require the Federal government to pay to state and local governments the direct costs incurred by those entities in complying with Federal

mandates, currently has 53 co-sponsors (including 10 Democrats).

- **U.S. Conference of Mayors and National Governors Association Resolutions on Unfunded Mandates:** In June, the Conference passed a resolution calling on the Congress and the President to pass legislation to end the practice of unfunded mandates. A similar resolution will likely be passed at the upcoming NGA meeting later this month.

In all, there seems to be a groundswell of political opposition to unfunded federal mandates coming from state and local communities. The Administration has, to date, responded positively to this rising tide of opinion by taking a public stand against unfunded mandates. The questions we must consider are: First, is OSHA reform an unfunded mandate, and; second, how do we square our support of OSHA Reform in light on our public statements and the current political mood?

IS OSHA REFORM AN UNFUNDED MANDATE?

Definition

What is an "unfunded mandate?" The term "Federal mandate" contained in the most prominent piece of legislation introduced on this topic, S. 993 (Kempthorne et al), reads as follows:

- ". . . a statute or regulation that requires a state or local government to --
- (A) take certain actions (including a requirement that a government meet national standards in providing a service), or;
 - (B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions."

An "unfunded" Federal mandate is one which would not meet the requirement of section 4 of the bill that:

". . . any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the state or local government only if all funds necessary to pay the direct costs incurred by the state or local government in conducting the activity are provided by the Federal government for the fiscal year in which the direct cost is incurred."

Arguments For and Against

There have been three main arguments offered against defining OSHA reform as an unfunded mandate." First, if the concept of unfunded mandates were really limited to the costs of "conducting an activity," it could be argued that the legislation does not create an unfunded mandate at all. Coverage of state and local employees does not require the state to run any new program -- only to comply in its employment practices with Federal rules, administered by the Federal government unless the state elects to run the program itself. Second, some have argued that OSHA reform deals with state and local governments in their capacities as employers, and not as governing entities (i.e. not in their capacity as service providers, or law and policy makers). Therefore, OSHA reform does not fall under the standard definition of an unfunded mandate. Finally, employee unions have asserted that the benefits of OSHA coverage demonstrably exceed the costs; if so, it can be argued that there is no net cost, and thus no unfunded mandate. At this point, DOL does not have the hard data available to confirm this argument.

In practice, however, the type of unfunded mandates which are the subject of complaint include many situations comparable to OSHA -- where the focus is on the cost of bringing state or local facilities into compliance with the law, just as private sector facilities must be in compliance with the law. The state and local governments who would for the first time be covered by OSHA reform will incur a new direct cost: the cost of compliance with OSHA requirements and regulations. In addition, even those state and local governments already covered will face incremental costs under the proposed legislation. Finally, from a political standpoint, OSHA reform will almost certainly be classified as an unfunded mandate by its opponents. Given these reasons, it would be difficult to argue that OSHA reform is not an unfunded mandate.

DOES OSHA REFORM MEET ACCEPTABLE CRITERIA FOR ENACTMENT?

Fortunately, not all of those who are concerned about unfunded mandates take the Kempthorne approach insisting that ALL Federal mandates be fully funded. Rather, many have adopted a more middle-of-the-road approach. A good example of this approach has been articulated by Columbus Mayor Gregory S. Lashutka. In his testimony before the Senate Committee on Governmental Affairs, Mayor Lashutka, a longtime advocate against unfunded Federal mandates, offered four key principals that should guide the Federal government in enacting such mandates:

1. The legislation or regulation in question should be based on well-

founded science or fact;

2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available;
3. The Federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all, and;
4. Local governments should be treated as a full partner in the development of any new laws or regulations.

These four principals are similar in spirit to the Administration's Executive Orders on Unfunded Mandates and Regulatory Planning and Review, in that they do not advocate an **absolute** ban on unfunded mandates. Rather, both approaches call on the Federal government to make sure that any unfunded mandate be well justified and reasonable, build in up-front participation by state and local governments, and be as flexible as possible for state and local governments to implement.

Because Mayor Lashutka's key principals are similar to the Administration's approach, they can be used as a rough benchmark for trying to determine whether or not OSHA Reform meets acceptable criteria for enactment, even if it is not fully funded:

1. The legislation or regulation in question should be based on well-founded science or fact.
 - OSHA Reform goes a long way toward meeting this criteria. Secretary Reich presented a strong case for the need for OSHA reform in April, including the need for coverage of public employees. In addition, statistics collected by the Department of Labor show that workers in the public sector are at no less risk (and frequently more risk) than their counterparts in the private sector.
 - Any new regulation or requirement issued under the new law will be subject to the Administration's Executive Order on Regulatory Planning and Review, which ensures that they are based on well-founded science or fact.
2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available, and;

3. The Federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all;
 - In terms of administration, OSHA already provides states the option to set up a State Plan to meet local needs and priorities. The State Plan process allows states enormous flexibility in implementing OSHA rules and regulations.
 - Again, any new rules and regulations will go through the process set up by the Executive Order on Regulatory Planning and Review. This process specifically requires state and local participation and flexibility.
 - A delay of several years in the effective date of public sector coverage is agreeable to the sponsors of the majority bill and already contained in the minority bill. This delay, if enacted, will provide state and local governments adequate time to phase-in compliance efforts and thus minimize the disruption that any up-front investments might otherwise create for other pressing priorities.
 - The whole point of OSHA reform is to get public employers and their employees, just like those in the private sector, engaged in designing and implementing flexible solutions that fit local conditions and particular worksites.
4. Local governments should be treated as a full partner in the development of any new laws or regulations.
 - The Department of Labor and Congress have sought, and will continue to seek, the involvement of representatives of state and local governments in designing OSHA reform legislation. Specific state and local representation on DOL's OSHA advisory council has been discussed as a distinct possibility, and the OSH Administration meets regularly with state Plan designees.

Given the arguments listed above, it seems that a credible case can be made for supporting OSHA reform/public sector coverage while remaining true to the principles set forth in Executive Orders 12866 and 12875. How this case will be received politically, especially by state and local governments, however, remains to be seen. In the politically charged atmosphere surrounding the unfunded mandate debate, it is likely that the subtle distinction between "justified" and "unjustified" Federal mandates will not be appreciated or understood by everyone.

calls in to DGA on issue

*Final
4:30 PM*

Issue Paper
January 12, 1994
EOB/DOL Discussion Group on OSHA Reform
Unfunded Mandates

Background

The Administration has indicated its support for the rapid enactment of OSHA reform legislation that would "address gaps in the protection of public employees."

The case for doing so was compelling. At the present time, about half the States already provide such protection. On the other hand, this leaves more than 7 million state and local public employees uncovered by OSHA, although a number of states do provide some protections to public employees under their own laws¹. Attachment 1. The hazards facing these employees are significant. Attachment 2. The argument that the public sector should comply with laws imposed on the private sector is a strong argument favoring coverage. Moreover, this provision is strongly backed by the public employee unions. Many governors and mayors who want their support in reelection fights this year may support the change. Attachments 3, 4. Finally, closing this gap in coverage is also included in the only OSHA reform bill introduced by the minority, albeit with an effective date delay several years longer than in the majority bills, somewhat immunizing the position from partisanship. All minority members who spoke on this subject last year supported coverage.

*15 States
w/ no coverage
of public
employees*

Having decided to "address gaps," the problem for the working group is how to best square this commitment with the institutional concern of state and local officials that we not create another "unfunded federal mandate." The basic problem is that many cities, towns and villages have run out of the capacity to raise taxes; accordingly, when the Federal government imposes a new duty, it may force them to cut back on police, fire, and other vital services. More generally, it forces them to reset their priorities: not only differently than they would like, but sometimes without much warning.

Some of those concerned about the mounting impact of unfunded Federal mandates have argued that if a new Federal mandate is necessary, it should be fully funded out of the Federal taxbase. Those who have expressed this point of view (Attachment 5), argue that exceptions not be made to this general principle. Thus, if OSHA reform is an unfunded mandate, they would argue that any costs associated with that mandate should be fully funded by the Federal government. Obviously, this creates some appropriations problems.

¹ OSHA is surveying the States to determine the extent of such protection. The information on the attachment in this regard is very preliminary.

Others take a more flexible view. Attachment 6. They urge that four key principles guide the Federal government in enacting such mandates. These are:

- COST/BENEFIT PRICE MISSING*
- the legislation or regulation in question should be based on well-founded science or fact;
 - local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available;
 - the federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all; and
 - local governments should be treated as a full partner in the development of any new laws or regulations.

Accordingly, we are presented with two general questions to consider:

- 1) Is OSHA reform an unfunded mandate? If it is a mandate, does it meet acceptable criteria for enactment even if not fully funded? Would responding to this issue start the Administration down an unacceptable road on unfunded mandates in general?
- 2) What types of contribution could we make if it is necessary to respond to this problem?

I 1) Is OSHA Reform an Unfunded Mandate?

The term "Federal mandate" contained in the most prominent piece of legislation introduced on this topic, S.993 (Kempthorne et al), reads as follows:

"... a statute or regulation that requires a state or local government to --

- (A) take certain actions (including a requirement that a government meet national standards in providing a service); or
- (B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions.

An "unfunded" Federal mandate is one which would not meet the requirements of section 4 of the bill that:

... any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the state or local government only if all funds necessary to pay the direct costs incurred by the State or local government in conducting the activity are provided by the Federal

government for the fiscal year in which the direct cost is incurred.

If the concept were really limited to the costs of "conducting an activity," it could be argued that the legislation does not create an unfunded mandate at all. Coverage of State and local employees does not require the State to run any new program -- only to comply in its employment practices with Federal rules, administered by the Federal government unless the State elects to run the program itself. Moreover, should the State make such a selection, Federal funding is available to share in plan implementation (50%) -- although appropriations have not allowed this level to be met in recent years for new applicants.

In practice, however, the type of "unfunded mandates" which are the subject of complaint include situations comparable to OSHA -- where the focus is on the cost of bringing State or local facilities into compliance with the law, just as private sector facilities must be in compliance with the law (e.g. access to the handicapped). The State and local governments who would for the first time be covered by OSHA reform do incur a new direct cost: the cost of compliance with OSHA requirements and regulations. In addition, even those covered already will face incremental costs under the proposed legislation.

It has been asserted by one of the employee unions that the benefits of coverage demonstrably exceed the costs (ASCME study by Ruttenberg); if so, it can be argued that there is no net cost, and thus no unfunded mandate. To put it another way, it could be argued that the up-front costs of prevention are an investment that produces savings to badly strapped state and local governments. At this point, however, we are not in a position to fully support that argument. The methodology of this study has been challenged, and the Department is still in the process of developing a better estimate on this point.

Even if we consider OSHA reform to be a Federal mandate, it may not be significant enough to require funding.?

Not all of those who are concerned about unfunded mandates are insisting that ALL Federal mandates be fully funded. Rather, they have adopted a more middle-of-the-road approach expressed in the criteria set forth above (again, see Attachment 6). It would appear that OSHA reform meets the criteria for enactment even if not fully funded.

1) The legislation or regulation in question should be based on well-founded science or fact.

* OSHA reform meets this criteria. The Secretary presented a good case for the need in April; in February, he will be pointing out that the solutions proposed in the bill are

tested and proven, and providing examples to buttress this point.

True?

- * Any regulation or requirement issued under the new law will be subject to the new Clinton Administration Executive Order on rulemaking, which likewise ensures that they are based on well-founded science or fact -- and which also contains special provisions to ensure attention to the special needs of State and local governments.

2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available.

- * In terms of administration, the law already provides States the option to set up a state plan to meet local needs and priorities. If they do, they get a number of benefits (described in more detail in the funding discussion below).

- * In terms of mechanisms that would be mandated by new legislation, such as programs and committees, public employers would have the same flexibility as private employers at a minimum. Moreover, the details would be worked out by regulation, and public employers would receive the special attention required under the Clinton Administration's Executive Order. The same is true for any new standards which the bill requires be adopted.

see Precision Cater

- * A delay of several years in the effective date is agreeable to the sponsors of the majority bill, and already contained in the minority bill. This will provide State and local governments adequate time to phase-in compliance efforts and thus minimize the disruption that any up-front investments might otherwise create for other pressing priorities.

3. The federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all.

- * The whole point of OSHA reform is to do just that by getting public employers and their employees, just like those in the private sector, engaged in designing and implementing flexible solutions that fit local conditions and particular worksites.

4. Local governments should be treated as a full partner in the development of any new laws or regulations.

- * The Labor Department and the Congress have sought, and will continue to seek, the involvement of representatives of state and local governments in designing this legislation. Specific representation on our advisory council is a

distinct possibility, and we meet regularly with all State plan designees. The new Clinton Executive Order guarantees such a partnership when it comes to regulations.

* It should be noted that legislative input from official representatives of State and local governments was minimal; the Washington offices who met with us were far more concerned about other Administration priorities, and found little interest in this matter at home.

Would Responding to the Issue of Unfunded Mandates Start the Administration Down an Unacceptable Road on Unfunded Mandates in General?

The Administration has clearly taken a strong public stand against the Federal Government's imposition of unfunded mandates on State and local governments. Aside from a number of informal public statements on the issue, four examples stand out in this regard:

- **The National Performance Review.** Both in substance and in tone, the NPR called for a reduction in unfunded mandates. In addition for its recommendation that the "President should issue a directive limiting the use of unfunded mandates by the administration," the report also called for reviewing all agency regulations with the goal of eliminating half of them, and giving cabinet secretaries and agency heads the authority to grant states and localities waivers from federal regulations or mandates.
- **Unfunded Mandates Day.** The Administration declared October 27, 1993 to be "Unfunded Mandates Day." On this day, the President met with Governors, Mayors, and other public officials to discuss the issue of unfunded mandates and their increasing burden on State and local governments.
- **Executive Order 12866 -- Regulatory Planning and Review.** Through this Order, the President created a regulatory planning and review process that is more streamlined and will ensure that agencies regulate only when necessary and promulgate regulations that are cost-effective and sensible. Among other things, the Order requires each agency to consult with appropriate State and local officials before imposing regulatory requirements that significantly affect those entities, and asks agencies to strive to minimize regulatory burdens on State and local governments.
- **Executive Order 12875 -- Enhancing the Intergovernmental Partnership.** This Executive Order, also known as the "Unfunded Mandates" Order, attempts to reduce the imposition of Federal regulatory mandates on State and local governments and streamline the application process for discretionary waivers.

NO
declared by
CONF of Mayors,
NGA, etc

It is important to note that the unfunded mandates that the two Executive Orders listed above are referring to are specifically limited to those regulations that are not required by law. This is an important point, but is one that is not well understood. In the minds of most people, including Members of Congress and State and local officials, the Administration has taken a strong stand against unfunded mandates in general.

Given this perception, the danger inherent in supporting any kind of mandated coverage of State and local employees is that it may be viewed as contradicting the Administration's previous statements and actions on unfunded mandates, and therefore cut the Administration's credibility on the issue. This danger is especially worrisome given the current political environment surrounding unfunded mandates, including:

• S-993 -- The Community Regulatory Relief Act (The "Kempthorne Bill"): Senator Kempthorne's bill, which would require the Federal Government to pay to State and local governments the direct costs incurred by those entities in complying with Federal mandates, currently has 53 co-sponsors (including 10 Democrats).

• U.S. Conference of Mayors and National Governors Association Resolutions on Unfunded Mandates: In June, the Conference passed a resolution calling on the Congress and the President to pass legislation to end the practice of unfunded mandates. A similar resolution will likely be passed at the upcoming NGA meeting later this month.

In all, there seems to be a groundswell of political opposition to unfunded federal mandates coming from state and local communities. The Administration has, to date, responded positively to this rising tide of opinion by taking a public stand against unfunded mandates. The question is, how do we square our support of OSHA Reform in light on our public statements and the current political mood?

Basic choice: unions vs. State & Local

see attachment 5

highlighted



→ How does this ^{Fight} affect us in Health Care? welfare Reform?

→ danger of stirring up Kempthorne crowd

explain

Alternatives:

1) Argue that OSHA reform is not an unfunded Federal mandate of the sort that has been the subject of concern.

nit picky

Pro: * OSHA reform involves application of a law to State and local governments as employers, not in their role as governments.

* Reflects the fact that incremental impact of new law significantly different among two groups of States -- those who have already decided to cover public employees (including a number not explicitly recognized by OSHA) on a purely voluntary basis, and those who have not -- and to reflect the fact that no administrative activity is mandated under the current law or reform act.

* Provides a graceful exit for the concerned institutional interests on an issue that is of less concern than other Federal mandates, and which a number of State and local officials would like to endorse.

Public vs Private

Con: * Lack solid data at this point to support the argument that benefits exceed costs.

Realistically, it will be seen as a mandate

2) Accept that OSHA reform is a Federal mandate on State and local governments.

Pro: * Avoids the need to defend this argument.

Con: * May force us to consider funding part or all of this mandate.

3) Press the argument that OSHA reform is a mandate that meets ~~the~~ *acceptable* criteria for new State and local funding.

Pro: * We have a pretty good case to meet criteria accepted by some groups.

* These criteria are similar in principle to those used in the Executive Order on regulatory review.

* Provides an out for those who want to support OSHA reform.

* Might set a useful precedent for other unfunded mandates (~~see last piece of this paper~~).

Con: * Some groups argue that any mandate should be

funded.

* Understanding our case might require a higher level of understanding of OSHA reform than may in practice be feasible.

* May lock the Administration into criteria it has not yet decided to accept.

4) Do not press the argument that OSHA meets these criteria.

Pro: * Avoids the need to achieve enough understanding of OSHA reform to make the case.

* Avoids locking the Administration into these criteria.

Con: * Places focus on lack of funding for the mandate.

2) What Types of Contribution Could We Make If It Is Necessary to Respond to this Problem?

There are a variety of approaches that could be utilized to either: a) offset some of the money that may have to be invested by some state and local governments; or b) to encourage the States to reduce the potential of Federal/State friction that is presented if the Federal government has to issue compliance orders and/or penalties on State and local employers.

1) Costs of Administering State Plans

As noted above, the States are not required to administer an OSHA program. Having them do so confers some advantages on the Federal government: saving direct resources for us, and avoiding messy intergovernmental conflicts created when the Federal government finds a public employer out of compliance (the best example of which is the continuing problem of overtime payments).

The Department has estimated that enactment of the legislation as presently drafted will add 115 FTE (79 compliance officers) and \$8.6 million a year in costs in order for the Federal government to inspect the additional workplaces in its jurisdiction. The assumptions assume that of the 28 jurisdictions not now covered by State plans, 6 more would apply for this status -- solely for their public employees. Funding the Federal government's share of the extrapolation of these plans would cost an estimated \$7.2 million. If we extrapolate from these numbers, it would cost an estimated \$33.6 million to pay the Federal government's administrative share if all the States decided -- without further

economic incentives -- to adopt such limited State plans, relieving the Federal government of enforcement responsibility, for a net cost of \$25 million. To put it another way, the Department's original estimates were this provision totalled \$15.8 million a year and 115 FTE; if all the States utilize State plans, the total is \$25 million a year and a minimal FTE increment (to help with State plan administration).

In deciding whether we need to provide this incentive, it should be noted that there are already strong incentives in the legislation for the States to adopt and maintain plans that cover public employees. First, they would not have Federal inspectors inspecting and citing their facilities. Second, States which adopt State plans are, under current law, permitted alternative sanction approaches. A number do not penalize State and local employers; others use the penalty money for special purposes, such as training. Attachment 7. Many States do have difficulty raising their own share of the funds needed to run these programs, however, although some assess the costs of program operations as a workers' compensation surcharge -- something the Federal government is not in a position to do (except for its own employees if we decide to do so) -- which adds an additional incentive for compliance.

If we think it is useful to provide additional resources for this purpose, we need to consider our goals in more detail. Are they limited to getting new States to adopt plans, or to help all States maintain them and comply with an existing mandate? A number of States with plans have expressed dissatisfaction with the funding they are currently receiving from the Federal government, which falls short of the 50% maximum set by the statute. Moreover, there is no statutory formula providing, for example, that our contributions are \$x per worker; instead, the agency has found itself in the position of using a formula that avoids cutting the contributions of those already receiving aid in order to help those making new efforts. Thus, those States which have started most recently, or which have put additional State resources into the effort recently, are disadvantaged. Some of these States are having trouble convincing their State legislatures to continue to provide the State share of the financing. When California dropped its State plan several years ago (it was reinstated subsequently), the drain on Federal resources was substantial.

A second question is whether we should focus any additional resources on encouraging State plans that cover only public employees, or give consideration to funding problems for those which wish to assume private sector responsibilities as well. Only the public employee coverage is an "unfunded mandate"; the decision to cover private sector employers is entirely at the option of the State. On the other hand, having the States assume part of these costs can save the Federal government considerable

enforcement resources and is consistent with the Federalism concept in the Act. Moreover, if end up providing more funds for public employee programs by draining resources away from those states who want to operate private sector programs, we increase the risk States deciding to leave this responsibility to us -- thus imposing additional enforcement costs on the Federal government (as happened in California).

2) Developmental Funding

In the first two years of its existence, OSHA offered 90% funding to encourage States to develop and submit State plans. While the costs of developing plans are not as significant as the costs of administration or compliance, covering these planning costs would no doubt be welcome. The Department has not developed a cost estimate for such an effort.

3) Compliance Funding

As noted above, the Department has not yet completed an economic analysis of the net cost (if any) to State and local employers in the 28 currently uncovered jurisdictions of coming into compliance -- nor of the additional net costs (if any) to State and local employers in currently covered jurisdictions of coming into compliance with the provisions of the new law.

4) Compliance Assistance Funding

All states currently receive 90% funding to enable them to provide consultation services to covered employers. This is a very popular program, and expansion of such services (at the expense of consultation) forms the heart of the minority approach to OSHA reform. Public employers can benefit from these services as much as private sector employers. With the expansion of the universe covered by OSHA, demand for additional funding for this activity will increase -- otherwise fewer services will be available for the private sector.

To meet the increased demand without cutting into compliance resources, the House bill would authorize the charging of fees for consultation services, and the establishment of a revolving fund to use these fees exclusively for that purpose. This would ensure that the availability could grow to meet the demand. Regulations of the Secretary could presumably adjust the fees to deal with particular problems (e.g. business size). There is strong opposition to the charging of fees for such services, based on concern it will effectively discourage those who need the services most from seeking them.

Focusing these services on newly covered employers for a while, or subsidizing those to public employers, could be considered.

5) Remittance of Federal penalties imposed

Under the bill, if States do not have a plan approved by the effective date, the Federal government will inspect public employer facilities and collect penalties in appropriate cases -- just as with private sector employees.

One approach is to allow States which adopt State plans to continue to have the flexibility not to penalize public employers. The law requires State plans to be "at least as effective as" the Federal law; accordingly, once the Federal law provides for the coverage of public employees under a Federal penalty regime, the present policy of giving the States flexibility in this area may have to be changed unless special legislative language to the contrary is added. This would ensure a strong incentive to adopt State plans would be created.

A second approach would be to focus on penalties assessed by Federal inspectors from public employers, and develop an alternative penalty assessment scheme to ensure we have more flexibility in imposing fines on public employers. The penalty policies followed by the Department, however, already provide considerable flexibility to mitigate potential penalties for good faith efforts, and to adjust abatement dates (in consultation with employee representatives) to deal with fiscal realities. Moreover, the current system has proved useful in establishing employer-wide compliance agreements through settlement of proposed penalties -- and approach that could prove very useful with public employers as well.

A third approach, again looking at the penalties assessed (and in this case collected) by the Federal government, is to provide for the remittance of any funds collected to the State involved, so it can be used to help public employers come into compliance. The House bill contains a similar provision on Federal employees that could be used as a model. (Attachment 8.) Nevertheless, this approach is very dangerous because it undercuts equity with the private sector and potentially creates a demand for similar private sector mechanisms.

6. Delaying effective date

Delaying the effective date of the legislation, as in the minority bill, would allow State and local governments much more time to plan for implementation, to receive technical help in coming into compliance, to consider the use of state plans, and otherwise to adjust their priorities.

Alternatives

- 1) Provide administrative funding

Pro: * Doing anything reasonable to ensure the States take over this responsibility is worthwhile, because it will avoid hundreds of politically difficult problems arising from Federal compliance orders and assessments on cash-strapped public employers.

* There would be a considerable saving in FTE if the States take on this activity.

Con: * There may already adequate incentives for States to adopt State plans, saving the Treasury at least \$25 million a year.

* The ultimate costs of moving in this direction may prove higher, because of pressures to aid existing State programs -- including those where most of the costs fund the State's voluntary decision to regulate the private sector.

2) Provide developmental funding for a few years

Pro: * This is assistance only for the short-term, and is not likely to be significant in cost.

* This funding adds an important incentive to encourage States to explore the possibility of a State plan, helping to ensure the advantages noted under alternative number 1.

Con: * The law still requires up to 50% sharing of implementation costs; and while that is subject to appropriation limits, the more States we encourage to adopt state plans the larger the ultimate obligation.

3) Provide compliance funding (directly, or by low-interest loans)

Pro: * This would respond to the heart of the concern, and the reality at the local level, of the mandate.

Con: * The up-front addition to the Federal budget has not been calculated, but could be significant; and loan repayment, if that is the mechanism, is questionable.

* If the purpose of covering these employees is to demonstrate equity with the private sector, the latter may demand equal treatment as a condition of supporting the legislation.

4) Provide compliance assistance funding to State and local employers either:

- a) free, as at the present time; or
- b) at cost, through a revolving fund

Pro: * Consultation visits that do not risk the immediate imposition of an abatement plan and penalty are strongly supported by all employers, including public employers, so this is a very positive type of aid.

* Public employers will be entitled to these services anyway; emphasizing the availability is a "freebie" to that extent.

Con: * Although there is no cost if a revolving fund covers everything, providing the services free or at a discount could have significant costs to the budget that will need to be considered. Accordingly, raising the matter in the context of the unfunded mandate could lead to pressures we want to resist.

5) Change penalty policies

a) Let State plan states continue to elect whether to penalize public employers under new law.

Pro: * Strong incentive to adopt State program.

* Continuation of existing practice, which States which already have State plans may not realize bill places in jeopardy.

Con: * Undercuts argument that we are going to hold public employers to the same standards as private-sector employers.

b) Establish a different penalty assessment scheme for public employers.

Pro: * Sounds good.

Con: * Plenty of flexibility now.

* Could undermine credibility of existing system in private sector.

c) Remit to States for training and education any penalties collected by Federal government from State and local authorities.

Pro: * Consistent with the approach suggested for Federal public employers.

* Positive use of funds, and fact that precious state resources are not going to reduce the Federal deficit, would be well received.

Con: * Major risk of creating demand for similar mechanisms for private sector.

* Removes an incentive for States to adopt State plans.

6. Delay implementation date of new coverage -- e.g. 3 years

Pro: * Consistent with minority bill.

* Time to plan, develop state plans, reorient priorities, come into compliance, etc.

Con: * Inconsistent with goal of equity: among States, and with private sector.

* Leaves millions of workers unprotected for some time, despite the risks.

No fed coverage
who Congress
no state can do
fed case

Time for states to
adopt funded
plan for
subject

to shake out
the intended mandate
to fund them
transferring roles

GROUP 3 - COVERAGE

- New Jersey - non-plan state that has more strict requirements than ASHA
- How many other non-plan states have similar background/experience

SECRETARY'S TASK FORCE
ON OSHA REFORM

REPORT OF THE WORKGROUP
ON COVERAGE ISSUES

U.S. DEPARTMENT OF LABOR

JULY 30, 1993

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PART ONE:

**COVERAGE OF STATE AND LOCAL
EMPLOYEES**

PART ONE: COVERAGE OF STATE AND LOCAL EMPLOYEES

I. SUMMARY

When Congress enacted the Occupational Safety and Health Act of 1970, concerns about the possible unconstitutionality of federal regulation of relations between state agencies and their employees led to the exemption of the public sector from OSHA coverage. After initially holding such coverage unconstitutional in Nat'l League of Cities (1976), the U.S. Supreme Court in 1985 ultimately upheld Congressional authority under the commerce clause to regulate the working conditions of state and local workers in Garcia v. San Antonio Metro. Transit Auth., H.R. 1280 and S. 575 would amend the definition of "employer" found in section 3 of the 1970 Act to include states and their political subdivisions.

Sponsors of current OSHA Reform legislation view extension of OSHA coverage to public workers as among the most important provisions of the bills. Committee staff interviewed by the work group emphasized that commitment, describing the issue as "critical" and "non-negotiable."

No one argues that state and local employees do not need such protection; illness and injury rates are at least comparable to those in the private sector and even exceed that in some states. Public employees in about half the states and cities in the U.S. are already subject to OSHA standards because such coverage is a condition of State plan approval. The remaining states and localities will probably oppose extension of coverage on cost-of-compliance grounds, objecting to what they characterize as an "unfunded federal mandate."

Extension of coverage clearly would require significant new resources, not only for enforcement but for training, consultation, and standard-setting.

II. STATE AND LOCAL COVERAGE: KEY ISSUES AND PROBLEMS

1. Is There A Need For OSHA Coverage Of State And Local Workers?

a.) Public Employment In Non-plan States

According to the Bureau of the Census, state and local governments (not including territories and possessions) currently employ 15.5 million workers, 7.6 million of whom work in states which maintain an OSHA state plan. The remaining 7.8 million employees of state agencies, cities, counties, townships and specialized units of

local government are presently excluded from OSHA coverage.

State and local employees engage in a remarkable variety of work activities. Major occupational categories traditionally associated with public employment include education (8 million employees); health care (1.5 million); police and fire protection (1.1 million); and transit and highway workers (.5 million).

Enforcement data from states with federally-approved plans reveal public-sector inspections and citations in virtually every industry division including agriculture, construction, mining, manufacturing, wholesale and retail trade, finance and services. There are abundant examples of state- or municipally-owned farms, quarries, railways, air terminals, docks and other commercial or manufacturing facilities. Prison employment, sheltered workshops, and job training programs sometimes virtually duplicate private sector workplaces.

It may be worth noting that in enacting the 1970 Act, Congress exempted state and local governments only because of doubts about the constitutionality of such coverage, not because it believed worker protection was unnecessary in public sector employment. Indeed, Congress clearly acknowledged the need for such coverage by making public-sector OSHA enforcement a criterion for State plans.

b.) Illness And Injuries Among State And Local Workers

National data comparing the injury and illness experience of state and local government workers to private sector workers is not available. Twenty-eight (28) states generate injury and illness rates that may be compared (see attachment xx). In most of the states the public sector employees experienced occupational injuries and illnesses at a lower rate than their private sector counterparts. However, 8 states had a higher public sector lost workday case rate. Without a more comprehensive data collection and analysis effort, it appears that public sector workers are being injured at about the same rate as private sector workers.

Hundreds of state and local government workers are killed in occupational accidents each year. The BLS 1991 Census of Fatal Occupational Injuries (CFOI) included 246 fatalities to state and local government

workers in just 31 states. The 1992 CFOI data will include information from all 50 states, and will help to provide a fuller picture of the fatality experience of public sector workers. The CFOI data only includes information on fatal injuries. State and local workers also die as a result of occupational illnesses such as asbestos related disorders.

An informal survey of occupational fatalities among AFSCME members since 1980 illustrates both the need for better OSHA compliance and the special hazards of public employment. Of 163 non-coronary fatalities noted by AFSCME for which a cause of death is known, a significant number resulted from confined space entry, contact with overhead power lines, and other hazards which would have been prevented by compliance with OSHA standards. Sixty-six (66) of the reported fatalities involved moving vehicles; some would have been prevented by existing OSHA standards requiring reverse alarms or machinery guarding, and others might have been prevented by employee training or other measures contemplated in OSHA's proposed vehicle safety standard. Thirty-three (33) of these fatalities involved acts of violence against government workers, a significantly large number considering that AFSCME includes relatively few law enforcement personnel among its members; almost all of the violence-related AFSCME fatalities involved hospital attendants, prison guards and social workers. Law enforcement, of course, is also a highly dangerous occupation as are fire fighting and emergency response.

c.) Costs Of Public Sector Illness And Injuries

Comprehensive injury and illness cost data for state and local government workers is not available. However, individual states can provide cost information for these workers. The state of Florida spent over 43 million dollars to pay for medical costs and lost worktime for public sector workers in 1991. The costs are more than \$4,000 per injured worker, somewhat less than the \$5,500 per injury in the private sector. This estimate does not include costs borne by the worker or his family, such as loss of earnings.

The state of Michigan paid over 7 million dollars to care for injured public sector workers in 1988. The average cost per claim was 1,500 dollars, slightly higher than the 1,300 dollars per private sector claim.

A recent study by the Rand Corporation estimated the total cost of work accidents public and private, at 83 billion dollars per year. There can be little doubt that injuries to state and local government workers represent a significant portion of those costs.

2. What Are The Disadvantages Of Covering Public-sector Workers?

a.) Resources

The primary objection expressed by the previous administration to OSHA coverage of state and local workers was the effect on already-scarce agency resources of adding some 75,000 to 100,000 workplaces to the sites already subject to inspection by the agency (1992 estimate by OSHA DOP). The resources problem remains a legitimate agency concern.

The Congressional Budget Office has estimated, based on current State plan inspection rates, that approximately 4,000 additional inspections would be needed annually, at an additional personnel cost of \$7 million. This estimate was apparently based upon the assumption that state plans devote about 10% of their inspections to the public sector; fed OSHA presently conducts somewhat more than 42,000 worksite visits each year in the private sector.

Using a similar, state-plan model but with correct data, which show closer to 20% of state plan inspections being conducted in the public sector, the workgroup on coverage issues has developed a range of resource estimates. Coverage at levels equal to current state plans enforcement, which include not only complaint inspections, fatality/catastrophe inspections and referrals from other agencies but also a substantial component of randomly-selected "general schedule" inspections, would entail approximately 8,300 additional OSHA inspections annually.

The state plan enforcement experience relied on above includes a substantial number of general schedule inspections. The minimum number of inspections could be much lower under a "complaints-only" enforcement program for the public sector. By using state numbers for inspections resulting from complaints, accidents and referrals (which numbered about 3,200 in 1991) a minimum of about 1,900 additional federal OSHA inspections would be required to cover state and local government workplaces in non-plan states.

Under another methodology based upon the number of state plan public sector inspections per 10,000 covered employees, 3,200 additional federal inspections would be required for "complaints-only" coverage of the public sector in non-plan states, and in excess of 11,000 for a comprehensive program including routine general schedule enforcement visits.

The effect of this legislation on the state plans program is difficult to predict. Theoretically, states which do not now have state plans could agree to assume responsibility for carrying out the new federal mandate, thus relieving OSHA of at least part of the expense of covering state and local workers. Logically, if OSHA coverage were extended one would suppose most of all of the states would immediately apply for a public-sector-only state plan, as the current OSH Act already allows them to do, in order to retain authority locally and to qualify for 50% federal matching funds to run their programs. However, state officials responsible for existing state plans expressed doubt that many states would be interested; some predicted that most state governments would rather federal OSHA take on the inevitable conflicts with localities this program would certainly engender.

One important, but usually overlooked, cost aspect of public sector coverage is the need to provide consultation and start-up compliance assistance to 50 states, and hundreds of counties, municipalities, territories and districts which have no experience with or knowledge of OSHA requirements. In the mid-1980's, when the U.S. Supreme Court in effect extended the Fair Labor Standards Act to cover states and localities, one of the first steps taken by the Employment Standards Administration was to furnish a compliance consultant to each of the states. OSHA already has a federally-funded OSHA on-site consultation service in each state, but substantial additional FTE's would inevitably be required to furnish compliance assistance in the public sector.

b.) Resistance And Objections By Local Government

Because no representatives of state or local agencies appeared or submitted comments during extensive hearings held on OSHA Reform in 1992, the Task Force has made a concerted effort to contact these groups and elicit their views. Comments made to the Task Force during meetings with representatives of state, county and municipal government suggest that substantial

objections will be raised to state and local employee coverage under OSHA, with a focus on the issue of "unfunded federal mandates." State and local government groups are already organized around this issue; to state and local groups, particularly the Conference of Mayors, OSHA Reform represents only another expensive federal initiative requiring the expenditure of local resources.

The Task Force has encouraged these groups to develop estimates of likely compliance costs. The Nat'l League of Cities provided a rough estimate prepared by officials of Plano, Texas, which estimates the cost of complying with ten unspecified OSHA standards at selected Texas municipalities at \$4 million the first year, \$2.5 million annually thereafter. The NLC has promised to conduct a member survey on compliance costs. We have suggested the NLC find out whether their cities are already in compliance with many OSHA standards, especially cities in state plan states, which are already covered by OSHA requirements.

Other issues include concern with potential personal liability on the part of city officials; the very first question on the draft NLC member survey points out that criminal fines against city management officials for willful OSHA violations could not be paid out of city funds, and elicits city attorney comment on this facet of OSHA reform. Yet another concern relates to the mandatory worker/management committee provisions, which according to state government representatives are likely to be viewed as an effort to introduce collective bargaining in states where bargaining is outlawed in the public sector.

One significant issue not raised by local government groups but encountered by DOL agencies enforcing the Fair Labor Standards Act, and by OSHA state plan officials in connection with public sector enforcement, is the phenomenon of attempted political interference in enforcement cases. State and local officials often enjoy exceptional access to legislators; enforcement proceedings which potentially involve considerable expense to local government often generate unfavorable attention.

Finally, Committee staff indicate that volunteer fire and rescue services in some Congressional districts have expressed concerns about potential coverage under an amended OSH Act; given that volunteer fire companies are ubiquitous and often quite influential in rural districts, the fear of OSHA coverage of volunteer

workers could become a wedge issue against coverage of state and local agencies. At the April 28, 1993, House Labor Committee hearing, Chairman Ford (in response to a concern expressed by Rep. Barrett of Nebraska) emphatically stated that nothing in should be construed as extending coverage to volunteer workers not now covered by OSHA.

3. Defining Federal OSHA's Public Sector Program

Present OSHA reform bills do not include unique requirements for the public sector but simply amend the definitions in the Act to include states and their political-subdivisions as employers, suggesting that OSHA's program for the public sector would be a mirror image of the procedures and requirements applicable to private industry. It is true that most hazards faced by private sector workers are also found in government-owned workplaces. It is also true that differences can be found between public and private employment with regard to such things as labor relations, authority for abatement and the availability of funds for penalties.

Possible alternative requirements and procedures for the public sector might include:

a.) Penalties

OSHA state plan regulations have never required the states to assess civil monetary penalties in the public sector if states adopt some equivalent sanction, such as injunctive relief. Eight (8) of 25 state plans have no monetary penalties in the public sector, and several others have specially-adopted penalties such as penalties for failure-to-abate only, or penalties only for serious violations, or remittance of penalties if violations are corrected.

The argument is often made that penalties against public agencies make no sense as a deterrent, as they only drain funds from some other important public purpose. Public employee unions have a concern that penalties not be imposed on government funds to be used for employee salaries, a concern relayed to the workgroup by House Committee staff. At the same time, the workgroup was repeatedly told by a variety of health and safety professionals from both unions and government that monetary penalties are indispensable in any regulatory program. A comparison was repeatedly made between OSHA and EPA; environmental compliance receives first priority largely because state

environmental agencies have the authority to levy fines even against federal agencies.

A compromise penalty system is worth considering, especially if it provides some mechanism for returning penalty money to local governments in the form of funding for compliance or employee training.

b.) Special Hazards: Criminal Violence

Injuries and deaths as a result of criminal activity are clearly a risk in some sectors of public employment, most obviously in law enforcement and corrections work; 23,650 law enforcement officers were injured in assaults during 1991, according to FBI Uniform Crime Reports. Criminal activity as an occupational risk is not restricted to the public sector, see BLS Report 845, Fatal Workplace Injuries In 1991 at pp. 39 et seq. (homicide found to be the leading cause of workplace death of women in Texas), but certainly figures prominently in the injury and illness rates of public employees.

Some risks are amenable to correction by compliance with OSHA-type requirements, while other risks may be so intertwined with law enforcement policy and other non-OSHA considerations as to be inappropriate for resolution by OSHA. Representatives of the National Association of Police Organizations recounted many instances of OSHA-type hazards encountered by its members, including excessive noise exposure from communications headsets (a problem resolved by referral to Michigan OSHA) and the need to reconfigure computer and weapons racks in police cruisers to accommodate air bags. Other issues, such as rules concerning the conduct of high-speed chases, are best resolved by authorities other than OSHA, in NAPO's view.

The workgroup suggests that if coverage is to be extended to the public sector, OSHA should focus its resources on hazards amenable to correction by engineering, personal protective equipment, work practice controls, training and other traditional methods of compliance. A total exemption of crime-related hazards from OSHA coverage would not be appropriate, because many crime-related hazards can be corrected through relatively simple and feasible means of abatement such as adequate interior and exterior lighting, alarms and security devices, plexiglass shields and other readily available technology. (Washington State has adopted a standard requiring a

variety of such corrective measures to protect employees in retail establishments, and we are aware of at least one case in which California has required installation of bulletproof glass in police stations under the state's general duty clause.) But OSHA should consider establishing a policy mechanism for exercising discretion in cases where public order/law enforcement concerns may outweigh ordinary job safety concerns.

c.) Special Coverage Provisions

Redefining the term "employer" under the Act to include "states and their political subdivisions" covers most but not all public sector workers. The workgroup suggests that this definition be expanded to include interstate compact agencies (such as Metro and the New York/New Jersey Port Authority) and agencies of Indian tribal government that serve governmental functions.

III. ANALYSIS OF CURRENT OSHA REFORM PROPOSALS

a.) The Secretary's Five Principles:

Preventing Hazards Should Be Our Focus.

Virtually all of the hazards faced by private sector workers are present to some extent in state and local government workplaces, plus a variety of additional risk factors that are much more common in the public sector than elsewhere. The workgroup is interested in obtaining reliable information on the costs of injuries and illnesses in the public sector; no source of national data exists, but what little state-based data we were able to locate during the available time suggest that the cost to society and local government of worker injuries and disability may be just as significant as those in the private sector.

Many of these hazards are preventable. A great number could be eliminated simply by compliance with OSHA standards, and it also seems clear that the benefits of systematic health and safety management, written safety programs, and cooperative approaches to employee involvement in health and safety issues would be every bit as applicable to government workplaces as to private industry.

Better Training Is An Important Means Of Prevention.

Proponents of OSHA coverage of state and local agencies, particularly those in organized labor, emphasize the need for OSHA's enforcement presence to stimulate local government compliance with health and safety rules. But OSHA coverage could also be a stimulus for improved training and education of both workers and management. State and local government agencies (at least those outside state plan states) have had little incentive to develop state-of-the-art health and safety programs or to adopt modern safety management techniques. OSHA would do well to make improved training and management techniques the focus of any enforcement program for state and local agencies.

Incentives To Promote Hazard Abatement Need Strengthening.

As noted above, compensation costs in the public sector provide a potential incentive for the correction of hazards. One line of inquiry the workgroup was unable to pursue during the study period was to examine the compensation-based safety programs states may already have in place. Some states may furnish valuable models; others may lack adequate programs. The addition of OSHA compliance responsibility might be a catalyst for increased state efforts in this area.

Regulatory Efforts Must Be Streamlined.

Extension of OSHA jurisdiction to state and local government workplaces will entail broadening the Department's regulatory focus to include hazards which, if not unique to public employment, are more prevalent there. Regulatory issues such as fire fighter safety, motor vehicle hazards, and hazards from criminal violence would assume a new priority, and risks related to communicable diseases, already an important priority, must be evaluated in light of many newly-regulated exposures in the public sector.

OSHA Must Have Penalties Which Induce Compliance.

More than twenty year's experience in state plan states suggests that civil monetary penalties can be a useful ingredient in a public sector compliance program. For many, the threat of monetary penalties is the hallmark

of any serious regulatory program, and is required if abatement responsibilities are to be taken seriously by state and local agencies who commonly are short of funds. Alternative methods for calculating, assessing and disposing of penalty revenue are worth considering.

b.) Impacts On OSHA And Affected Groups:

- As discussed above, extension of OSHA coverage to state and local employees, an addition of 7.8 million workers to OSHA's present universe of about covered workers, will require significant additional resources. A minimal program of enforcement coverage would entail 4,000 additional OSHA inspections per year, plus concomitant support services, administrative, laboratory and legal staff resources. Coverage comparable to current private sector efforts could entail as much as 11,000 additional inspections annually. Additional program and resources impacts will include the need for more consultation and training personnel, and quite possibly greater rulemaking resources as well.
- If a large number of states elect to submit public-sector-only state plans, OSHA will perhaps spend less on enforcement in those states but much of the savings will have to be devoted to state plan matching grants, laboratory and other support services for the states, and monitoring costs.
- The work group does not have access to reliable data on the cost of compliance by state and local agencies with OSHA standards. To date, the only likely source of such data is the pending Nat'l League of Cities member survey, whose usefulness may be limited because of the generality of the questions and the viewpoint of both the administrators and the respondents. Our only general indicator of the impact on state and local governments is the fact that local government agencies in 25 state plan states have been subject to OSHA standards for many years and have presumably been able to absorb whatever compliance costs may have resulted.

c.) Views Of Parties Consulted By The Workgroup:

- Public employee unions agreed that they can have little impact in attempting to improve working

conditions through organizing and negotiating, in the absence of a plausible regulatory presence by OSHA in public sector workplaces.

- Representatives of states and local governments not only oppose the extension of OSHA coverage as an "unfunded federal mandate" but gave the impression that these groups intend to be more active in voicing this opposition when Congress begins actively considering current reform bills.
- Safety groups such as the National Safety Council and the American Public Health Association support the extension of OSHA coverage, as do certain business groups like NAM.
- State plan officials have raised no objection to the extension of coverage, although program staff in New York and Connecticut are uneasy about the possibility that a flood of new applicants for "public sector only" state plans may dilute available federal matching funds for such programs.
- It might be useful to identify and consult with officials who currently administer safety programs for government agencies in non-plan states; they may be able to provide useful models and experience.

IV. OPTIONS

Arguments For And Against Covering Public Employees

The principal choice for the Department is, of course, to support or oppose the extension of OSHA jurisdiction to include employees of the states and their political subdivisions. The most significant factor counseling caution in accepting extended jurisdiction is the very significant impact on already-scarce OSHA resources; it would not be prudent for the Department to support extension without requesting additional staffing and funding. Another consideration, somewhat more difficult to quantify, is the possibility that public sector enforcement will lead to occasional political confrontation and possibly complicate the agency's Congressional relationships.

The case for extending OSHA jurisdiction rests largely on considerations of consistency and equitable treatment. Public employees in one state should receive occupational safety and health protection comparable to those in other states, and

minimum standards of job safety and health should be applicable in all workplaces, public or private.

The argument that it would be unfair to require states and localities to spend scarce resources on health and safety (the "unfunded mandate" argument) seems to ignore the fact that nearly half the nation's public institutions already must comply with OSHA under state plans. Indeed, there is a fairly compelling argument that coverage is needed to assure comparable health and safety efforts between state plan and non-plan states.

Handwritten notes:
No money
be a
good
argument
for
state
choice

Options Concerning Penalties And Enforcement Procedures

Although many state plans include identical enforcement provisions for all employers, other states have specially devised rules and procedures for the public sector, particularly regarding penalties. Connecticut's public-sector-only plan, for example, has declined to adopt the sevenfold increase in federal penalties, and New York imposes monetary sanctions only for failures to abate hazards. Congress will undoubtedly be urged to consider modifying OSHA requirements for public employers, particularly requirements regarding penalties.

Various possible refinements in OSHA penalty and enforcement procedure might include a relaxation of the current OSH Act principle of first-instance sanctions; penalties might be remitted if a public employer immediately abates a violation, or might be imposed only if the employer fails to abate within the time specified in the citation. The current Act permits OSHA and the Review Commission to consider only employer size, history, and good faith in adjusting monetary penalties; in adapting this scheme to the public sector, additional criteria may be worth considering.

One important modification that deserves consideration would be the dedication of revenue from civil monetary penalties paid by public agencies to special funds to be used for health and safety purposes. Retaining these funds for use within the state where they were generated might be considered.

Other Possible Agency Initiatives

If a decision is made not to press for outright coverage of state and local employees in non-plan states, other programs for advancing the cause of safety and health in the public sector should be considered. At a minimum, extending OSHA's existing on-site consultation services to public agencies in non-plan states is worth considering. This program, currently administered by state agencies in most states with 90% federal OSHA funding, provides penalty-free, on-site visits by trained

health and safety personnel. The popular and highly-regarded service is available free of charge to employers, but except in state plan states it is not now available to state or local government employers. Because employers must agree to abate any serious hazards pointed out during a consultation visit, see 29 CFR 1908.6(f), statutory authority might be advisable before initiating such a program. In any case, it would be necessary to significantly increase current funding for the consultation program, which has received notable, bipartisan Congressional support for many years.

Another administrative option might be to encourage as many states as possible to adopt public sector state plans; legal authority currently exists for approval of such plans but not for funding.

Finally, in the absence of OSHA enforcement coverage, thought might be given to the creation of an incentive grant program for job safety and health. States might be awarded grants to research develop, and administer innovative programs for injury and illness reduction. The original Act provided 90% development and planning grants for states contemplating the submission of a state plan, but that authority expired in 1973. A second-generation developmental grant program might be devised to encourage the states to study their own illness and injury rates and design programs to reduce them. The program should de-emphasize federal oversight and encourage state creativity; see, generally, the "new federal compact" chapter in Mandate for Change.

APPENDIX 1. Groups Contacted By The Workgroup

American Federation of Government Employees
American Federation of State, County, and Municipal Workers
American Federation of Teachers
Int'l Union of Operating Engineers
National Association of Police Organizations
Service Employees Int'l Union

New York Department of Labor
Connecticut Department of Labor

Occupational Safety and Health State Plan Association

National League of Cities
National Conference of State Legislatures
National Association of Counties
United States Conference of Mayors

PART FOUR:

STATE PLANS

PART FOUR: STATE PLANS

I. SUMMARY

The Occupational Safety and Health Act of 1970 generally preempts civil regulatory jurisdiction by states over job safety and health but allows states to reenter the field by obtaining federal approval of a state OSHA program, or "State plan." OSHA Reform bills would make relatively minor procedural changes to the current law and state plans procedure aimed at improving federal oversight of state operations and enhancing worker protection in plan states.

The bills would provide that when a state fails to adopt a new occupational safety or health standard within 6 months of its adoption by OSHA, the state must enforce the federal standard to provide interim employee protection. The bills would tighten procedures for federal investigation of complaints about the administration of state programs and would enhance OSHA's concurrent enforcement authority in state plan states in some circumstances.

Finally, H.R. 1280 and S. 575, the 1993 COSHRA bills, include language designed to overturn the Supreme Court's decision in Gade v. Nat'l Solid Wastes Management Assn., ___ U.S. ___, 60 LW 4587 (June 18, 1992), which held that section 18 of the present OSH Act preempts states from regulating any issue addressed by an OSHA standard, except through a federally-approved state plan. The proposed amendment would authorize states to adopt multi-purpose laws and regulations which overlap OSHA without submitting or obtaining OSHA approval of a state plan.

II. KEY ISSUES AND PROBLEMS

Introduction: OSHA Reform And The State Plans

The Imperial Poultry fire occurred in Hamlet, North Carolina on September 3, 1991, a few weeks after the COSHRA bills were first introduced, and proponents of OSHA reform were quick to call attention to the Hamlet fire as an example of the need for OSHA reform. See: Hearings on H.R. 3160 and the Fire at the Imperial Food Products Plant, 102d. Cong., 2d. Sess. (Sept. 12, 1991). Because North Carolina maintains a federally-approved state plan, a thorough reevaluation of all state plans that cover private industry was undertaken by the Department of Labor, and a study of OSHA's monitoring of state plans was initiated by the General Accounting Office. Suggestions were made by House Education and Labor Chairman Ford at the close of the Hamlet hearing that the bills' state plans provisions might be further revised, but no amendments to this effect have been offered.

Notwithstanding Hamlet, state plan reform has not become a major focus of OSHA reform. The state plan states have instead served as source of useful illustrations of OSHA reform ideas at work: mandatory health and safety programs and worker/management committees, criminal prosecutions for workplace violations which cause serious injuries, and inspection scheduling based on the worker's compensation injury rates for particular employers are all ideas derived from the programs of various state plan states.

In general, state opposition to state plans reform has been relatively muted. Testimony by state officials at last year's hearings and at the July, 1993 House hearing concentrated on endorsement of major OSHA reform provisions such as written safety programs and worker/management committees; little if anything has been said about Title X, the state plans section of the bills. Similarly, the state officials consulted by the work group seemed far more interested in the proposed changes to OSHA than in possible revisions to state plans evaluation procedure.

NOTE: A major study by the General Accounting Office of federal OSHA's oversight of State plans, commissioned by the House Education and Labor Committee following the Hamlet fire, is near completion. OSHA expects to receive a copy for comment within days after the present workgroup report is submitted; recommendations made by GAO may generate Congressional interest and may be an important factor in formulating a Departmental position on the state plans provisions of OSHA reform.

1. Concurrent Federal OSHA Jurisdiction

Under section 18 of the OSH Act and current OSHA regulations, states applying for a state plan first must qualify for "initial approval" by federal OSHA, which lifts the barrier of federal preemption and permits the state to begin enforcement activity. Employers in states with initial state plan approval are subject to concurrent enforcement by both federal OSHA and the state. After a state qualifies for so-called "final approval" under section 18(e), however, federal standards no longer apply in that state and OSHA loses its authority to enforce the Act with respect to safety and health issues covered by the state plan.

The reform bills would add various procedural rules and time limits to OSHA's existing regulations which require OSHA to investigate complaints by employees or other members of the public concerning the manner in which states administer their programs. The bills would add to OSHA's current investigation authority a provision authorizing OSHA to issue citations for any hazard not cited by the state, even in states where final approval has been granted under section 18(e). Furthermore, in cases where OSHA finds sufficient grounds, after giving the state six months to correct any deficiencies, to warrant withdrawing

approval of the plan, OSHA may exercise concurrent authority during the withdrawal proceedings. Under current law and procedures, federal enforcement authority could not be reinstated until after withdrawal proceedings are completed, an extremely cumbersome legal process which would take years to complete.

2. Enforcement Of Federal Standards

The existing OSH Act requires states, as a condition of state plan approval, to adopt occupational safety and health standards which are at least as effective in protecting worker safety and health as the federal standards adopted by OSHA under section 6 of the federal Act. State plan regulations require the states to adopt state standards comparable to new federal OSHA standards within six months, 29 CFR 1953.23.

The reform bills would require each state plan which has not within six months adopted its own standard in response to a newly-promulgated OSHA standard, to enforce the federal standard. Current bill language should be revised to avoid legal and logistical difficulties potentially created by requiring the states to enforce federal law, but requiring that states have authority to automatically adopt federal standards as state standards after a certain time period would accomplish the intended result.

3. The Gade Preemption Issue

In 1992, the U.S. Supreme Court resolved the long-unsettled issue involving the extent to which states are preempted by the OSH Act from regulating occupational safety and health issues if they have not submitted and obtained federal approval of a state plan in accordance with section 18(b) of the Act. It had been relatively clear even before Gade that states are preempted from asserting civil regulatory authority over purely occupational safety or health matters, and indeed the Department of Labor has had an interpretive regulation to that effect since shortly after enactment of OSHA, 29 CFR 1901.2.

The question resolved in Gade involves multi-purpose state laws, those aimed primarily at public or environmental health or safety, but which have the incidental effect of regulating the safety of workers. The state law challenged in Gade required licensing of crane operators and other employees working in the hazardous waste disposal industry; other examples of multi-purpose laws include boiler and pressure vessel regulations which protect the community from fires or explosions but also incidentally protect personnel who attend this equipment; restrictions on demolition procedures which might cause the release of asbestos or other hazardous materials into the

environment; or regulation of field sanitation or migrant housing for public health reasons.

In Gade, the Supreme Court held that in enacting section 18, Congress intended the state plans mechanism to be the sole means by which states could assert civil regulatory jurisdiction over occupational hazards; states without state plans are accordingly preempted from enforcing requirements that supplement OSHA or deal with occupational safety, even as part of a multi-purpose regulatory program aimed at public safety as well as job safety issues.

Language has been added to this year's House version of the OSHA reform bill which is intended to overturn Gade and remove any restriction on the authority of states to regulate issues which present mixed questions of job safety and environmental or public health law.

(Note: The Court's decision in Gade deals only with civil enforcement issues and does not resolve the issue of federal preemption of state criminal prosecutions for workplace crimes, a topic addressed by other provisions of OSHA reform legislation. As the Department of Justice accurately points out, the present reform bills would exempt all state criminal enforcement from preemption, not just prosecution for common-law crimes such as manslaughter and battery, thus opening the door for direct state regulation of health and safety through the criminal process, evading the state plans review process entirely.)

III. ANALYSIS OF MAJOR PROVISIONS

1. Concurrent Federal OSHA Jurisdiction

Concurrent federal enforcement is a remedy OSHA has found necessary to protect workers in initially-approved state plan states on many occasions. For a two-year period after California ceased operating its state plan and until funding was restored by the legislature in 1989, OSHA provided health and safety inspections and enforcement in workplaces throughout the state. In Iowa, after the state's Supreme Court invalidated IOSHA's authority to obtain search warrants, OSHA reinstituted federal concurrent jurisdiction until the legislature supplied the missing legal authority for the state program. Probably the most prominent example is OSHA's resumption, as a result of evaluations of the North Carolina state plan following the Hamlet fire, of federal enforcement authority to respond to workplace complaints and carry out discrimination investigations within the state.

If any of these circumstances had arisen in one of the fourteen state plans which now have achieved "final approval" under section 18(e) of the Act, OSHA would have been unable to respond. After final approval, OSHA is barred by law from enforcing its health and safety standards, and cannot immediately regain jurisdiction even by agreement with the state plan, since the 18(e) jurisdictional defense is one which employers can raise directly against OSHA in any enforcement proceeding. Moreover, a state that wishes to preserve its exclusive jurisdiction over its employers can delay federal enforcement almost indefinitely by insisting on the completion of extremely cumbersome administrative plan withdrawal procedures.

The reform bills would furnish OSHA the authority to conduct supplementary safety and health enforcement after plan withdrawal is initiated. OSHSPA, the group which represents state plans, has not yet issued a formal position on this provision. It seems unlikely the states would ever endorse such a remedy, particularly since state administrators typically prize the autonomy that final approval represents.

Although there undoubtedly are some employers in state plan states who would object to the extension of federal OSHA's supervisory authority over their workplaces, employer groups to date have not challenged the state plans provisions of COSHRA. Indeed, the National Association of Manufacturers generally endorsed these bill provisions in 1992.

The COSHRA bills contain two provisions for concurrent enforcement that would apply during two quite different phases of the state plans approval process. Each has its own advantages and disadvantages; the Department should consider them separately in evaluating whether to endorse either or both:

Complaints about state plans: Under state plan regulations at 29 CFR 1954.20 et seq., employers, employees and other members of the public who are dissatisfied with any aspect of state plan operations may file complaints about state program administration (known in the trade as a CASPA). This procedure was designed by OSHA as an aid to monitoring and evaluating state plan performance, and is intended as a means of identifying systemic flaws or persistent problems in state plan states. It is not intended as a vehicle for federal intervention in specific, pending state enforcement actions, nor as an additional route of appeal for state OSHA litigants dissatisfied with decisions reached by state agencies in particular cases.

The COSHRA bills, in addition to imposing mandatory time frames for investigating CASPA's, would require OSHA, after investigation and consultation with the state, to issue citations for any serious violation the state has not cited. The new procedure represents a significant change in focus from

monitoring to federal intervention, and tends to shift to federal OSHA the ultimate responsibility for handling difficult enforcement cases in state plan states. An additional shortcoming is the provision's extremely limited scope; OSHA can become actively involved only when a state completely fails to cite a particular hazard, not when citations are issued that do not prescribe adequate abatement, or when adequate citations are ineffectively prosecuted. 40

Concurrent enforcement during withdrawal proceedings: The bills would also authorize federal OSHA to resume supplementary federal enforcement when, after investigation and a six-month grace period to correct deficiencies, OSHA has decided to initiate proceedings to withdraw federal plan approval. Clearly, this differs from the proposal discussed above; federal enforcement is much more likely to be needed where state program problems are so severe as to warrant the commencement of plan withdrawal action. LS

2. Adoption Of Federal Standards

Among the most persistent performance problems identified by OSHA monitoring of the state plan states is untimeliness in the adoption of new federal safety and health standards. The special evaluation of all state plans, conducted at the request of then-Secretary Martin following the Hamlet fire, disclosed that 12 out of 23 state plans failed to adopt health or safety standards within the required six months following their promulgation by OSHA, including standards on asbestos, bloodborne pathogens, process safety management, and lockout-tagout.

The trend does not appear to be improving; in many states, the problem stems from more and more complex regulatory review requirements under state administrative procedure laws, and, in some states, from mandatory legislative review of state agency rules. The problem is most acute in the one or two states which elect to develop their own standards, rather than simply adopting those issued by federal OSHA. Both of these states now have statutory authority to adopt identical federal standards under state law in certain circumstances should they choose to do so.

The solution of mandating automatic adoption of federal standards would provide the state an available enforcement remedy and protect workers even if the state subsequently chose to adopt a standard of its own. In practice, another effect might be to discourage independent standard-setting by the states, but greater similarity between state and federal workplace safety rules may ultimately prove advantageous. See: Osborne, et al., "A New Federal Compact: Sorting Out Washington's Proper Role" in Mandate for Change, p. 250 (uniform job safety standards are "strongly justified"). Comparable standards also make compliance more practicable for multi-state employers, and renders OSHA's

task easier in the event concurrent enforcement becomes necessary.

The present COSHRA provisions notably fail to address the long-standing anomaly of delayed start-up dates in state plan states. A state plan state can delay enforcement of a newly-issued OSHA standard and still be in compliance with current procedures, which allow for a six month delay even for states which do no more than adopt an identical standard. It may be worth considering whether the COSHRA provision for automatic adoption of federal standards should perpetuate the current six-month grace period; Congress could as easily mandate a lesser period, such as thirty days, with the result that workers in all states would receive comparable protection from newly-regulated hazards.

If states are to be encouraged to adopt federal standards, state involvement in the development of proposed and final federal standards should also be encouraged; administrative obstacles to such participation should be removed, and if modifications to the Federal Advisory Committee Act would assist in this process the Department should consider recommending such changes.

The Department of Justice has objected to the bills' mandate that states must enforce federal regulations; last year, Justice found the concept objectionable under the Appointments Clause of the Constitution, which they assert prohibits anyone not part of the Executive Branch from enforcing federal laws. Justice has not raised that argument this year, but has instead circulated a draft letter outlining somewhat different objections under the Tenth Amendment. The Supreme Court has held that Congress may not constitutionally direct the states to enact or administer federal laws. It is clear from the same decisions, however, that Congress may give the states the option to enact a certain law or face federal preemption. The Office of the Solicitor intends to meet with DOJ officials to resolve these issues, and believes that relatively minor changes in bill language would probably resolve their concerns about the state plans provisions of COSHRA.

3. OSHA Preemption: The Gade Clause In H.R. 1280 And S. 575

Congress very clearly intended some form of preemption of state regulatory authority when it enacted section 18 of the original Act, which requires the submission and approval of a state plan as a condition for any assertion of state jurisdiction over job safety issues regulated by OSHA. Faced with what was then an appalling record of state under-regulation, Congress swept aside all existing state programs, and permitted the states to reenter the field only by subjecting their standards and enforcement procedures to OSHA for evaluation.

The Department of Labor has often taken positions supporting preemption of non-plan state enforcement activity affecting job safety and health. The Hazard Communication standard was adopted partly in response to proliferating (and sometimes conflicting) state right-to-know laws, and included an explicit statement of intent to preempt the non-plan states, 29 CFR 1910.1200(a)(2). Moreover, it was the Department of Labor that developed the arguments presented by the Solicitor General as amicus curiae during the Gade litigation, supporting preemption.

On the other hand, the Department has often acknowledged the value of state enforcement of public-safety laws, and has officially taken the position that state laws which protect a class of persons broader than employees, such as boiler and elevator laws, ought not to be viewed as preempted by OSHA. Program Directive STP 2.1.10A (1981). Many OSHA enforcement staff are supportive of local enforcement of state health and safety requirements, even by non-plan states, because state and local agencies can be useful in protecting workers and sometimes (particularly in the case of fire marshals and boiler inspectors) can resolve hazards more quickly than traditional OSHA enforcement.

After Gade, the question has become whether the sweeping preemption articulated by the Supreme Court goes further than necessary to carry out the quality control function contemplated by Congress, and whether strict adherence to the state plan principle on balance hurts or helps the overall national worker protection effort. States, labor and environmental groups will undoubtedly strongly support greater latitude for supplementary regulation by the states. The state plan representatives consulted by the workgroup enthusiastically supported the Gade clause in H.R. 1280, particularly the public-sector-only states who would otherwise be preempted in the private sector. Business groups have not to date focussed on the provision, but are likely to oppose it as a source of additional regulatory burden.*

* One theoretically sound, but perhaps administratively impracticable, middle ground for the agency might be to leave Gade undisturbed but to begin approving limited, single-issue state plans for hazards the states may have a public-safety interest in regulating, such as asbestos, lead, or fire safety. Practical problems would include the shortage of resources for evaluation and monitoring, probable state requests for program funding, and the possibility of eventual 18(e) preemption of federal authority over the regulated issues, at least under current law. Moreover, it seems unlikely many states would want to apply OSHA-type procedures required of all state plans (such as prohibitions on advance notice, mandatory first instance sanctions, employee contest rights, etc.) to traditional licensing, fire inspection and public health inspections.

If the Department supports amending the Act to modify Gade, technical assistance should be offered as to exact bill language.

IV. OTHER PROPOSALS

Title X of the reform bills presently includes worthwhile technical changes to the Act but does not attempt to resolve a number of highly significant legal and policy issues which have emerged in the state plans area in recent years.

Criteria: State plans are required to provide enforcement "at least as effective as" federal OSHA. Current monitoring is based primarily on units of work (numbers of inspections conducted or citations issued) rather than on program results (e.g., number of deaths or lost workdays avoided). A pending GAO study reportedly may make recommendations for such a change in monitoring criteria. See also "Reinventing Government: Creating an Entrepreneurial Federal Establishment," id. at pp. 263 et seq. (Program quality should be measured by "outcomes" not units of work or numbers of transactions.) The Chief Financial Officer Act and the soon-to-be-enacted S.20, Government Performance and Results Act of 1993 also have a similar emphasis. Current obstacles to reassessing the concept of "effectiveness" under OSHA are the lack of concrete measures for OSHA enforcement, federal or state, and the difficulty of correlating OSHA enforcement with injury and illness statistics.

Funding Formula: Current law authorizes 50% federal funding for state OSHA programs but, unlike most other federal assistance programs for state and local government, no statutory formula is provided for distributing available funding among the states. Historical and fiscal circumstances have produced wide disparities. A legally separate but programmatically related issue is that of court-ordered health and safety staffing benchmarks, established under a somewhat controversial court decision in 1978, which have prevented numerous states from achieving final approval.

Sanctions: Committee staff conveyed considerable disappointment at the apparent inability of OSHA to translate adverse evaluation findings about state plans into concrete improvement. The primary sanction provided in the current Act for defective state plan performance is withdrawal of plan approval, an extremely cumbersome process (made even more cumbersome by regulations at 29 CFR 1955, which require trial-type procedures) which has never successfully been applied. Withholding state funding is not feasible under present regulations and appropriations provisions, and in any case may further impair an already-defective state program, to the detriment of worker protection. Resumption of federal jurisdiction may be the most useful response when state

OSHA standards or enforcement prove inadequate, but is prohibited in so-called "final approval" states by section 18(e) of the Act; current COSHRA bills would allow the exercise of concurrent federal authority in certain circumstances, but the technical language in the bills could be improved.

V. OPTIONS

Collectively, the state plans provide safety and health protection to nearly 40% of the nation's workforce, a responsibility they carry out at roughly half the cost which OSHA would otherwise incur. As members of the Task Force who conferred with them will agree, the state officials who staff these programs are well-informed, highly professional, and enthusiastic about OSHA (and, it might be added, about many features of OSHA reform.)

The relatively modest State plan proposals in the current bills have not as yet engendered fervent opposition from the states or others, and the workgroup believes these proposals could probably be adopted without disrupting the work of the state plans or unduly straining federal/state relationships. An attractive case can be made for concurrent federal jurisdiction while state plan withdrawal proceedings are underway; the need for such authority in carrying out CASPA investigations is somewhat less clear. A persuasive argument can also be made for equipping the states with authority to adopt new federal standards automatically, but consideration should be given to a more expedited time frame than the six months allowed by the bill and OSHA's current procedures.

Although for the sake of a complete report the workgroup has included suggestions for additional bill provisions, we should note that these suggestions might be useful but are not indispensable. The funding formula problem is one which OSHA and the states have lived with for some time; OSHA's monitoring criteria can be (and have been) revised administratively; and if the lack of effective sanctions for poor state performance is perceived to be a problem, administrative procedures for withdrawal of plan approval could be streamlined by amending OSHA's state plans regulations.

But the OSHA reform bills seem to have identified two major state plans problems for which legislative change seems to be the only answer. The delinquent standards problem, caused by factors largely outside the control of state plan officials, has for years resisted all corrective efforts by OSHA, and the barrier to concurrent OSHA enforcement activity can be raised only by amending section 18.

APPENDIX 1. Groups And Individuals Contacted By The Workgroup

Randy Rabinowitz - House Education and Labor Committee

Greg Watchman - Senate Labor and Human Resources Committee

State OSHA Administrators:

Occupational Safety and Health State Plan Association Board of Directors -

Doug Earle (Michigan) (current Chair)
Nancy Burkeheimer (Maryland)
Vergil Duffie (South Carolina)
Ken Zeller (Indiana)
Steve Levette (Washington)

OSHPA Meeting-States represented included the above, plus:

Alaska
Arizona
Connecticut
Kentucky
Hawaii
Iowa
Minnesota
New York
North Carolina
New Mexico
Nevada
Oregon
Puerto Rico
Tennessee
Utah
Vermont
Virgin Islands
Virginia

Coverage Workgroup meeting with organized labor representatives held on June 29 - no state plans issues were raised. No industry representative addressing the Task Group raised state plans issues, except to express a generalized preference for enforcement consistency among OSHA regions as well as between fed OSHA and the states.

PART FIVE:

**STATUTORY DEFINITION AND OTHER
COVERAGE ISSUES**

PART FIVE: STATUTORY DEFINITIONS AND OTHER COVERAGE ISSUES

In preceding sections of this work group report, we have addressed major issues of OSH Act coverage which would be affected by current OSHA reform bills; our report would not be complete, however, without mention of a few important potential coverage or definitional issues that might be presented in the ongoing dialogue on OSHA reform. Because they have as yet not been identified as pertinent OSHA reform issues, the workgroup has neither discussed these issues with outside parties nor attempted to assemble an extensive presentation. We nevertheless wanted to identify them as interesting and potentially significant issues, and they can be further pursued if the Task Force would like.

1. Definitions Of Employer And Employee

Like many other labor laws, the OSH Act covers "employers" and protects "employees." OSHA coverage is confined within the employment relationship and limited by whatever definition the courts may give to these two key statutory concepts.

The difficulty is that while many other labor laws are intended to regulate financial transactions (minimum wage, overtime, promotion rights, pension obligations, and the like) OSHA is essentially an environmental statute which regulates physical conditions in workplaces. Many workplace hazards are created or controlled by persons who are not technically the "employer" of the workers exposed to the hazard. OSHA, the Commission and the courts have developed certain legal theories for assigning compliance responsibility in multi-employer workplaces to the employer who creates or controls particular hazards, and there are other instances where OSHA has had to stretch conventional notions of the employer/employee relationship to attain health or safety objectives. See Anning-Johnson Co., 4 OSHC (BNA) 1193 (Rev. Comm. 1976), and Grossman Steel & Aluminum Corp., 4 OSHC (BNA) 1185 (Rev. Comm. 1976) (employer responsibility on multi-employer sites); 29 CFR 1910.1200(b), (g) ("manufacturers" required to assess the hazards of chemicals they produce or import and to develop material safety data sheets). Other gaps in coverage (such as coverage of sole proprietors or partnerships which have no "employees") are also worth addressing. It would be useful to have an explicit textual basis in the definitions section of the Act in order to apply OSHA to increasingly diverse hazards and work relationships.

Similarly, traditional or overly-legalistic concepts about who is an "employee" often are counterproductive to health and safety in the workplace; as employers resort more and more frequently to provisional employment arrangements such as leased employees, temporaries, and independent contractors, questions frequently

arise concerning what, if any, OSHA protection such workers are entitled to receive.

We believe that a set of OSHA-specific statutory definitions could be devised which would provide clearer OSHA authority over workplace health and safety conditions for all workers. For example, the term "employer" could be redefined as "any person engaged in a business affecting commerce who has responsibility or authority to direct or control work performed by employees, or has authority over working conditions of employees." This definition tends to focus compliance responsibility on individuals with control over the physical workplace and authority to eliminate hazards.

The term "employee" could be redefined as "any person who works in a business affecting commerce," a definition which would embrace virtually all workers including independent contractors. As noted earlier in this workgroup report, concerns have been raised that OSHA may assert jurisdiction over volunteer fire companies and other volunteer groups; to avoid being entangled in such disputes, the employee definition could be qualified by specifying that "the term employee does not include a person doing uncompensated, volunteer work for a religious, charitable or public service organization."

2. Coverage Of Indian Tribes And Tribal Enterprises

The Department's long-standing position, based on a decision of the U.S. Supreme Court in Federal Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) and embodied in an OSHA interpretive regulation at 29 CFR 1975.4(b)(3), is that the OSH Act, like other federal laws of general application, applies to Indians, to Indian-owned enterprises, and to businesses on reservations. But the Review Commission has ruled against OSHA jurisdiction over workplaces maintained by Indian "tribal enterprises," which are essentially industrial enterprises on reservation land, operated by tribes or leased to outsiders, for the economic benefit of tribal members. Navajo Forest Products Industries, ___ BNA OSHC ___ (Rev. Comm. 19___). The federal courts of appeals are divided on this issue, compare Dept. of Labor v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1991) (OSH Act applicable to tribal enterprise), and Dept. of Labor v. OSHRC, 935 F.2d 182 (9th Cir. 1985) (same) with Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982) (Congress failed to expressly abrogate treaty rights; OSH Act does not apply on Navajo reservation).

As we noted in the section on coverage of state and local employees, tribal governments are not political subdivisions of states, and if Congress decides to extend OSHA coverage to employees of tribal governments Congress should do so explicitly.

As to employees of tribal commercial enterprises, the U.S. Court of Appeals for the Ninth Circuit would allow OSHA coverage while the Tenth Circuit (which, like the Ninth, embraces several western states including many large reservations) would not. The federal courts agree that Congress has complete authority to settle all questions of regulatory coverage of Indians, and the matter could easily be included in any OSHA reform proposal.

In considering whether to attempt a legislative resolution, it may be worth noting that the Bureau of Indian Affairs at Interior, plus the Lands and Civil Rights divisions at Justice, have strenuously objected to the Department of Labor's litigating position in various cases involving regulatory jurisdiction over Indians, and Senator Inouye, Chairman of the Senate Select Committee on Indian Affairs, is described as lobbying against the Department's position in every available forum. Moreover, enactment of an Indian coverage provision for the OSH Act would do little to assist in the enforcement of other employment-related laws administered by DOL or other agencies.

3. Coverage Of OSHA Physicians Under Public Health Service Act

Physicians of the U.S. Public Health Service (including physicians employed by NIOSH) are protected from malpractice liability by a special provision of the Public Health Service Act, 42 USC 233, which provides that the sole remedy in any case involving allegations of malpractice by a PHS officer or employee shall be against the federal government, under the provisions of Federal Tort Claims Act.

Physicians in OSHA's Office of Occupational Medicine, in addition to regular duties, must engage in clinical practice on a regular basis, usually in a non-profit hospital or clinic, in order to retain their board certification. The matter of malpractice liability must be specially negotiated with each medical provider; failure to reach agreement on insurance coverage or a hold-harmless provision may leave the physician exposed to considerable potential liability.

An amendment specifying inclusion of OSHA medical staff among the federal medical personnel covered by 42 USC 233 would help the agency attract and retain well-qualified medical staff.

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- ▶ Tye, The Anatomy of a Voluntary Standard, 14 Hazard Prevention (4th quarter 1989) (discussing Consumer Product Safety Commission safety standards).
- ▶ Vilnius & Dandoy, A Priority Rating System for Public Health Programs, 105 Public Health Reports 462 (Sept.-Oct. 1990).

Reports

- ▶ Occupational Health and Safety Forum of New York and New Jersey, Creating an Infrastructure to Safeguard the Health of America's Workforce (May 1993).
- ▶ U.S. Department of Health and Human Services, NIOSH, Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries: Occupational Cardiovascular Diseases (1986).
- ▶ U.S. Environmental Protection Agency, Science Advisory Board, Reducing Risk: Setting Priorities and Strategies for Environmental Protection (1990).

Attachment 1
~~Attachment 1~~ Part 1

DRAFT

**State and Local Government Workers Currently
Covered By OSHA Approved State Plans**

State	Employment
-----	-----
Alaska	50,845
Arizona	217,584
California	1,708,950
Connecticut	176,793
Hawaii	74,821
Indiana	344,498
Iowa	200,109
Kentucky	220,271
Maryland..	282,846
Michigan	579,239
Minnesota	303,855
Nevada	69,784
New Mexico	117,508
New York	1,278,678
North Carolina	422,345
Oregon	193,559
South Carolina	220,750
Tennessee	279,162
Utah	113,599
Vermont	36,816
Virginia	391,720
Washington	311,387
Wyoming	44,003
-----	-----
Total	7,639,122

Source: Public Employment 1991, U.S. Department of Commerce

Attachment 1
~~Attachment 1~~ *Part 2*

DRAFT

State And Local Government Workers Not Covered By The OSH Act

State	Employment
Alabama	260,516
Arkansas	145,207
X Colorado	231,486
Delaware	42,364
D.C.	57,257
X Florida	751,419
Georgia	421,117
X Idaho	71,647
X Illinois	687,685
X Kansas	190,991
Louisiana	276,825
X Maine	80,604
Massachusetts	319,597
Mississippi	171,981
Missouri	290,405
Montana	68,608
Nebraska	130,724
X New Hampshire	64,737
* New Jersey	468,303
North Dakota	54,667
* Ohio	646,348
X Oklahoma	214,797
Pennsylvania	564,047
X Rhode Island	53,316
South Dakota	55,204
Texas	1,059,597
X West Virginia	102,823
X Wisconsin	330,378
Total	7,812,650

Source: Public Employment 1991, U.S. Department of Commerce

* These states protect public employees even though they do not have approved state plans, at least in part. Information preliminary.

Table 2-1

Private and Public Sector Injury and Illness Rates By State, 1991

State		Total Rate	LWD Case Rate	State		Total Rate	LWD Case Rate
U.S. Average	Private Sector	8.4	3.9	New Mexico	Private Sector	8.1	3.9
	State & Local Govt	N.A.	N.A.		State & Local Govt	8.2	3.6
Alaska	Private Sector	10.5	4.6	New York	Private Sector	N.A.	N.A.
	State & Local Govt	7.8	3.5		State & Local Govt	13.5	8.2
American Samoa	Private Sector	3.7	2.3	North Carolina	Private Sector	7.8	3.4
	State & Local Govt	1.0	1.0		State & Local Govt	5.4	2.6
Arizona	Private Sector	7.9	3.4	Oregon	Private Sector	9.1	4.4
	State & Local Govt	8.3	2.7		State & Local Govt	7.5	2.9
California	Private Sector	9.4	4.6	Puerto Rico	Private Sector	5.0	3.9
	State & Local Govt	13.5	5.7		State & Local Govt	8.8	7.6
Connecticut	Private Sector	9.0	4.2	South Carolina	Private Sector	7.6	3.2
	State & Local Govt	14.5	7.9		State & Local Govt	7.5	3.3
Guam	Private Sector	6.7	4.5	Tennessee	Private Sector	9.4	4.2
	State & Local Govt	4.2	2.1		State & Local Govt	7.6	3.7
Hawaii	Private Sector	10.6	6.0	Utah	Private Sector	10.1	4.0
	State & Local Govt	9.3	4.8		State & Local Govt	7.1	2.5
Indiana	Private Sector	10.2	4.5	Vermont	Private Sector	8.1	4.0
	State & Local Govt	8.0	3.1		State & Local Govt	7.0	3.2
Iowa	Private Sector	10.3	4.7	Virgin Islands	Private Sector	2.9	1.7
	State & Local Govt	8.5	3.8		State & Local Govt	3.4	2.9
Kentucky	Private Sector	9.9	5.0	Virginia	Private Sector	6.9	3.3
	State & Local Govt	6.1	3.3		State & Local Govt	8.1	3.9
Maryland	Private Sector	6.8	3.4	Washington	Private Sector	11.1	5.1
	State & Local Govt	8.3	5.1		State & Local Govt	8.1	3.6
Michigan	Private Sector	10.4	4.6	West Virginia	Private Sector	9.4	4.9
	State & Local Govt	8.8	5.0		State & Local Govt	6.9	3.6
Minnesota	Private Sector	8.1	3.8	Wyoming	Private Sector	7.6	3.6
	State & Local Govt	7.8	2.9		State & Local Govt	6.6	2.8
Nevada	Private Sector	11.0	5.1				
	State & Local Govt	10.0	3.6				

Rates per 100 full time workers

LWD: lost workday cases include those cases resulting in days away from work and/or days of restricted work activity.

Source: 1991 Annual Survey of Occupational Injuries and Illnesses, BLS

Attachment 2-1

Table 2-2

State and Local Government Injury and Illness Rates By State, 1991

State		Total Rate	LWD Case Rate	State		Total Rate	LWD Case Rate
Alaska	State	6.4	2.6	New York	State	13.5	8.5
	Local	9.0	4.2		Local	13.5	8.1
California	State	10.9	4.5	North Carolina	State	3.7	2.0
	Local	14.4	6.0		Local	6.1	2.9
Connecticut	State	14.1	9.7	Oregon	State	6.9	2.4
	Local	14.8	6.8		Local	7.8	3.2
Hawaii	State	7.3	3.6	Puerto Rico	State	8.1	7.0
	Local	15.5	8.7		Local	12.3	10.9
Indiana	State	7.2	2.8	South Carolina	State	6.7	3.5
	Local	8.3	3.3		Local	8.1	3.2
Iowa	State	8.2	4.6	Utah	State	5.4	2.2
	Local	8.7	3.4		Local	8.2	2.6
Kentucky	State	4.8	3.2	Vermont	State	6.5	3.7
	Local	7.0	3.3		Local	7.4	2.8
Maryland	State	8.1	4.4	Virgin Islands	State	N.A.	N.A.
	Local	8.4	3.6		Local	3.4	2.5
Michigan	State	6.0	3.2	Virginia	State	7.6	4.0
	Local	10.1	3.9		Local	8.2	3.8
Minnesota	State	5.0	2.0	Washington	State	5.6	2.7
	Local	9.2	3.3		Local	9.6	4.2
Nevada	State	7.6	3.3	West Virginia	State	7.2	3.8
	Local	11.2	3.7	(1990 data)	Local	6.6	3.4
New Mexico	State	5.3	2.7	Wyoming	State	7.2	3.6
	Local	10.3	4.2		Local	6.3	2.4

Rates per 100 full time workers

LWD: lost workday cases include those cases resulting in days away from work and/or days of restricted work activity.

Source: 1991 Annual Survey of Occupational Injuries and Illnesses, BLS

Attachment 2-2

Table 2-3 (AFHME)

COMPARISON OF PUBLIC VS. PRIVATE SECTOR INJURIES AND DEATHS

INCIDENCE RATES 1991

INDUSTRY	Total Cases	% Above All Industry	Cases Involving Days Away From Work & Deaths	% Above All Industry	Lost Workdays (Severity)	% Above All Industry
ALL INDUSTRY (Private)	8.7	NA	1.8	NA	78	NA
Public Administration	12.9	48%	4.8	167%	109	38%
General Government	14.7	69%	5.5	206%	117	48%
Public Works	19.1	120%	7.7	328%	188	113%

Source: National Safety Council, Accident Facts, 1992

INCIDENCE RATES 1990

INDUSTRY	Total Cases	% Above All Industry	Cases Involving Days Away From Work & Deaths	% Above All Industry	Lost Workdays (Severity)	% Above All Industry
ALL INDUSTRY (Private)	9	NA	2.3	NA	64	NA
Public Administration	9	0%	4.3	100%	63	-1%
General Government	13.8	53%	5.5	159%	102	21%
Public Works	18.6	107%	6.2	192%	172	105%

Source: National Safety Council, Accident Facts, 1991

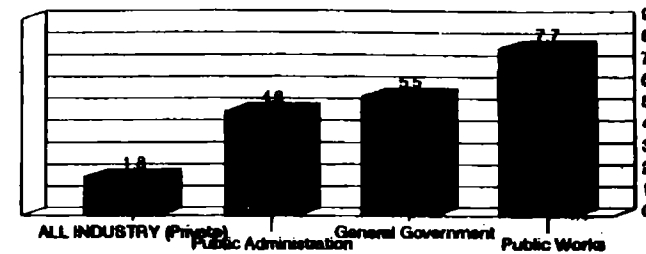
INCIDENCE RATES 1989

INDUSTRY	Total Cases	% Above All Industry	Cases Involving Days Away From Work & Deaths	% Above All Industry	Lost Workdays (Severity)	% Above All Industry
ALL INDUSTRY (Private)	8.78	NA	2.17	NA	72	NA
Public Administration	11.85	35%	4.87	112%	108	28%
General Government	18.74	113%	5.91	189%	115	37%
State Depts of Trans	9.84	10%	5.1	132%	144	71%

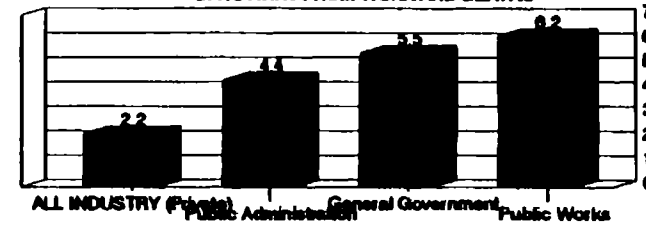
Source: National Safety Council, Accident Facts, 1990

Note: Incidence Rates are defined as injuries (or deaths) per 100 full time workers.

1991 PUBLIC VS PRIVATE RATES
DAYS AWAY FROM WORK AND DEATHS

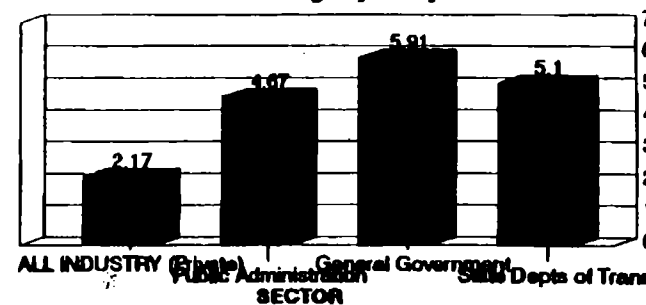


1990 PUBLIC VS PRIVATE RATES
DAYS AWAY FROM WORK AND DEATHS



1989 PUBLIC VS PRIVATE RATES

Cases Involving Days Away from Work and Deaths



INCIDENCE RATES

INCIDENCE RATES

INCIDENCE RATES

01/12/94

16:48

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Attachment 3

12/15/93: Please deliver to Kathy Hoyt as soon as possible.

**TO: Kathleen Hoyt, Chief of Staff for
Governor Howard Dean, M.D., State of Vermont**

**FROM: Barbara G. Ripley, Commissioner
Vermont Department of Labor and Industry**

As you have requested, the following is a statement about Vermont's OSHA program. If you have any questions or need further information, please contact VOSHA Manager Robert McLeod (802) 828-2765, or Steve Monahan, General Counsel at Labor and Industry, 828-2288 (or Louise).

The State of Vermont is pleased to support the Kennedy/Ford OSHA Reform bill. This bill will afford greater protection to American workers, particularly those workers in the public sector that are not covered in nearly half of the States. Vermont, a State Plan State, has been providing coverage to public sector employees for over 20 years.

A safe and healthy workplace is a fundamental right of all working men and women. Safety and health committees along with safety programs, training and education will further this goal for American workers. Safety and health committees will expand limited OSHA and State Plan resources by empowering people in the workplace with the authority to identify and correct workplace hazards and prevent injuries through a cooperative rather than adversarial process.

Workers' Compensation costs have risen dramatically in recent years. Accident prevention is the first-line defense against these rising costs and the united, proactive efforts of employers and employees will not only reduce costs but more importantly the suffering of injured workers and their families.

~~Attachment 4~~ Attachment 4

January 7, 1994

IGA OHSA REPORT

IGA staff have been assigned to work with specific constituents.

GOVERNORS

STATE	GOVERNOR	contacted	COMMENTS
Hawaii	Waihee	12/17/93	Letter as of 1/5/94
Indiana	Bayh	12/17/93	Letter as of 12/20
Kentucky	Jones	Yes	
Maryland	Schaefer	Yes	As of 1/6, Draft letter initiated, but not sure it will be signed.
Nevada	Miller		
New Mexico	King	Yes	Have L/M. Will call again.
New York*	Cuomo	12/17 & 12/20	Letter as of 12/29/93
North Carolina	Hunt	Yes	
Oregon*	Roberts	12/15 & 17th	Have requested info from which to construct letter 1/6/94.
Tennessee	McWherter		
Vermont	Dean	YES	LETTER
Washington	Lowery	Yes.	Joe Dear called. Expects letter.
Wyoming	Sullivan	12/17	L/M. Will call again.

Att 4 (cont)

STATE	GOVERNOR	contacted	COMMENTS
Other states			

MAYORS:

CITY	MAYOR	CONTACTED	COMMENTS
New York, NY	Dinkins	Yes	Requested info from which to express opinion.
Duluth, MN		Yes	Letter expected
Sioux City, IA		Yes	Letter expected
Atlanta, GA		Yes	Letter expected
Seattle	Rice	Yes	Call & follow up call. Waiting for response.
Gary, IN	Barnes	Yes	Call & follow up call. Waiting for response.
Baltimore,	Schmoke	Yes	Call & follow up call. Waiting for response.
St. Paul, MN	Scheibel	Yes	Call & follow up call. Waiting for response.
Charleston,	Riley	Yes	Call & follow up call. Waiting for response.

Att. 4 (cont)

CITY	MAYOR	CONTACTED	COMMENTS
Saginaw, MI	Laster	Yes	Call & follow up call. Waiting for response.
Portland, OR	Katz	Yes	Call & follow up call. Waiting for response.
Memphis, TN	Herenton	Yes	Call & follow up call. Waiting for response.
San Francisco, CA	Jordan	Yes	Letter expected, but later in Jan. 1/7/94.
Sacramento, CA	Serna	Yes	Letter expected. Target date is Tues 1/11/94.
Long Beach, CA	Kell	Yes	Letter expected Target date Wk of 1/14.
Oakland	Harris	Yes	Letter expected. ASAP target Tues 1/11/94.
Los Angeles	City Councilman Hernandez	Yes	Waiting for response, but appears likely. Target date Tues 1/1/94
Los Angeles	City Councilwoman Walters	Yes	Waiting for response, but appears likely.

Note: additional states and cities being added.

Special Report on Unfunded Mandates

Unfunded Federal Mandates . . . The Philadelphia Story

Attachment
5

Unfunded federal mandates are a major problem for local governments. The American with Disabilities Act (ADA) is a prime example. The ADA requires that public facilities be accessible to people with disabilities. This means that cities must spend money to make buildings, streets, and public transportation accessible. For many cities, this is a huge expense, especially if the federal government does not provide the necessary funding.

The ADA requires that public facilities be accessible to people with disabilities. This means that cities must spend money to make buildings, streets, and public transportation accessible. For many cities, this is a huge expense, especially if the federal government does not provide the necessary funding. A study by the American with Disabilities Act (ADA) found that the number of federal mandates grew from two in 1960 to 61 by 1990 to do this year — an incredible 3,000 percent increase. While many of these mandates originally were handed down with full or partial funding for compliance during the 1960s, a process began to reduce and then eliminate all federal grants and funding. For example, all construction grants and even loans for compliance with the Clean Water Act are being completely phased out. As the problem with the federal budget deficit has grown, it has become easier and easier for Congress to meet the demands of special interest groups by passing laws that require local governments to take certain actions, but not to pay for the cost of complying with these requirements. We are afraid that this practice will continue, and Congress will go on passing the bill and passing the buck to us.

The situation affects every city, large and small.

To comply with the Clean Air Act, Chicago's Northwest Incinerator must be retrofitted at a cost of \$73 million. In addition, under the Resource Conservation and Recovery Act, the City may be required to spend an additional \$17 million per year to treat the incinerator ash as hazardous. The combination of these two mandates could make the Northwest Incinerator so costly to operate that the city would have to shift to greater reliance on space-heating and environmentally less sound fuels.

Installation of curb ramps at intersections, consistent with the ADA mandate, is estimated to cost Royal Oak, Michigan \$2.5 million. In many cases, the sidewalks leading to these intersections are in need of repair; estimated cost: \$10 million. To comply with ADA, the city would be forced to rip out and replace functional curbs, while leaving the broken sidewalks unrepaired.

The National Pollution Discharge Elimination System requires that Richmond, and other cities, conduct an ongoing study of the sources and amounts of pollutants carried by stormwater runoff into streams and rivers. Towson is a desert community in which waterways are dry most of the year, yet the city must spend millions to monitor pollutants in non-existent water in dry stream beds.

In Columbus, Ohio, a medium-size city, a comprehensive study showed that federal environmental mandates would cost its tax-

payer more than \$26 billion over the next decade — an extra \$656 in fees and taxes per household by the year 2000. Under the Safe Drinking Water Act, Columbus must monitor its municipal water system for at least 133 specified pollutants. Many of the substances are not significant in local water supplies, but must be tested anyway. One of the pesticides tested, DBCP, was used on pineapples in Hawaii and has been banned for 15 years.

To comply with the Americans with Disabilities Act, Knoxville must add lift bus service to its Saturday fixed route bus service. Because of the high cost of adding the service, the City must consider eliminating Saturday fixed route service altogether to avoid non-compliance with ADA. Funds currently used in Knoxville for federal mandates could be applied to several pressing needs, including expanded fixed route bus service or the addition of evening bus services to benefit a larger group of people.

In California, things have gotten so bad and the costs so overwhelming that last spring, state and local governments threatened to give enforcement of drinking water programs back to the EPA (Congressional Record, 1/21/93, S. 549, 552). A study of the effect of just 10 unfunded federal mandates was conducted by the U.S. Conference of Mayors. The total cost is incredible and will grow dramatically in the next five years as a survey for Philadelphia indicates. A copy of both surveys is attached.

My fellow mayors and I are not contending that federal mandates are bad — in fact, the goals of most of them are ones which we all can agree are very worthwhile. We are simply saying that local governments do not have the resources to pay for their implementation. Many local governments have no further ability to raise resources. In many instances, their taxing power is legally capped or in others it is capped in a practical way because high tax structures have already caused an alarming erosion of the tax base. In Philadelphia, in the 11 years prior to my becoming Mayor we endured 19 increases in our tax rates, causing a massive decrease in our tax base. As a result, cities must pay for the cost of unfunded federal mandates by shutting other services, like police, fire, recreation, parks, libraries, etc.

While many of these mandates originally were handed down with full or partial funding for compliance during the 1960s, a process began to reduce and then eliminate all federal grants and funding.

Greatly increasing the cost of drinking water necessarily increases the public health threat to the poor and near-poor; more money for water will mean less money to spend on other equally essential goods and services which are needed to protect their health.

Unfunded federal mandates have robbed local mayors and city councils of the ability to prioritize their resources according to the real needs of their constituents. The effect of "unfunded federal mandates" on local government is being felt dramatically by business, consumers and just ordinary citizens. For example, there is a growing problem with the affordability of water as a result of these mandates.

I recognize that "affordability" can mean different things to different people. However, it is important to realize that if consumers cannot afford the water from the public water supply, they will turn to other sources of water. This problem is real and is happening throughout the country today. (Thousands of water consumers are abandoning their public water supplies by drilling unregulated, private wells.) Very small utilities are trying to encourage enough customers to abandon the system so that they fall under the Federal law's regulatory threshold of fifteen permanent customer connections. Consumers are turning to bottled water and "pure" mountain springs. For drinking water is unprecedented numbers. Further, and perhaps most frighteningly, developers are choosing not to install public water systems in new developments; forcing consumers to rely on unregulated, private wells. All of these actions have real and serious, drinking water-related public health consequences, and they are a direct result of concerns about the affordability of water services from a public water supplier.

These consequences of failing to recognize affordability are in addition to the far more serious, but more difficult to quantify, effects of forcing poor and near-poor consumers to use their scarce resources for drinking water. Every day, the poor are making choices among food, shelter, medical care, heat, medicine, and other essential needs.

As a further example, in Philadelphia, a family of four receiving Aid-to-Families with

Dependent Children ("AFDC") will spend 15 percent of their total household income for the cost of water and wastewater services.

Some "unfunded federal" though having laudable goals, have been given unrealistic implementation schedules and others are just plain ludicrous and silly. Here are two case studies that are perfect examples to demonstrate this point:

Americans with Disabilities Act ("ADA")

Every American agrees with the goals of ADA — to ensure fair and equal access for the disabled. This is clearly a good unfunded federal mandate, but an illogical interpretation of it will have an extremely damaging effect on Philadelphia.

The ADA requires the City to put in curb cuts in all City blocks by the end of 1995 at a cost of \$130 million — a sum the City of Philadelphia simply does not have. As a result, we are petitioning the Justice Department to allow us a hardship waiver to allow the City a more reasonable period of time — 12 to 15 years — to complete the work at the more affordable cost of approximately \$10 million per year. DOJ has made no decision on the City's request.

ADA also required the Department of Justice to promulgate regulations to implement the goals of the Act. One of these regulations reads as follows: Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

On July 15, 1993, a number of disabled individuals who live and work in the City of Philadelphia filed suit in U.S. District Court for the Eastern District of Pennsylvania seeking to compel the City to install curb ramps or curb cuts on all street which the City resurfaces after the effective date of the ADA. The City contended that resurfacing is not "new construction or alteration" of the street, and, therefore, it would not be required to do curb cuts each time it lays out new repairs. On February 2, 1993, the Court ruled in favor of the plaintiffs. The City has appealed the case, and at present, no decision has been handed down. The federal District Court expressed sympathy for the City to deal with the burdens that unfunded mandates impose, stating: "Congress often fails to provide the means of financing the obligations it imposes."

If we are forced to comply with this Court order, basic street repairing will be severely curtailed in Philadelphia. There is currently \$15 million in our capital budget for street resurfacing. If we are required to do curb cuts on every street we resurface, a full one-third of that money would have to be spent on curb cuts — leaving only \$10 million for resurfacing. That is extremely damaging for Philadelphia where, because of our financial crisis, we have fallen way behind in resurfacing those streets that desperately need it.

The DBCB and Water Quality of the Delaware River

In 1986, the Delaware River Commission ("DRBC"), which was created by the



Philadelphia Mayor Ed Rendell makes point during November 3 hearing before Senate Committee on Governmental Affairs.

Special Report on Unfunded Mandates

Continued from previous page

EPA began a federally mandated Use Attainability Assessment ("UAA") of the Delaware Estuary. The study was designed to assess the potential to upgrade water quality standards of the Delaware River to meet the Clean Water Act's "fishable and swimmable" goals.

The UAA, which used water quality data from 1985 and 1986, was released in 1989 and concluded that the "swimmable" goal could not be achieved until regulations controlling combined sewer overflows are adopted. However, the UAA also concluded that the "fishable" goal could be met in the Philadelphia area by maintaining dissolved oxygen levels in the river at 4 milligrams/liter (mg/l) or above. According to the UAA, such a standard could only be achieved if Philadelphia upgraded its tertiary wastewater treatment.

The Philadelphia Water Department estimates that building a tertiary treatment plant would cost as much as \$500 million in capital funds. The City of

Philadelphia just built such a facility at a cost of \$500 million. Annual costs to operate such a facility would be approximately \$30 million.

What makes the DRBC's order so unbelievable is that the City had obtained an average of 4 mg/l of oxygen in the Delaware River during the critical summer months. At other times of the year, the level of oxygen is even better. The DRBC indicated that the level of milligrams of oxygen per liter must now fall below four during the summer, even if, as is the case, the City seldom drops below that level and consistently averages 4 mg/l or better.

There never was any evidence presented that fish were dying or dying as a result of those low summer days when the level fell below 4 mg/l. Fortunately, the City, at my direction, refused to comply, and the DRBC, as a result, is reevaluating its decision.

Senator Glenn, in his invitation to me, has called that I define "unfunded federal mandates." I believe that the definitions contained in S. 993, which has the enthusiastic support of the U.S. Conference of Mayors — Democrats and Republicans alike — define it perfectly.

"The term 'Federal mandates' means a statute or regulation that requires a State or local government to —

(A) take certain actions (including a requirement that a government meet national standards in providing a service); or

(B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions.

SEC. 4. FEDERAL FUNDING REQUIREMENT.

(a) In General. — Notwithstanding any other provision of law, any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the State or local government only if all funds necessary to pay the direct costs incurred by the State or local government in conducting the activity are provided by the Federal Government for the fiscal year in which the direct cost is incurred.

Absent the type of funding set forth in S. 993 Sec. 4(a) above, a federal mandate is an "unfunded federal mandate."

Senator Glenn also inquired about what criteria should be used in making distinctions among federal mandates, and what criteria more flexible regulatory approaches might relieve the burden of compliance on local government. The answer is there should be no distinction drawn among unfunded federal mandates and there are no alternative approaches which will provide real relief for local government. Only a total ban on unfunded federal mandates can give local government any true protection. Once distinctions or exceptions are made allowing for some "unfunded federal mandates," Congress will simply not be able to pick and choose — to say yes to some special interests and no to others. The floodgates will open, and local government will continue to drown in a sea of red ink.

Similarly, there are no effective alternative approaches that offer any real protection either. Regulating "cost-benefit" or "risk-reduction" analyses provide little or no benefit because history has shown that through the process of creative estimation, federal regulators can justify virtually any mandate through a purportedly objective cost-benefit analysis.

What follows are a shocking list of examples of this: In November 16, 1990 final rule governing wastewater discharges, the Environmental Protection Agency ("EPA") estimated that preparing the stormwater permit for Philadelphia would cost \$76,681 and take 4,534 hours. Our actual costs to apply for the permits have been \$978,950, and it has taken 13,520 hours to comply.

In September 1993, the EPA issued its biennial needs survey of construction and improvement of wastewater treatment facilities for the next 20 years, estimating needs at \$137 billion nationwide. This figure was \$57 billion higher than EPA's estimate of \$80 billion only two years earlier, an increase of over 70 percent. While some of the rise can be attributed to more specific regulations in the areas of combined sewer overflows and stormwater, most of it is due to the fact that the previous survey was developed in the office on a computer model due to lack of EPA staff and funding. This time, the EPA actually went out and surveyed needs, resulting in a much larger estimate.

In its June 29, 1989 final rule regulating filtration of drinking water, the EPA estimated total nationwide costs for currently unfiltrated systems to install or avoid filtration at \$2.3 billion. Because Philadelphia already has filtration, we can meet these requirements with relatively minor and inexpensive modifications to our system. New York, Boston, San Francisco and other cities which do not currently filter would face huge costs if their applications for a waiver from this regulation are not approved. New York City alone now

estimates a cost of \$5 to 8 billion if it has to build filtration. Even allowing for inflation and exaggeration, the EPA estimate is low.

The EPA is working to promulgate a rule setting limits for arsenic in drinking water, lowering the allowable standard from 50 parts-per-billion to 1 to 10 parts-per-billion. The agency estimates that a standard of 2 parts per billion would cost \$6 billion to implement nationwide. One large water agency we have worked with estimates that its compliance cost alone would be \$10 billion. Again, the EPA estimate is very low.

The above are all examples of how federal government regulators intentionally or inadvertently minimize cost impact on local government. The same pattern holds true when these regulators are required to do risk reduction analysis.

The Office of Management and Budget ("OMB") made certain very crude observations on the current system of risk assessment and standard setting (Current Regulatory Issues in Risk Assessment and Risk Management, 1990):

1. The continued reliance on conservative (worst-case) assumptions by federal agencies distorts risk assessment, yielding estimates that may overstate likely risks by several orders of magnitude.

2. Conservative biases embedded in risk assessment impact a substantial margin of safety. The choice of an appropriate margin of safety should remain the prerogative of responsible risk management officials, and should not be pre-empted through biased risk assessments.

3. Conservation in risk assessment distorts the regulatory priorities of the Federal Government, directing societal resources to reduce what are often insignificant carcinogenic risks while failing to address more substantial threats to life and health.

A perfect example of the total lack of common sense by regulators in making risk assessments is found under The Safe Drinking Water Act ("SDWA"), which requires municipal water treatment plants to monitor streams for a number of chemicals that have been assigned safety levels by the EPA. For the herbicide atrazine, the EPA established the level of 3 parts per billion ("ppb") as acceptable for people to drink every day for a lifetime. If water contained 3 ppb every day, one would have to drink 3,082 gallons of water daily for life to equal the atrazine dose that caused an effect in a laboratory animal.

We already know from years of monitoring that drinking water supplies never contain atrazine levels of 3 ppb every day for even a year. In fact, that level is exceeded on only a few days in spring, when herbicides are used. The EPA has said that a concentration of 100 ppb for up to 10 days does not pose an unacceptable risk.

But it's possible under the SDWA for a single springtime detection of 13 ppb to create an annual average that would put a water supply out of compliance, even if samples

taken in summer, fall, and winter show no atrazine traces whatsoever. Cities could then be required to install very costly equipment to filter atrazine.

In a report that is fast becoming a model for other cities wading up to the drain on their treasuries, Columbus officials estimated it would cost \$2 to 3 million annually to operate such equipment once it is installed.

I have attached as an exhibit to my statement a compelling New York Times series entitled "What Price Cleanup?" which details the absurdly high costs local government have been required to shoulder for what is often minimal risk reduction. Special attention should be given to the chart it contains which details cost per regulation for premature death averted. You will note that the cost for atrazine in drinking water is over \$92 billion.

Senator Glenn has also asked for comment on President Clinton's September 30, 1993 executive order on regulatory planning and review. Because it does not totally ban regulations from passing down unfunded mandates, it does not provide the full protection local governments need, but it is a small step in the right direction because of Sections (b)(5) and (11):

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall

design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider methods for enforcement, consistency, predictability, the costs of enforcement and compliance by the government, regulated entities, and the public, flexibility, distributive impacts, and equity.

(11) Each agency shall take steps to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small businesses and government-owned entities), consistent with achieving the regulatory objectives, taking into account, among other things, and to the practicable, the costs of cumulative regulations.

If the regulators follow these directives and implement them honestly and fairly, the President's executive order will have some benefit.

Senator Gregg has asked me to on S. 993, Senator Kyl's bill, and S. 648, which he introduced. Senator Gregg's bill has one advantage over S. 993, and that is that it makes clear that the legislation applies to any newly enacted federal mandates and to existing mandates as the underlying statute are reauthorized. S. 993 is silent on its applicability to reauthorization.

Senator Gregg's bill is not as good as S. 993 because it leaves a loophole — a one — through which Congress can avoid funding one of its mandates. It would allow a waiver to occur by three-fifths of the Senate. As I stated earlier, there can be no loopholes, no waivers, no outs. Only if Congress acts now and passes S. 993 will it put an end to a practice that is figuratively eating cities alive.

My fellow mayors and I are not contenting that federal mandates are bad

Attachment 6

Office

Special Report on Unfunded Mandates

Unfunded Federal Mandates . . . The Columbus Story

(Below is the full text of Columbus Mayor Gregory S. Lashutka's November 3, 1993 statement before the Senate Committee on Governmental Affairs.)

Thank you, Mr. Chairman, for the opportunity to testify on the subject of unfunded federal mandates.

Your invitation asked me how I would define an unfunded federal mandate. I will repeat the definition I wrote in the Columbus Dispatch last week: An unfunded mandate is when the federal government orders a city to do something, whether we need it or not, and then makes the city taxpayers pay for it. It is like having your Uncle Sam take you out to dinner, then order your food, and hand you the check.

Columbus has been a national leader in pointing out the dramatic increase in the scope and high cost of mandates. I'd like to briefly go over what we found.

Major federal environmental legislation began in 1970 with the Clean Air Act and then the Clean Water Act. During the 1970s, the number of state and federal toxic management mandates reached 11. In the period 1980-85, nine more mandates were added. Over the last four years, an additional 75 toxic management mandates have been imposed on local government, some scheduled for implementation as late as 2015.

In the 70s, along with the mandates came federal grants to help comply — primarily for sewer and water treatment upgrades. In the 80s and today, the river of federal grants is drying up, while the unfunded mandates keep pouring in.

Concerned about our ability to pay for these mandates, the City of Columbus set up an interdepartmental committee to identify all the state and federal environmental mandates affecting Columbus and estimate the cost of compliance. The Committee found the cost to comply with 14 major environmental mandates would total \$1.088 billion in 1991 dollars, or \$1.6 billion at a 7% inflation rate, over 10 years. By the year 2000, each Columbus household's share

of that cost will be \$856 per year. This represents a drastic increase in utility fees and/or local taxes. Just for comparison, the average property tax for a house in Columbus is \$800 to \$1,200.

The Columbus study received widespread attention in cities across the country, causing them to launch similar studies. Nine Ohio cities — Columbus, Cincinnati, Cleveland, Akron, Lima, Mansfield, Springfield, Toledo, and Zanesville — documented \$2.8 billion in compliance costs for 10 major mandates over 10



Columbus Mayor Lashutka discusses his city's experience with unfunded federal mandates.

years in 1992 dollars. Annual household costs by 2001 reached as high as \$812 a year, even though three of the larger cities only determined compliance costs for one environmental mandate.

The scary part about that is the cost estimates may be too low. For example, to obtain a National Pollutant Discharge Elimination System permit for Columbus, it was estimated in the Federal Register to cost \$26.58 million. The actual cost was \$1.5 million.

Now, despite all this talk about unfunded mandates and high costs, I'm not leading up to a pitch for more federal dollars. Everyone knows the federal government doesn't have the money either. What we need to do is change the nature of the relationship between federal, state and local government.

Let me suggest four basic principles.

Principle 1: Legislation and resulting regulations should be formulated on facts or well-founded peer-reviewed sciences.

Let me give you an example. The Safe Drinking Water Act mandates that the corn herbicide atrazine in drinking water

be less than 3 parts per billion. Atrazine has never been shown to be carcinogenic with the farmers who have actually handled it for the last 30 years. However, because rats that were given large doses developed tumors, the EPA lists atrazine as a "possible human carcinogen."

A person would have to have over 3,000 gallons of water a day that contained atrazine at 3 parts per billion to reach the level that was shown as harmful to the rats. Columbus' water is typically

below the extremely low 3 parts per billion standard. However, if we ever have just one sample that is over 12 parts per billion, Columbus would have to install \$80 million in new water treatment equipment that cost \$2.3 million to operate annually.

My point is, even if cities nationwide spend the tens of billions of dollars currently required chasing every last molecule in the water supply, I do not think the scientific and medical community would say that is the best and most cost-effective way to improve public health. Quite the contrary, we may be forced to spend a huge amount fixing negligible health risks, while more obvious health problems go begging.

Principle 2: Local governments should be able to prioritize their resources to achieve the greatest environmental risk reduction for the funds available.

One-size-fits-all regulation is counterproductive at the local level because the environment is so different in different areas. Mandates take decision-making power away from local officials. For instance, the U.S. EPA requires removal of many of the city's underground fuel tanks. Incidentally,

we are going to have to do this in advance of our assessments that above ground will eventually have their own set of regulations. The Columbus Fire Division will have to spend \$880,000 moving these tanks. We need two 24 new firefighters, or buy two engines and a ladder truck for the same amount.

I didn't get to make that decision. EPA did. I call that "spending without representation." Mayors, city councils, and county commissioners have no vote on whether these mandated spending programs are appropriate for our city. Yet we are forced to cut other budget items, or raise taxes and utility bills, to pay for them, because we must balance our budget.

Principle 3: Because of variable local conditions, incorporate flexibility into the federal and state regulatory process.

For instance, Ohio cities were forced to test our water for a pesticide that was only used on pineapples in Hawaii. Due primarily to our well-publicized complaints, this mandate was recently waived. A landfill in Yuma, Arizona was forced to close because they could not afford the required double liner that protects ground water. Yesterday receives 3 inches of rain a year, so there was no need to

protect the landfill from leaching.

Flexibility in finding ways to meet mandates should also be granted, instead of command-and-control solutions that may not be the lowest cost answer for a unique situation.

Principle 4: Local governments should be afforded the opportunity for fuller participation in the legislative and regulatory process.

One final example. The goals of the ADA are something I support. However, the law has unintended consequences. Prior to the ADA, one half of the people who apply to become Columbus police officers were rejected for not meeting the physical requirements. Now the ADA mandates that no physical exam can be given until after an applicant is offered a job. So every applicant has to be processed through the testing, background checks, and interviews before a physical can be given. This has doubled overtime costs for background checks. Thus, the city is forced to spend a great deal more time and money screening people who will never become police officers.

The total cost of all federal mandates is so large that it virtually dictates to communities how their budgets will be spent.

My point is, when it comes to mandates, we are not looking at one problem off time. That's not what mayors have to do. They have to look at all of a city's problems and set

priorities. In many cities, the greatest risk to public health right now is getting shot, not underground tanks or water treatment.

Many cities may be forced to cut police, fire, sanitation, or other services to pay for these mandates. In essence, local decisions would not be made by local officials; they would be made in Washington. That's wrong. We have to restore some balance and accountability to our federal system of government.

The Executive Order by President Clinton last week was a step in the right direction. But an executive order is not nearly as powerful as legislation. The order repeatedly states, "to the extent permissible by law," and as I have already stated, federal law is very flexible on many of these mandates.

I thank you for the opportunity to discuss this situation. By building a new partnership between all levels of government, we can better protect the environment, reduce the cost of services, and make government more responsive, as well as accountable to the people we serve.

Attachment 2

Office of State Programs
December 27, 1990

PUBLIC SECTOR vs PRIVATE SECTOR PROGRAMS

In the following States (10), State and local government employees are covered under the same provisions as private including first instance sanctions.

Michigan
Minnesota
Hawaii
Connecticut*

Vermont
Oregon
Alaska

Washington
Iowa
Kentucky

In the following States (8), same provisions except no penalties are assessed for violations found in the public sector.

California
Puerto Rico
Wyoming

North Carolina
Virgin Islands
Virginia

Indiana
Utah

In the following States (2), same provisions except no penalties for other-than-serious violations.

South Carolina
Nevada

In the following States (3), same provisions with exceptions as noted.

Arizona - penalties for serious violations only.

New York* - penalties for failure to abate only (\$50 a day).

New Mexico - penalties for "serious violations" are deemed paid if the violations are corrected within the abatement period.

The following States (2) have self-inspections programs as described below.

Maryland - Has a public sector self-inspection (PSSI) program available to State agencies. The five (5) participating agencies have their own inspectors doing safety inspections of their agencies. All other public sector establishments are covered by Maryland Occupational Safety and Health (MOSH) essentially the same as the private sector, except no penalties.

Tennessee - Covers State and local government employees through a self-inspection program as well as State enforcement with no penalties imposed for violations found in public sector.

* = public sector only

Attachment B

FILE COPY

I

103D CONGRESS
1ST SESSION**H. R. 115**

To strengthen the authority to require safe workplaces for Federal and Postal Service employees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. CLAY introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To strengthen the authority to require safe workplaces for Federal and Postal Service employees, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Federal and Postal
5 Service Employees Occupational Safety and Health Act of
6 1993".

7 **SEC. 2. FEDERAL OCCUPATIONAL SAFETY AND HEALTH**
8 **PROGRAMS.**

9 (a) NEW SUBCHAPTER.—Chapter 79 of title 5, Unit-
10 ed States Code, is amended—

1 “(4) Reasonable attorney’s fees and costs.

2 “(e) NOTIFICATION.—The Secretary shall take rea-
3 sonable actions to inform victims of their rights under this
4 section.

5 **“§ 7920b. Federal Occupational Safety and Health**
6 **Training Fund**

7 “(a) There is established in the Treasury of the Unit-
8 ed States an account to be known as the Federal Occupa-
9 tional Safety and Health Training Fund (hereinafter in
10 this subchapter referred to as the ‘Fund’). The Fund, and
11 any amounts deposited in it, including any interest earned
12 thereon, shall be available to the Secretary, subject to ap-
13 propriations Acts, to develop and implement agency train-
14 ing and education programs in occupational safety and
15 health.

16 “(b) Amounts in the Fund which are not currently
17 needed for the purpose of this section shall be kept on
18 deposit or invested in obligations of, or guaranteed by, the
19 United States and all earnings on such investments shall
20 be deposited in the Fund.

21 “(c) The Secretary shall transmit to the Committee
22 on Post Office and Civil Service of the House of Rep-
23 resentatives, not later than 4 months after the end of each
24 fiscal year, a report on the financial condition, uses, and
25 operation of the Fund during the preceding fiscal year.

1 processes which have been adopted or are in use, in such
2 place of employment unless the agency did not, and could
3 not with the exercise of reasonable diligence, know of the
4 presence of the violation.

5 “(m) Civil penalties owed under this subchapter shall
6 be paid to the Secretary for deposit into the Secretary’s
7 penalty fund established under section 7920b and may be
8 recovered in a civil action in the name of the United States
9 brought in the United States district court for the district
10 where the violation is alleged to have occurred or where
11 the agency has its principal office.

12 “(n) Nothing in this subchapter shall preclude State
13 and local law enforcement agencies from conducting crimi-
14 nal prosecutions in accordance with the laws of such State
15 or locality.

16 “(o) It is the sense of the Congress that no agency
17 should pay any fine under this subchapter out of any
18 funds appropriated for employee salaries or expenses.

19 **“§ 7916f. Office of Federal Programs**

20 “The Secretary shall establish within the Department
21 of Labor an Office of Federal Programs which shall have
22 jurisdiction on behalf of the Secretary over this subchapter
23 and which shall be headed by an Assistant Deputy Sec-
24 retary of Labor.

OSHA Reform - Unfunded Mandates

1-13-23

- Labor unions - turning up endorsements from Mayors / Governors

I. Is this an unfunded mandate?

- is it a cost?

NGA - Not vocal opposition
not publicize decision

→

States acting in employer capacity --
not in ~~governmental~~ capacity

→ Program as an investment - near-term paybacks - saves on workers comp costs

→ CBO number should be low

Pam Van Weis - CBO scoring issue

Guidelines on IDITS from OMB

State plans must be at least as effective as OSHA

equity issue - already $\frac{1}{2}$ states
have state plans - others laboring under unfunded

- expanded coverage equity issue for employees
- different than unfunded mandate
- payback argument

very small cost - small gap
not so states, not even 30
must

* any studies of cost savings from states
who recently adopted state plans

- high performance / steelcase argument

Mitigation Strategies

① Cost of ~~mitigation~~ administering state plans

↳ \$25 million/year to have all states
come in & have state plans

Problems

- public vs private state enforcement? Can we
money for this?
- what about states already with state plans?
they would ask for more - not fair

② Short term developmental \$

- Targeted
- short term
- incentive - not much \$
- original Act did this

③ Compliance Funding

- slippery slope
- private sector will want too - equity

Compliance assistance Funding

- charging for services?
- high demand
- Bill proposes "revolving fund" approach
- opposition from small business (some can't afford)
- more funding for free services

Remittance for Fed tentacles

- similar concept in clay bill for fed empl.
- private sector equity issue
- slippery slope?
- disincentive for adopting state plans

Delaying effective date

- minority approach
- addresses big complaint about unfunded mandates - no time to plan for them - re-set priorities
- closes gap between us & minority
- Time for planning & to work

any way to have partial state plans?

i.e. - state covers safety, OSHA covers health

Do we flip incentives - now with this bill - why would a state become a state plan? Feds will now cover state employees for us, take political heat, pay for inspections! we save \$

3 year phase in -- Targeted Developmental \$
incentive for states to adopt state plans

Difficult issue -- unions using OSHA standards
as screen for more staffing
(mental hospitals & assaults)

- Police & fire fighting occupations also a problem

assignments / wrap-up

- Explore issue of Developmental \$
- Inclined to go along w/delay in implement
some delay is appropriate
- In Budget & other sense, what kinds of savings
from ^{new} state plans -- how do we use those
savings
- Remittance to states issue - examine
if fine money collected goes into Fund for mental
for state plan administer.
- Q & A on Unfunded Mandate issue

talking points/AgA
not mod.

- Do we want to get caught up in ~~argument~~ over unfunded mandates -- NO

- But we need some sort of defense/
rationale when the issue is raised -- and it will
be raised.

We only pledged to address gaps in
the protection of public employees. Not
to full ^{mandatory} coverage.

Either way, it benefits us to give states
the most flexibility & funding that we
can get

Options

- Support Kennedy/Ford Mandated Coverage
- Support Kennedy/Ford w/ changes to give
States Flexibility
- Support merely giving states incentives
to become state plans
- Do not support

ALTERNATIVES ON COVERAGE OF PUBLIC EMPLOYEES

So far, our public position has been only to "address gaps in the protection of public employees." Therefore, we have several options available to us, including:

- Support the Kennedy/Ford mandated coverage provisions as is;
- Support Kennedy/Ford with reservations -- offer changes in bill that give states more flexibility/funding for coverage;
- Oppose mandatory coverage -- support instead giving states incentives (monetary or otherwise) to become state plans;
- Oppose mandatory coverage -- support status quo (not a great option given our public statement, but still possible);

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001a. fax	US Department of Labor, draft paper for tomorrow's meeting (1 page)	01/12/94	b(6)

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Clinton Presidential Records
Domestic Policy Council
Michael Schmidt
OA/Box Number: 7344

FOLDER TITLE:

OSHA Reform: Coverage of Public Employees

2013-0968-S

sb56

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



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January 12, 1994/1:21pm

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DEPARTMENT/COMPANY: DPC

FACSIMILE NUMBER: 456-7028

FROM: PETE GALVIN

NUMBER OF PAGES INCLUDING COVER: 13

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IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY 202/219-5288

MESSAGE: Draft paper for tomorrow's meeting -- sorry I missed you this morning. If you want to see attachment's this afternoon, let me know and I'll fax them over too. Please get back to me with any suggestions or insertions (especially on last page) -- hopefully, we'll have time to circulate today.

* Also, please be sure to give my name to the guards so I can come tomorrow. Its Peter D., birthdate (b)(6). Thanks. .

① Discussion of unfunded mandates

-handbook
with

② Options for providing flexibility to states

Draft Issue Paper
January 12, 1994, pdg, 1PM
EOB/DOL Discussion Group on OSHA Reform
Unfunded Mandates

Background

The Administration has indicated its support for the rapid enactment of OSHA reform legislation that would "address gaps in the protection of public employees."

The case for doing so was compelling. At the present time, about half the States already provide such protection. On the other hand, this leaves more than 7 million state and local public employees uncovered by OSHA, although a number of states do provide some protections to public employees under their own laws. (Attachment 1.) The hazards facing these employees are significant. (Attachment 2.) The argument that the public sector should comply with laws imposed on the private sector is a strong argument favoring coverage. Moreover, this provision is strongly backed by the public employee unions. Many governors and mayors who want their support in reelection fights this year may support the change. (Attachments 3, 4.) Finally, closing this gap in coverage is also included in the only OSHA reform bill introduced by the minority, albeit with an effective date delay several years longer than in the majority bills, somewhat immunizing the position from partisanship.

bold

Having decided to "address gaps," the problem for the working group is how to best square this commitment with the institutional concern of state and local officials that we not create another "unfunded federal mandate." The basic problem is that many cities, towns and villages have run out of the capacity to raise taxes; accordingly, when the Federal government imposes a new duty, it may force them to cut back on police, fire, and other vital services. More generally, it forces them to reset their priorities: not only differently than they would like, but sometimes without much warning.

Some of those concerned about the mounting impact of unfunded Federal mandates have argued that if a new Federal mandate is necessary, it should be fully funded out of the Federal taxbase. Those who have expressed this point of view (Attachment 5), argue that exceptions not be made to this general principle. Thus, if OSHA reform is an unfunded mandate, they would argue that any costs associated with that mandate should be fully funded by the Federal government. Obviously, this creates some appropriations problems.

Others take a more flexible view. (Attachment 6.) They urge that four key principles guide the Federal government in enacting such mandates. These are:

- the legislation or regulation in question should be based on well-founded science or fact;
- local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available;
- the federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all; and
- local governments should be treated as a full partner in the development of any new laws or regulations.

Accordingly, we are presented with four questions to consider:

- What has been the Administration's position on unfunded mandates?*
- 1. Is OSHA reform an unfunded mandate?
 - 2. If it is a mandate, does it meet acceptable criteria for enactment even if not fully funded?
 - 3. What types of contribution could we make?
 - 4. Would responding to this issue start the Administration down an unacceptable road on unfunded mandates in general?

1. Is OSHA Reform an Unfunded Mandate?

The term "Federal mandate" contained in the most prominent piece of legislation introduced on this topic, S.993 (Kempthorne et al), reads as follows:

"... a statute or regulation that requires a state or local government to --

(A) take certain actions (including a requirement that a government meet national standards in providing a service); or

(B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions.

An "unfunded" Federal mandate is one which would not meet the requirements of section 4 of the bill that:

... any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the state or local government only if all funds necessary to pay the direct costs incurred by the State or local government in conducting the activity are provided by the Federal government for the fiscal year in which the direct cost is incurred.

If the concept were really limited to the costs of "conducting an activity," it could be argued that the legislation does not create an unfunded mandate at all. Coverage of State and local employees does not require the State to run any new program -- only to comply in its employment practices with Federal rules,

administered by the Federal government unless the State elects to run the program itself. Moreover, should the State make such a selection, Federal funding is available to share in plan implementation (50%) -- although appropriations have not allowed this level to be met in recent years for new applicants.

In practice, however, the type of "unfunded mandates" which are the subject of complaint include situations comparable to OSHA -- where the focus is on the cost of bringing State or local facilities into compliance with the law, just as private sector facilities must be in compliance with the law (e.g. access to the handicapped). The State and local governments who would for the first time be covered by OSHA reform do incur a new direct cost: the cost of compliance with OSHA requirements and regulations. In addition, even those covered already will face incremental costs under the proposed legislation.

It has been asserted by one of the employee unions that the benefits of coverage demonstrably exceed the costs (ASCME study by Ruttenberg); if so, it can be argued that there is no net cost, and thus no unfunded mandate. To put it another way, it could be argued that the up-front costs of prevention are an investment that produces savings to badly strapped state and local governments. At this point, however, we are not in a position to fully support that argument. The methodology of this study has been challenged, and the Department is still in the process of developing a better estimate on this point.

Alternatives:

- 1) Argue that OSHA reform is not an unfunded Federal mandate of the sort that has been the subject of concern.

Pro: * Reflects the fact that incremental impact of new law significantly different among two groups of States -- those who have already decided to cover public employees (including a number not explicitly recognized by OSHA) on a purely voluntary basis, and those who have not -- and to reflect the fact that no administrative activity is mandated under the current law or reform act.

* Provides a graceful exit for the concerned institutional interests on an issue that is of less concern than other Federal mandates, and which a number of State and local officials would like to endorse.

Con: * Lack solid data at this point to support the argument that benefits exceed costs.

- 2) Accept that OSHA reform is a Federal mandate on State and

*Realistically,
TO state local govt, any cost
is considered an
unfunded mandate*

admit/concede

local governments.

Pro: * Avoids the need to defend this argument.

Con: * May force us to consider funding part or all of this mandate.

If it is a Mandate, Does it Meet Acceptable Criteria for Enactment Even if Not Fully Funded?

As noted, not all of those who are concerned about unfunded mandates are insisting that ALL Federal mandates be fully funded. Rather, they have adopted a more middle-of-the-road approach expressed in the criteria set forth by the NLC. It would appear that OSHA reform meets the criteria for enactment even if not fully funded.

1) The legislation or regulation in question should be based on well-founded science or fact.

* OSHA reform meets this criteria. The Secretary presented a good case for the need in April; in February, he will be pointing out that the solutions proposed in the bill are tested and proven, and providing examples to buttress this point.

* Any regulation or requirement issued under the new law will be subject to the new Clinton Administration Executive Order on rulemaking, which likewise ensures that they are based on well-founded science or fact -- and which also contains special provisions to ensure attention to the special needs of State and local governments.

2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available.

* In terms of administration, the law already provides States the option to set up a state plan to meet local needs and priorities. If they do, they get a number of benefits (described in more detail in the funding discussion below).

* In terms of mechanisms that would be mandated by new legislation, such as programs and committees, public employers would have the same flexibility as private employers at a minimum. Moreover, the details would be worked out by regulation, and public employers would receive the special attention required under the Clinton Administration's Executive Order. The same is true for any new standards which the bill requires be adopted.

* A delay of several years in the effective date is

Do we support

agreeable to the sponsors of the majority bill, and already contained in the minority bill. This will provide State and local governments adequate time to phase-in compliance efforts and thus minimize the disruption that any up-front investments might otherwise create for other pressing priorities.

3. The federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all.

* The whole point of OSHA reform is to do just that by getting public employers and their employees, just like those in the private sector, engaged in designing and implementing flexible solutions that fit local conditions and particular worksites.

4. Local governments should be treated as a full partner in the development of any new laws or regulations.

* The Labor Department and the Congress have sought, and will continue to seek, the involvement of representatives of state and local governments in designing this legislation. Specific representation on our advisory council is a distinct possibility, and we meet regularly with all State plan designees. The new Clinton Executive Order guarantees such a partnership when it comes to regulations.

* It should be noted that legislative input from official representatives of State and local governments was minimal; the Washington offices who met with us were far more concerned about other Administration priorities, and found little interest in this matter at home.

Alternatives:

acceptable criteria

1. Press the argument that OSHA reform is a mandate that meets the criteria for new State and local funding.

Pro: * We have a pretty good case to meet criteria accepted by some groups.

* Provides an out for those who want to support OSHA reform.

* Might set a useful precedent for other unfunded mandates (see last piece of this paper).

Con: * Some groups argue that any mandate should be funded.

* Understanding our case might require a higher

This assumes we accept this criteria

level of understanding of OSHA reform than may in practice be feasible.

2) Do not press this argument.

Pro: * Avoids the need to achieve understanding of OSHA reform.

Con: * Places focus on funding the mandate.

financial
2) What Types of Contribution Could We Make?

1) Costs of Administering State Plans *currently*

As noted above, the States are not *currently* required to administer an OSHA program. Having them do so confers some advantages on the Federal government: saving direct resources for us, and avoiding messy intergovernmental conflicts created when the Federal government finds a public employer out of compliance (the best example of which is the continuing problem of overtime payments).

Shafter
The Department has estimated that enactment of the legislation as presently drafted will add 115 FTE (79 compliance officers) and \$8.6 million a year in costs in order for the Federal government to inspect the additional workplaces in its jurisdiction. The assumptions assume that of the 28 jurisdictions not now covered by State plans, 6 more would apply for this status -- solely for their public employees. Funding the Federal government's share of the extrapolation of these plans would cost an estimated \$7.2 million. If we extrapolate from these numbers, it would cost an estimated \$33.6 million to pay the Federal government's administrative share if all the States decided -- without further economic incentives -- to adopt such limited State plans, relieving the Federal government of enforcement responsibility, for a net cost of \$25 million. *Then* put it another way, the Department's original estimates *were* this provision totalled \$15.8 million a year and 115 FTE; if all the States utilize State plans, the total is \$25 million a year and a minimal FTE increment (to help with State plan administration).

In deciding whether we need to provide this incentive, it should be noted that there are already strong incentives in the *new? current?* legislation for the States to adopt and maintain plans that cover public employees. First, they would not have Federal inspectors inspecting and citing their facilities. Second, States which adopt State plans are, under current law, permitted alternative sanction approaches. A number do not penalize State and local employers; others use the penalty money for special purposes, such as training. (Attachment 5.) Many States do have difficulty raising their own share of the funds needed to run these programs, however, although some assess the costs of program operations as a workers' compensation surcharge -- something the

Federal government is not in a position to do (except for its own employees if we decide to do so) -- which adds an additional incentive for compliance.

If we think it is useful to provide additional resources for this purpose, we need to consider our goals in more detail. Are they limited to getting new States to adopt plans, or to help all States maintain them and comply with an existing mandate? A number of States with plans have expressed dissatisfaction with the funding they are currently receiving from the Federal government, which falls short of the 50% maximum set by the statute. Moreover, there is no statutory formula providing, for example, that our contributions are \$x per worker; instead, the agency has found itself in the position of using a formula that avoids cutting the contributions of those already receiving aid in order to help those making new efforts. Thus, those States which have started most recently, or which have put additional State resources into the effort recently, are disadvantaged. Some of these States are having trouble convincing their State legislatures to continue to provide the State share of the financing. When California dropped its State plan several years ago (it was reinstated subsequently), the drain on Federal resources was substantial.

A second question is whether we should focus any additional resources on encouraging State plans that cover only public employees, or give consideration to funding problems for those which wish to assume private sector responsibilities as well. Only the public employee coverage is an "unfunded mandate"; the decision to cover private sector employers is entirely at the option of the State. On the other hand, having the States assume part of these costs can save the Federal government considerable enforcement resources and is consistent with the Federalism concept in the Act. Moreover, ^{we} in ^{end} up providing more funds for public employee programs by draining resources away from those states who want to operate private sector programs, we increase the risk ^{of} States deciding to leave this responsibility to us -- thus imposing additional enforcement costs on the Federal government (as happened in California).

2) Developmental Funding

In the first two years of its existence, OSHA offered 90% funding to encourage States to develop and submit State plans. While the costs of developing plans are not as significant as the costs of administration or compliance, covering these planning costs would no doubt be welcome. The Department has not developed a cost estimate for such an effort.

3) Compliance Funding

As noted above, the Department has not yet completed an economic

analysis of the net cost (if any) to State and local employers in the 28 currently uncovered jurisdictions of coming into compliance -- nor of the additional net costs (if any) to State and local employers in currently covered jurisdictions of coming into compliance with the provisions of the new law.

4) Compliance Assistance Funding

All states currently receive 90% funding to enable them to provide consultation services to covered employers. This is a very popular program, and expansion of such services (at the expense of consultation) forms the heart of the minority approach to OSHA reform. Public employers can benefit from these services as much as private sector employers. With the expansion of the universe covered by OSHA, demand for additional funding for this activity will increase -- otherwise fewer services will be available for the private sector.

To meet the increased demand without cutting into compliance resources, the House bill would authorize the charging of fees for consultation services, and the establishment of a revolving fund to use these fees exclusively for that purpose. This would ensure that the availability could grow to meet the demand. Regulations of the Secretary could presumably adjust the fees to deal with particular problems (e.g. business size). There is strong opposition to the charging of fees for such services, based on concern it will effectively discourage those who need the services most from seeking them.

Focusing these services on newly covered employers for a while, or subsidizing those to public employers, could be considered.

5) Remittance of Federal penalties imposed

Under the bill, if States do not have a plan approved by the effective date, the Federal government will inspect public employer facilities and collect penalties in appropriate cases -- just as with private sector employers.

One approach is to allow States which adopt State plans to continue to have the flexibility not to penalize public employers. The law requires State plans to be "at least as effective as" the Federal law; accordingly, once the Federal law provides for the coverage of public employees under a Federal penalty regime, the present policy of giving the States flexibility in this area may have to be changed unless special legislative language to the contrary is added. This would ensure a strong incentive to adopt State plans would be created.

A second approach would be to focus on penalties assessed by Federal inspectors from public employers, and develop an alternative penalty assessment scheme to ensure we have more

flexibility in imposing fines on public employers. The penalty policies followed by the Department, however, already provide considerable flexibility to mitigate potential penalties for good faith efforts, and to adjust abatement dates (in consultation with employee representatives) to deal with fiscal realities. Moreover, the current system has proved useful in establishing employer-wide compliance agreements through settlement of proposed penalties -- and approach that could prove very useful with public employers as well.

A third approach, again looking at the penalties assessed (and in this case collected) by the Federal government, is to provide for the remittance of any funds collected to the State involved, so it can be used to help public employers come into compliance. The House bill contains a similar provision on Federal employees that could be used as a model. (Attachment 6.)

6. Delaying effective date

Delaying the effective date of the legislation, as in the minority bill, would allow State and local governments much more time to plan for implementation, to receive technical help in coming into compliance, to consider the use of state plans, and otherwise to adjust their priorities.

Alternatives

1) Provide administrative funding

Pro: * Doing anything reasonable to ensure the States take over this responsibility is worthwhile, because it will avoid hundreds of politically difficult problems arising from Federal compliance orders and assessments on cash-strapped public employers.

* There would be a considerable saving in FTE if the States take on this activity.

Con: * There may already be adequate incentives for States to adopt State plans, saving the Treasury at least \$25 million a year.

* The ultimate costs of moving in this direction may prove higher, because of pressures to aid existing State programs -- including those where most of the costs are the State's voluntary decision to regulate the private sector.

2) Provide developmental funding for a few years

Pro: * This is assistance only for the short-term, and

is not likely to be significant in cost.

* This funding adds an important incentive to encourage States to explore the possibility of a State plan, helping to ensure the advantages noted under alternative number 1.

Con: * The law still requires up to 50% sharing of implementation costs; and while that is subject to appropriation limits, the more States we encourage to adopt state plans the larger the ultimate obligation.

3) Provide compliance funding (directly, or by low-interest loans)

Pro: * This would respond to the heart of the concern, and the reality at the local level, of the mandate.

Con: * The up-front addition to the Federal budget has not been calculated, but could be significant; and loan repayment, if that is the mechanism, is questionable.

* If the purpose of covering these employees is to demonstrate equity with the private sector, the latter may demand equal treatment as a condition of supporting the legislation.

4) Provide compliance assistance funding to State and local employers either:

- a) free, as at the present time; or
- b) at cost, through a revolving fund

Pro: * Consultation visits that do not risk the immediate imposition of an abatement plan and penalty are strongly supported by all employers, including public employers, so this is a very positive type of assistance.

* Public employers will be entitled to these services anyway; emphasizing the availability is a "freebie" to that extent.

Con: * Although there is no cost if a revolving fund covers everything, providing the services free or at a discount could be significant costs to the budget that will have to be considered. Accordingly, raising the matter in the context of the unfunded mandate would lead to pressures we

want to resist.

5) Change penalty policies

a) Let State plan states continue to elect whether to penalize public employers under new law.

Pro: * Strong incentive to adopt State program.

* Continuation of existing practice, which States which already have State plans may not realize bill places in jeopardy.

Con: * Undercuts argument that we are going to hold public employers to the same standards as private-sector employers.

b) Establish a different penalty assessment scheme for public employers.

Pro: * Sounds good.

Con: * Plenty of flexibility now.

* Could undermine credibility of existing system in private sector.

c) Remit to States for training and education any penalties collected by Federal government from State and local authorities.

Pro: * Consistent with the approach being taken to Federal public employees.

* Positive use of funds, and fact that precious state resources are going to reduce the Federal deficit, will be well received.

Con: * Removes an incentive for States to adopt State plans.

6. Delay implementation date of new coverage -- e.g. 3 years

Pro: * Consistent with city bill.

* Time to plan, develop state plans, reorient priorities, come into compliance, etc.

Con: * Inconsistent with goal of equity: among States, and with private sector.

* Leaves millions of workers unprotected for some time, despite the risk.

Additional alternative, pros and cons: choice for each state to opt out of coverage? To be developed in final draft

Would Responding to this Issue Start the Administration down an Unacceptable Road on Unfunded Mandates in General?

(brief discussion to be inserted as led by Mike Schmidt, DPC: how has the Administration approached this issue, both in general and in response to riders attached to bills to specific pieces of legislation? Do we have to be concerned about setting any kind of precedent?) Pros and cons.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001b. fax	US Department of Labor, draft paper for tomorrow's meeting (1 page)	01/12/94	b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Michael Schmidt
OA/Box Number: 7344

FOLDER TITLE:

OSHA Reform: Coverage of Public Employees

2013-0968-S

sb56

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

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Confirmation:
202/219-6141

January 12, 1994/1:21pm

TO: MIKE SCHMIDT

DEPARTMENT/COMPANY: DPC

FACSIMILE NUMBER: 456-7028

FROM: PETE GALVIN

NUMBER OF PAGES INCLUDING COVER: 15

FACSIMILE REPLIES: CONGRESSIONAL AFFAIRS

202/219-5120

INTERGOVERNMENTAL AFFAIRS

202/219-5736

IMMEDIATE OFFICE OF ASSISTANT SECRETARY 202/219-5288

MESSAGE: *Enclosures*
~~draft paper for tomorrow's meeting~~
If you want to see attachment
them over too. Please get back
(especially on last page) -- h
today.

- sorry I missed you this morning.
afternoon, let me know and I'll fax
with any suggestions or insertions
ly, we'll have time to circulate

Also, please be sure to give my name to the cards so I can come tomorrow. Its
Peter D., birthdate (b)(6) Thanks. .

*Atch. Table 1, Part 1***DRAFT**

**State and Local Government Workers Currently
Covered By OSHA Approved State Plans**

State	Employment
-----	-----
Alaska	50,845
Arizona	217,584
California	1,700,850
Connecticut	176,793
Hawaii	74,821
Indiana	344,498
Iowa	200,109
Kentucky	230,271
Maryland..	284,846
Michigan	501,129
Minnesota	311,145
Nevada	41,144
New Mexico	111,103
New York	1,201,178
North Carolina	401,145
Oregon	111,159
South Carolina	201,150
Tennessee	111,162
Utah	111,199
Vermont	31,116
Virginia	301,110
Washington	311,117
Wyoming	41,113
-----	-----
Total	7,611,182

Source: Public Employment 1991, U.S. Department of Commerce

*Att. ~~File~~ 1, Part 2***DRAFT****State And Local Government Workers Not Covered By The OSH Act**

State	Employment
Alabama	269,516
Arkansas	145,207
X Colorado	231,486
Delaware	42,364
D.C.	57,257
X Florida	751,419
Georgia	421,117
X Idaho	71,647
X Illinois	637,685
X Kansas	180,991
Louisiana	217,825
X Maine	12,604
Massachusetts	317,597
Mississippi	177,981
Missouri	257,405
Montana	17,608
Nebraska	137,724
X New Hampshire	11,737
X New Jersey	477,303
North Dakota	51,667
X Ohio	647,348
X Oklahoma	211,797
Pennsylvania	517,047
X Rhode Island	13,316
South Dakota	17,204
Texas	1,077,597
X West Virginia	117,623
X Wisconsin	317,378
Total	7,677,650

Source: Public Employment 1991, U.S. Department of Commerce

* These states protect public employees even though they do not have approved state plans, at least in part. Information preliminary.

Table 2-1

Private and Public Sector Injury and Illness Rates By State, 1991

State		Total Rate	LWD Case Rate	State		Total Rate	LWD Case Rate
U.S. Average	Private Sector	8.4	3.9	New Mexico	Private Sector	8.1	3.9
	State & Local Govt	N.A.	N.A.		State & Local Govt	8.2	3.6
Alaska	Private Sector	10.5	4.6	New York	Private Sector	N.A.	N.A.
	State & Local Govt	7.8	3.5		State & Local Govt	13.5	8.2
American Samoa	Private Sector	3.7	2.3	North Carolina	Private Sector	7.8	3.4
	State & Local Govt	1.0	1.0		State & Local Govt	5.4	2.6
Arizona	Private Sector	7.9	3.4	Oregon	Private Sector	9.1	4.4
	State & Local Govt	8.3	2.7		State & Local Govt	7.5	2.9
California	Private Sector	9.4	4.6	Puerto Rico	Private Sector	5.0	3.9
	State & Local Govt	13.5	5.7		State & Local Govt	8.8	7.6
Connecticut	Private Sector	9.0	4.2	South Carolina	Private Sector	7.6	3.2
	State & Local Govt	14.5	7.9		State & Local Govt	7.5	3.3
Guam	Private Sector	6.7	4.5	Tennessee	Private Sector	9.4	4.2
	State & Local Govt	4.2	2.1		State & Local Govt	7.6	3.7
Hawaii	Private Sector	10.6	6.0	Utah	Private Sector	10.1	4.0
	State & Local Govt	9.3	4.8		State & Local Govt	7.1	2.5
		10.2	4.5			8.1	4.0
		8	4.1			7.0	3.2
Iowa	Private Sector	10.3	4.7	Virgin Islands	Private Sector	2.9	1.7
	State & Local Govt	8.5	3.8		State & Local Govt	3.4	2.5
Kentucky	Private Sector	9.9	5.0	Virginia	Private Sector	6.9	3.3
	State & Local Govt	6.1	3.3		State & Local Govt	8.1	3.9
Maryland	Private Sector	6.8	3.4	Washington	Private Sector	11.1	5.1
	State & Local Govt	8.3	5.1		State & Local Govt	8.1	3.6
Michigan	Private Sector	10.4	4.6	West Virginia	Private Sector	9.4	4.9
	State & Local Govt	8.8	5.0	(1990 data)	State & Local Govt	6.9	3.6
Minnesota	Private Sector	8.1	3.8	Wyoming	Private Sector	7.6	3.6
	State & Local Govt	7.8	2.9		State & Local Govt	6.6	2.8
Nevada	Private Sector	11.0	5.1				
	State & Local Govt	10.0	3.6				

Rates per 100 full time workers

LWD: lost workday cases include those cases resulting in days away from work and/or days of restricted work activity.

Source: 1991 Annual Survey of Occupational Injuries and Illnesses, BLS

Table 2-2

State and Local Government Injury and Illness Rates By State, 1991

State		Total Rate	LWD Case Rate	State		Total Rate	LWD Case Rate
Alaska	State Local	6.4 9.0	2.6 4.2	New York	State Local	13.5 13.5	8.5 8.1
California	State Local	10.9 14.4	4.5 6.0	North Carolina	State Local	3.7 6.4	2.0 2.9
Connecticut	State Local	14.1 14.8	9.7 6.8	Oregon	State Local	6.9 7.8	2.4 3.2
Hawaii	State Local	7.3 15.5	3.6 8.7	Puerto Rico	State Local	8.1 12.3	7.0 10.9
Indiana	State Local	7.2 8.3	2.8 3.3	South Carolina	State Local	6.7 8.1	3.5 3.2
Iowa	State Local	8.2 8.7	4.6 3.4	Utah	State Local	5.4 8.2	2.2 2.6
Kentucky	State Local	4.8 7.0	3.2 3.3	Vermont	State Local	6.5 7.4	3.7 2.8
Maine	State Local	8.1 4	4.4 1.6	Virgin Islands	State Local	N.A. 3.4	N.A. 2.5
Massachusetts	State Local	6.0 10.1	3.2 3.9	Virginia	State Local	7.6 8.2	4.0 3.8
Minnesota	State Local	5.0 9.2	2.0 3.3	Washington	State Local	5.6 9.6	2.7 4.2
Nevada	State Local	7.6 11.2	3.3 3.7	West Virginia (1990 data)	State Local	7.2 6.6	3.8 3.4
New Mexico	State Local	5.3 10.3	2.7 4.2	Wyoming	State Local	7.2 6.3	3.6 2.4

Rates per 100 full time workers

LWD: lost workday cases include those cases resulting in days away from work and/or days of restricted work activity.

Source: 1991 Annual Survey of Occupational Injuries and Illnesses, BLS

COMPARISON OF PUBLIC VS. PRIVATE SECTOR INJURIES AND DEATHS

INCIDENCE RATES 1991

INDUSTRY	Total Cases	% Above All Industry	Cases Involving Days Away From Work & Deaths	% Above All Industry	Lost Workdays (Severity)	% Above All Industry
ALL INDUSTRY (Private)	8.7	NA	1.6	NA	76	NA
Public Administration	12.9	48%	4.8	167%	109	38%
General Government	14.7	60%	5.5	206%	117	48%
Public Works	19.1	120%	7.7	329%	168	113%

Source: National Safety Council, Accident Facts, 1992

INCIDENCE RATES 1990

INDUSTRY	Total Cases	% Above All Industry	Cases Involving Days Away From Work & Deaths	% Above All Industry	Lost Workdays (Severity)	% Above All Industry
ALL INDUSTRY (Private)	9	NA	2.2	NA	64	NA
Public Administration	9	0%	4.4	100%	63	-1%
General Government	13.8	53%	6.5	159%	102	21%
Public Works	18.6	107%	8.2	182%	172	105%

Source: National Safety Council, Accident Facts, 1991

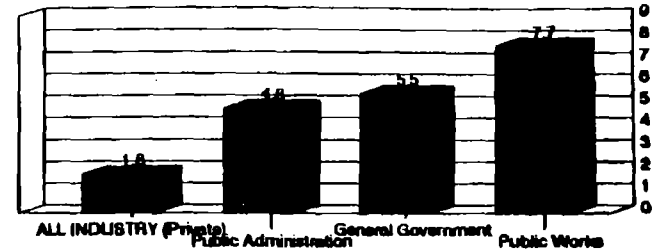
INCIDENCE RATES 1989

INDUSTRY	Total Cases	% Above All Industry	Cases Involving Days Away From Work & Deaths	% Above All Industry	Lost Workdays (Severity)	% Above All Industry
ALL INDUSTRY (Private)	8.78	NA	2.17	NA	72	NA
Public Administration	11.85	35%	4.97	112%	108	26%
General Government	18.74	113%	5.91	169%	115	37%
State Depts of Trans	9.64	10%	5.1	132%	144	71%

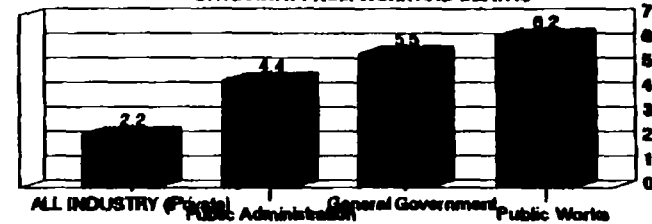
Source: National Safety Council, Accident Facts, 1990

Note: Incidence Rates are defined as injuries (or deaths) per 100 full time workers.

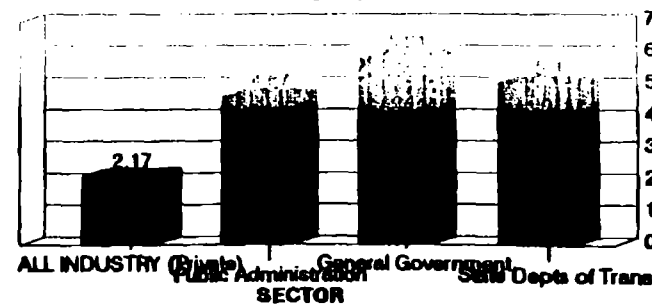
1991 PUBLIC VS PRIVATE RATES
DAYS AWAY FROM WORK AND DEATHS



1990 PUBLIC VS PRIVATE RATES
DAYS AWAY FROM WORK AND DEATHS



1989 PUBLIC VS PRIVATE RATES
Cases Involving Days Away from Work and Deaths



INCIDENCE RATES

INCIDENCE RATES

INCIDENCE RATES

Attachment 3

Dean letter (Vermont) -
incoming chair, Governors

AA- [unclear] [unclear]

January 7, 1994

IGA OHSA REPORT

IGA staff have been assigned to work with specific constituents.

GOVERNORS

STATE	GOVERNOR	contacted	COMMENTS
Hawaii	Waihee	12/17/93	Letter as of 1/5/94
Indiana	Bayh	12/17/93	Letter as of 12/20
Kentucky	Jones	Yes	
Maryland	Schaefer	Yes	As of 1/6, Draft letter initiated, but not sure it will be signed.
Nevada	Miller		
New Mexico	King	Yes	Have L/M. Will call again.
New York*	Cuomo	12/17 & 12/20	Letter as of 12/29/93
North Carolina	Hunt	Yes	
Oregon*	Roberts	12/15 & 17th	Have requested info from which to construct letter 1/6/94.
Tennessee	McWherter		
Vermont	Dean		LETTER
Washington	Lowery	Yes.	Joe Dear called. Expects letter.
Wyoming	Sullivan	12/17	L/M. Will call again.



STATE	GOVERNOR	CONTACTED	COMMENTS
Other states			

MAYORS:

CITY	MAYOR	CONTACTED	COMMENTS
New York, NY	Dinkins	Yes	Requested info from which to express opinion.
Duluth, MN		Yes	Letter expected
Sioux City, IA		Yes	Letter expected
Atlanta, GA		Yes	Letter expected
Seattle	Rice	Yes	Call & follow up call. Waiting for response.
Gary, IN	Barnes	Yes	Call & follow up call. Waiting for response.
Baltimore,	Schmoke	Yes	Call & follow up call. Waiting for response.
St. Paul, MN	Scheibel	Yes	Call & follow up call. Waiting for response.
Charleston,	Riley	Yes	Call & follow up call. Waiting for response.

CITY	MAYOR	CONTACTED	COMMENTS
Saginaw, MI	Laster	Yes	Call & follow up call. Waiting for response.
Portland, OR	Katz	Yes	Call & follow up call. Waiting for response.
Memphis, TN	Herenton	Yes	Call & follow up call. Waiting for response.
San Francisco, CA	Jordan	Yes	Letter expected, but later in Jan. 1/7/94.
Sacramento, CA	Serna	Yes	Letter expected. Target date is Tues 1/11/94.
Long Beach, CA	Kell	Yes	Letter expected. Target date Wk of 1/14.
Oakland	Harris	Yes	Letter expected. ASAP target Tues 1/11/94.
Los Angeles	City Councilman Hernandez	Yes	Waiting for response, but appears likely. Target date Tues 1/1/94
Los Angeles	City Councilwoman Walters	Yes	Waiting for response, but appears likely.

Note: additional states and cities being added.

Unfunded Federal Mandates . . . The Philadelphia Story

Philadelphia, Pa., Mayor Rendell, who has been elected to his second term in 1993, is facing a similar situation. He is being asked to pay for the cost of the federal mandate to install curb ramps at all intersections. The city is being asked to pay for the cost of the federal mandate to install curb ramps at all intersections. The city is being asked to pay for the cost of the federal mandate to install curb ramps at all intersections.

The federal government is asking cities to pay for the cost of the federal mandate to install curb ramps at all intersections. The city is being asked to pay for the cost of the federal mandate to install curb ramps at all intersections. The city is being asked to pay for the cost of the federal mandate to install curb ramps at all intersections.

The situation affects every city, large and small.

To comply with the Clean Air Act, Chicago's Northwest Incinerator must be retrofitted at a cost of \$73 million. In addition, under the Resource Conservation and Recovery Act, the City may be required to spend an additional \$17 million per year to treat the incineration ash as hazardous. The combination of these two mandates could make the Northwest Incinerator so costly to operate that the city would have to shift to greater reliance on space-heating and environmentally less sound landfills.

Installation of curb ramps at intersections, consistent with the ADA mandate, is estimated to cost Royal Oak, Michigan \$2.5 million. In many cases, the sidewalks leading to these intersections are in need of repair, estimated costs \$10 million. To comply with ADA, the city would be forced to rip out and replace functional curbs, while leaving the broken sidewalks unrepaired.

The National Pollution Discharge Elimination System requires that Toledo, and other cities, conduct an ongoing study of the sources and amounts of pollutants carried by stormwater runoff into streams and rivers. Toledo is a desert community in which waterways are dry most of the year, yet the city must spend millions to monitor pollutants in nonexistent water in dry stream beds.

In Columbus, Ohio, a medium-size city, a comprehensive study showed that federal environmental mandates would cost its tax-

payors more than \$1.6 billion over the next decade—on extra \$856 in taxes per household by the year 2000. Under the Safe Drinking Water Act, Columbus must monitor its municipal water system for at least 133 specified pollutants. Many of these substances are not significant in terms of water supplies, but must be tested anyway. One of the pollutants tested, DBCP, has caused pineapples in Hawaii and has been banned for 15 years.

To comply with the Americans with Disabilities Act, Knoxville must alter its Saturday fixed route bus service. The cause of the high cost of compliance is the City must consider eliminating its fixed route service altogether to achieve compliance with ADA. Further, in Knoxville for federal money applied to several pressing expanded fixed route bus services to benefit a larger group of people.

In California, things have gotten so bad and the costs so overwhelming that last spring, state and local governments threatened to give enforcement of drinking water programs back to the EPA (Congressional Record, 1/21/1993, S. 549-552).

A study of the effect of just 10 unfunded federal mandates was conducted at the Conference of Mayors in 1991. The study found that the cost of compliance with these mandates will grow next five years as a sure indicator. A copy of the study is available.

My fellow mayors and I are all in agreement that the goals of most of the federal mandates are very laudable. We simply say that local governments have the resources to do the job. Many local governments have the ability to raise the money to do the job.

When the federal government asks a city to do something, it is asking the city to do something that it is not equipped to do. The federal government is asking the city to do something that it is not equipped to do.

Philadelphia is a city of 1.5 million people. It is a city of 1.5 million people. It is a city of 1.5 million people. It is a city of 1.5 million people. It is a city of 1.5 million people.

Unfunded federal mandates have robbed local mayors and city councils of the ability to prioritize their resources according to the real needs of their constituents. The effect of "unfunded federal mandates" on local government is being felt dramatically by business, consumers and just ordinary citizens. For example, there is a growing problem with the affordability of water as a result of these mandates.

I recognize that "affordability" can mean different things to different people. However, it is important to realize that if consumers cannot afford the water from the public water supply, they will turn to other sources of water. This problem is real and is happening throughout the country today. (Thousands of water consumers are abandoning their public water supplies by drilling unregulated, private wells.) Very small utilities are trying to encourage enough customers to abandon the system so that they fall under the Federal law's regulatory threshold of fifteen permanent customer connections. Consumers are turning to bottled water and "pure" mountain springs—for drinking water is unprecedented numbers. Further, and perhaps most frighteningly, developers are choosing not to install public water systems in new



Philadelphia Mayor Rendell makes point during November 1993 before Senate Committee on Environment and Public Works.

developments; forcing consumers to rely on unregulated, private wells. All of these actions have real, and serious, drinking water-related public health consequences, and they are a direct result of concerns about the affordability of water service from a public water supplier.

These consequences of failing to recognize affordability are in addition to the far more serious, but more difficult to quantify, effects of forcing poor and near-poor consumers to use their scarce resources for drinking water. Every day, the poor are making choices among food, shelter, medical care, health care, and other essential needs.

These mandates originally were funded by the federal government. In the 1980s, a process began to reduce the federal grants and funding.

Greatly increasing the cost of drinking water necessarily increases the public health threat to the poor and near-poor: more money for water will mean less money to spend on other equally essential goods and services which are needed to protect their health.

As a further example, in Philadelphia, a family of four receiving Aid-to-Families-with-

Dependent Children ("AFDC") will spend 15 percent of their total household income for the cost of water and wastewater services.

Some "unfunded federal mandates," though having laudable goals, have given unrealistic implementation schedules and others are just plain ludicrous and silly. Here are two case studies that are perfect examples to demonstrate this point:

Americans with Disabilities Act ("ADA")

Every American agrees with the goals of ADA—to ensure fair and equal access for the disabled. This is clearly a good unfunded federal mandate, but an illogical interpretation of it will have an extremely damaging effect on Philadelphia.

The ADA requires the City to put in curb cuts in all City blocks by the end of 1995 at a cost of \$130 million—a sum the City of Philadelphia simply does not have. As a result, we are petitioning the Justice Department to allow us a hardship waiver to allow the City a more reasonable period of time—12 to 15 years—to complete the work at the more affordable cost of approximately \$10 million per year. DOJ has made no decision on the City's request.

ADA also required the Department of Justice to promulgate regulations to implement the goals of the Act. One of the regulations reads as follows: Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

On July 13, 1993, a number of disabled individuals who live and work in the City of Philadelphia filed suit in U.S. District Court for the Eastern District of Pennsylvania seeking to compel the City to install curb ramps or curb cuts on all streets which the City resurfaces after the effective date of the ADA. The City contended that resurfacing is not "new construction or alteration" of the street and, therefore, it would not be required to do curb cuts each time it does ordinary repairs. On February 2, 1993, the Court ruled in favor of the plaintiffs. The City has appealed the case, and at present, no decision has been handed down. The federal District Court expressed sympathy for the City having to deal with the burdens that unfunded mandates impose, stating: "Congress often fails to provide the means of financing the obligations it imposes."

If we are forced to comply with this Court order, basic street repaving will be severely curtailed in Philadelphia. There is currently \$15 million in our capital budget for street resurfacing. If we are required to do curb cuts on every street we resurface, a full one-third of that money would have to be spent on curb cuts—leaving only \$10 million for resurfacing. That is extremely damaging to Philadelphia, because of our financial crisis, we have fallen way behind in resurfacing those streets that desperately need it.

The DRBC and Water Quality of the Delaware River

In 1986, the Delaware River Commission ("DRBC"), which was created by the

Special Report **Funded Mandates**

Continued from previous page

EPA began a federally mandated Use Attainability Assessment ("UAA") of the Delaware Estuary. The study was designed to assess the potential to upgrade water quality standards of the Delaware River to meet the Clean Water Act's "fishable and swimmable" goals.

The UAA, which used water quality data from 1985 and 1986, was released in 1989 and concluded that the "swimmable" goal could not be achieved until regulations controlling combined sewer overflows are adopted. However, the UAA also concluded that the "fishable" goal could be met in the Philadelphia area by maintaining dissolved oxygen levels in the river of 4 milligrams/liter (mg/l) or above. According to the UAA, such a standard could only be achieved if Philadelphia upgraded its tertiary wastewater treatment.

The Philadelphia

Water Department estimates that building a tertiary treatment plant would cost as much as \$500 million in capital funds. The City of

Philadelphia just built such a facility at a cost of \$500 million. Annual costs to operate such a facility would be approximately \$30 million.

What makes the DRBC's order so unbelievable is that the City had obtained an average of 4 mg/l of oxygen in the Delaware River during the critical summer months. At other times of the year, the level of oxygen is even better. The DRBC indicated that the level of milligrams of oxygen per liter must never fall below four during the summer, even if, as is the case, the City seldom drops below that level and consistently averages 4 mg/l or better.

There never was any evidence presented that fish were dying or died as a result of those few summer days when the level fell below 4 mg/l. Fortunately, the City, at my direction, refused to comply, and the DRBC, as a result, is reevaluating its decision.

□♦♦♦□

Senator Glenn, in his invitation to me, has asked that I define "unfunded federal mandates." I believe that the definitions contained in S. 993, which has the enthusiastic support of the U.S. Conference of Mayors — Democrats and Republicans alike — define it perfectly:

"the term 'Federal mandates' means a statute or regulation that requires a State or local government to —

(A) take certain actions (including a requirement that a government meet national standards in providing a service); or

(B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions.

SEC. 4 FEDERAL FUNDING REQUIREMENT.

(a) In General. — Notwithstanding any other provision of law, any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the State or local government only if all funds necessary to pay the direct costs incurred by the State or local government in conducting the activity are provided by the Federal Government for the fiscal year in which the direct cost is incurred."

Absent the type of funding in S. 993 Sec. 4(a) above, a federal mandate is an "unfunded federal mandate."

Senator Glenn also inquired what criteria should be used in making decisions among federal mandates and, in my note, more flexible regulatory approaches might relieve the burden of compliance on local government. The answer is that there be no distinction drawn among federal mandates and there be no distinction in approaches which will provide relief for local government. Only a distinction in unfunded federal mandates and federal government any true priorities, functions or exceptions or a distinction in some "unfunded federal mandates" great will simply not be chosen — to say yes to some and no to others.

Some "unfunded federal mandates," though having laudable goals, have been given unrealistic implementation schedules, and others are just plain ludicrous and silly.

that offer any real protection. "cost-benefit" or "cost-benefit" analysis provides little or no benefit. It has shown that through subjective estimation, federal virtually any mandatorily objective cost-benefit analysis.

What follows are examples of this: In its final rule governing the Environmental Protection Agency's permit for Philadelphia would take 4,534 hours. Out of the permits have been taken 13,520 hours.

In September 1993, the Environmental Protection Agency announced that preparation of a permit for Philadelphia would take 4,534 hours. Out of the permits have been taken 13,520 hours. In its final rule governing the Environmental Protection Agency's permit for Philadelphia would take 4,534 hours. Out of the permits have been taken 13,520 hours.

In its June 29, 1993, final rule governing the Environmental Protection Agency's permit for Philadelphia would take 4,534 hours. Out of the permits have been taken 13,520 hours. In its final rule governing the Environmental Protection Agency's permit for Philadelphia would take 4,534 hours. Out of the permits have been taken 13,520 hours.

estimates a cost of \$3 to \$8 billion if it has to build filtration. Even allowing for inflation and exaggeration, the EPA estimate is low.

The EPA is working to promulgate a rule setting limits for arsenic in drinking water, lowering the allowable standard from 50 parts per billion to 1 to 10 parts per billion. The agency estimates that a standard of 2 parts per billion would cost \$6 billion to implement nationwide. One large water agency we have worked with estimates that its compliance cost alone would be \$10 billion. Again, the EPA estimate is very low.

The above are all examples of how federal government regulations intentionally or inadvertently minimize cost impact on local government. The same pattern holds true when new regulations are required to do risk reduction analysis.

The Office of Management and Budget ("OMB") made certain very astute observations on the current system of risk assessment and standard setting (*Current Regulatory Issues in Risk Assessment and Risk Management*, 1990):

1. The continued reliance on conservative (worst-case) assumptions by federal agencies distorts risk assessment, yielding estimates that may overstate likely risks by several orders of magnitude.

2. Conservative biases embedded in risk assessment impart a substantial margin of safety. The choice of an appropriate margin of safety should remain the prerogative of responsible risk management officials, and should not be pre-empted through biased risk assessments.

3. Conservatism in risk assessment distorts the regulatory priorities of the Federal Government, directing tactical resources to reduce what are often insignificant carcinogenic risks while failing to address more substantial threats to life and health.

A perfect example of the total lack of common sense by regulators in making risk assessments is found under the Safe Drinking Water Act ("SDWA"), which requires municipal water treatment plants to monitor streams for a number of chemicals that have been assigned safety levels by the EPA. For the herbicide atrazine, the EPA established the level of 3 parts per billion ("ppb") as acceptable for people to drink every day for a

lifetime. If water contained 3 ppb every day, one would have to drink 3,082 gallons of water daily for life to equal the atrazine dose that caused an effect in a laboratory animal.

We already know from years of monitoring that drinking water supplies never contain atrazine levels of 3 ppb every day for even a year. In fact, that level is exceeded on only a few days in spring, when herbicides are used. The EPA has said that a concentration of 100 ppb for up to 10 days does not pose an unacceptable risk.

But it's possible under the SDWA for a single springtime detection of 13 ppb to create an annual average that would put a water supply out of compliance, even if samples

taken in summer, fall, and winter show no atrazine traces whatsoever. Cities could then be required to install very costly equipment to filter atrazine.

In a report that is fast becoming a model for other cities wading up to the drain on their treasuries, Columbus officials estimated it would cost \$2 to 3 million annually to operate such equipment once it is installed.

I have attached as an exhibit to my statement a compelling New York Times series entitled "What Price Cleanup?" which details the absurdly high costs local governments have been required to shoulder for what is often minimal risk reduction. Special attention should be given to the chart it contains which details cost per regulation for premature death averted. You will note that the cost for atrazine in drinking water is over \$92 billion.

Senator Glenn has also asked for comment on President Clinton's September 30, 1993 executive order on regulatory planning and review. Because it does not totally ban regulators from passing down unfunded mandates, it does not provide the full protection local government needs, but it is a small step in the right direction because of Sections (b)(5) and (11):

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall

design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider alternatives for enforcement, consistency, predictability, the costs of enforcement and compliance by the government, regulated entities, and the public, flexibility, distributability and equity.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and government entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the practicable, the costs of cumulative regulations.

If the regulators follow those directives and implement them honestly and fairly, the President's executive order will have benefit.

Senator Gregg has asked me to comment on S. 993, Senator Kassebaum's bill, and S. 648, which he introduced. Senator Gregg's bill has one advantage over S. 993, and we recommend that it be appended to it, and that is that it makes clear that the legislation applies to any newly enacted federal mandates and to existing mandates as the underlying are reauthorized. S. 993 is silent on its applicability to reauthorization.

Senator Gregg's bill is not as good as S. 993 because it leaves a loophole — a great one — through which Congress can avoid funding one of its mandates. It would allow a waiver to arise by the House of Representatives. As I stated earlier, there can be no loopholes, no waivers, no such. Only if Congress acts now and passes S. 993 will it put an end to a practice that is figuratively eating cities alive.

My fellow mayors and I are not contenting that federal mandates are bad

Attachment 5

Office of State Programs
December 27, 1990

PUBLIC SECTOR vs PRIVATE SECTOR PROGRAMS

In the following States (10), State and local government employees are covered under the same provisions as private including first instance sanctions.

Michigan	Vermont	Washington
Minnesota	Oregon	Iowa
Hawaii	Alaska	Kentucky
Connecticut*		

In the following States (8), same provisions except no penalties are assessed for violations found in the public sector.

California	North Carolina	Indiana
Puerto Rico	Virgin Islands	Utah
Wyoming	Virginia	

In the following States (2), same provisions except no penalties for other-than-serious violations.

South Carolina
Nevada

In the following States (3), same provisions with exceptions as noted.

Arizona - penalties for serious violations only.
New York* - penalties for failure to abate only (\$50 a day).
New Mexico - penalties for "serious violations" are deemed paid if the violations are corrected within the abatement period.

The following States (2) have self-inspections programs as described below.

Maryland - Has a public sector self-inspection (PSSI) program available to State agencies. The five (5) participating agencies have their own inspectors doing safety inspections of their agencies. All other public sector establishments are covered by Maryland Occupational Safety and Health (MOSH) essentially the same as the private sector, except for penalties.

Tennessee - Covers State and local government employees through a self-inspection program as well as State enforcement with no penalties imposed for violations found in public sector.

* = public sector only

Attachment 6

FILE COPY

I

103D CONGRESS
1ST SESSION**H. R. 115**

To strengthen the authority to require safe workplaces for Federal and Postal Service employees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. CLAY introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To strengthen the authority to require safe workplaces for Federal and Postal Service employees, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Federal and Postal
5 Service Employees Occupation Safety and Health Act of
6 1993".

7 **SEC. 2. FEDERAL OCCUPATION SAFETY AND HEALTH**
8 **PROGRAMS.**

9 (a) NEW SUBCHAPTER.—Chapter 79 of title 5, Unit-
10 ed States Code, is amended—

1 “(4) Reasonable attorney's fees and costs.

2 “(e) NOTIFICATION.—The Secretary shall take rea-
3 sonable actions to inform victims of their rights under this
4 section.

5 **“§ 7920b. Federal Occupational Safety and Health**
6 **Training Fund**

7 “(a) There is established in the Treasury of the Unit-
8 ed States an account to be known as the Federal Occupa-
9 tional Safety and Health Training Fund (hereinafter in
10 this subchapter referred to as the ‘Fund’). The Fund, and
11 any amounts deposited in it, including any interest earned
12 thereon, shall be available to the Secretary, subject to ap-
13 propriations Acts, to develop and implement agency train-
14 ing and education programs in occupational safety and
15 health.

16 “(b) Amounts in the Fund which are not currently
17 needed for the purpose of this section shall be kept on
18 deposit or invested in obligation or guaranteed by, the
19 United States and all earnings on such investments shall
20 be deposited in the Fund.

21 “(c) The Secretary shall transmit to the Committee
22 on Post Office and Civil Service of the House of Rep-
23 resentatives, not later than 4 months after the end of each
24 fiscal year, a report on the condition, uses, and
25 operation of the Fund during the preceding fiscal year.

1 processes which have been adopted or are in use, in such
2 place of employment unless the agency did not, and could
3 not with the exercise of reasonable diligence, know of the
4 presence of the violation.

5 “(m) Civil penalties owed under this subchapter shall
6 be paid to the Secretary for deposit into the Secretary’s
7 penalty fund established under section 7920b and may be
8 recovered in a civil action in the name of the United States
9 brought in the United States district court for the district
10 where the violation is alleged to have occurred or where
11 the agency has its principal office.

12 “(n) Nothing in this subchapter shall preclude State
13 and local law enforcement agencies from conducting crimi-
14 nal prosecutions in accordance with the laws of such State
15 or locality.

16 “(o) It is the sense of the Congress that no agency
17 should pay any fine under this subchapter out of any
18 funds appropriated for employee salaries or expenses.

19 **“§ 7916f. Office of Federal Programs**

20 “The Secretary shall establish within the Department
21 of Labor an Office of Federal Programs which shall have
22 jurisdiction on behalf of the Secretary of this subchapter
23 and which shall be headed by an Assistant Deputy Sec-
24 retary of Labor.

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

FOR

AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES

DECEMBER 1993

Prepared By

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EXECUTIVE SUMMARY

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

December 1993

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

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

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

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

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

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

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

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

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

How Much Would Public Sector OSHA Coverage Cost?

Administrative Costs

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

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

Compliance Costs

- How much total?

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

OSHA Coverage Makes A Difference in Worker Safety and Health

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

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

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

How Much Would OSHA Coverage Save?

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

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

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

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

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

**OSHA COVERAGE FOR PUBLIC EMPLOYEES
IS COST-EFFECTIVE
For
AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES
December 1993**

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OSHA COVERAGE FOR PUBLIC EMPLOYEES IS COST-EFFECTIVE

December 1993

I. THE LOGIC OF OSHA COVERAGE FOR PUBLIC EMPLOYEES

State and local public employees are the fourth largest group of workers in the United States, yet they are excluded from coverage under the federal Occupational Safety and Health Act.¹ In 1993 both the Senate and the House of Representatives are considering bills to revise the Act.² These bills, if passed, would extend coverage to public employees.

Excluding public employees from OSHA coverage has meant that in many states carpenters employed by a city have fewer protections on the job than carpenters employed by a private concern in that same city. A public employee lineman can climb a pole with little or no employer-provided safety gear, whereas a lineman working for a utility company on the other side of the pole must be equipped and trained in full safety procedures. The uniformed services of fire and police are two of the most hazardous of all occupations, yet in most states these public servants are not protected by the federal OSHA law.

In 1970, when the U.S. Congress passed the Occupational Safety and Health Act, it assured every working man and woman safe and healthful working conditions. But, as a result of the definition of "employer" in Section 3(5), state and local government employees were denied coverage. Public employees in 23 states of the United States (See in Appendix 1) have since gained coverage through OSHA-approved state Occupational Safety and Health programs, but public employees in the other 27 states lack protection under the law.

The Scope of Public Sector Work and the Hazards Faced

Accidents are at least as frequent in government service as in the private sector.³ Some say they are more prevalent. A study by the New York Department of Labor found that public employees suffer 25 percent more injuries than private sector workers and that these

¹ With the exception of 23 states and two territories which have approved OSHA state plans (21 of which cover public and private employees, two of which cover public employees only).

² U.S. Senate, S.575, and U.S. House of Representatives, H.R. 1280, Occupational Safety and Health Reform Acts, 1993.

³ State of New York, Department of Labor. "Political Subdivision, Capital Cost Survey for A Public Employee Safety and Health Program," 1979, p. VIII.1.

injuries are almost 75 percent more severe.⁴ Local government was one of four industrial groups listed in a 1993 U.S. Department of Labor report⁵ as having the largest number of fatal work injuries.

Public employees work in a wide variety of settings: city halls, municipal offices, pumping stations, cemeteries, laboratories, landfills, reservoirs, parking facilities, water pollution control facilities, court houses, police stations, libraries, schools, incinerators, on garbage trucks, at fire stations, hospitals, nursing homes, mental health facilities, prisons, sewage treatment and disposal plants, water treatment plants, lighting plants, power generation and distribution plants, storage buildings, recreation facilities, garages, and on roads and highways. A sewage treatment plant operator, who is often a public employee, is three times more likely to suffer a disabling injury than a coal miner. Hospital workers, who also may be employed in the public sector, are as likely to be hurt as coal miners. Police Firefighters are three times as likely to be killed or injured on the job as the average U.S. worker. Public works department employees are more than four times as likely to be killed or injured on the job as the average U.S. worker.⁶

In many instances overcrowding in public sector work places has led to such hazards as blocking of fire exits and aisles. Budget cutbacks have left vehicles and other equipment inadequately maintained. Many of the bridges, highways, sewers and other physical plants of cities have become unsafe -- both to workers and citizens of those jurisdictions.

A list of hundreds of public employees killed on the job⁷ shows a wide range of causes of death: electrocution, chemical poisoning, decapitation by a tire changing machine, being sideswiped while riding on the back of a garbage truck, drowning when a balloon burst that was used to bank the flow of sewage, suffocating in confined space at a waste water treatment plant, suffocating when an unshored trench collapsed while replacing sewer line, asbestos related disease, being backed over by a truck that did not have a warning signal, being crushed by a loader at a tree

⁴ "Testimony of Jordan Barab, Occupational Safety and Health Coordinator, American Federation of State, County and Municipal Employees on House Bill 308 [Ohio]," 4/18/89, p.2.

⁵ U.S. Department of Labor, Bureau of Labor Statistics, "First National Census of Fatal Occupational Injuries Reported By BLS," Press Release, 10/1/93, p.2.

⁶ National Safety Council, *Accident Facts*, 1992, pp. 49-51.

⁷ List compiled by American Federation of State, County, and Municipal Employees, Washington, D.C., 1993.

disposal area, and others. Public employees are exposed to asbestos, lead, PCBs, formaldehyde, and ethylene oxide. They are exposed to pesticides, coal tars, and blood borne pathogens.

The Costs of Occupational Injury and Illness

According to the National Safety Council, work accidents in the United States cost \$115.9 billion in 1992.⁸ The total cost reflects wage and productivity losses of \$62.5 billion and administrative expenses of \$14.5 billion. It includes employer costs of \$10.2 billion -- such as the money value of time lost by workers other than those with disabling injuries. These employer costs are for those either directly or indirectly involved in accidents and includes the cost of time required to investigate accidents, write up accident reports, etc. The cost estimates also include damage to motor vehicles in work accidents of \$3.4 billion and fire losses of \$3.3 billion. These costs do not in any way include personal out-of-pocket expenses to the injured worker nor do they account for the suffering and sorrow experienced by victims and their families.

Public sector workers made up over 15 percent of the U.S. work force in 1991. If the cost of their on-the-job accidents were proportionate to their population share (and indications are that they are higher), then the work accidents of public sector employees cost the nation \$17.4 billion -- or at least \$8.7 billion in those states not covered by OSHA.⁹ If only 8 percent of these costs had been eliminated as a result of OSHA coverage,¹⁰ then nearly \$700 million would be saved. (If instead of 8 percent the savings were 18 percent, then nationwide savings would rise to \$1.6 billion; if 24 percent, the savings would reach \$2.1 billion).

A 1991 study by the Rand Institute for Civil Justice¹¹ concluded that accidents occurring on work time cost \$83 billion.

⁸ National Safety Council, *Accident Facts*, 1993, p. 35.

⁹ Assumption is that with 27 states not covering public employees, at least half the cost would fall in these states.

¹⁰ Experiences in states extending OSHA coverage to public employees suggest 8%, cited in *Safe Working Environments for Public Employees*, "Benefits of Compliance with HB 1300," 2/11/90. Other studies of states extending coverage to public employees have found reductions in occupational injury and illness incidents of 18 and 24%. See testimony of Jordan Barab, Ohio Bill 308, 4/18/89 and Attachment to Letter from Ann Cohen to Stuart Davidson, 11/11/85. Calculations in this report assume 8% rather than 18% or 24%.

¹¹ Rand Institute for Civil Justice, *Compensation for Accidental Injuries in the U.S.*, 1991, p.18.

In addition these work time accidents accounted for almost half the total cost of all accidents in the nation and two-thirds of the total work loss of 200 million days off work a year. If 8 percent of the public sector share of these costs had been eliminated as a result of OSHA coverage, then more than \$495 million would be saved.

The National Safety Council has estimated that the cost per work place death in 1992 was \$780,000 and the cost per disabling injury was \$27,000.¹² Work injuries in 1992 accounted for 105 million lost work days.

There were 1,700 public sector work deaths in 1992¹³-- 2.8 times as many as in the entire manufacturing sector, which had approximately the same number of employees as government. If deaths per 100,000 employees in government could be brought to the level in manufacturing, there would have been nearly 600 fewer fatalities in that year -- 600 fewer families suffering preventable tragedies. In 1992, public sector work deaths rose to 1,700.

OSHA Coverage Makes a Difference

Available evidence suggests that extending OSHA coverage to public employees will make a positive difference.

North Carolina experienced a 24 percent decline in public sector injuries in the seven years after extending OSHA coverage to that group (see discussion in Chapter 2). A cost-benefit analysis done by the New York State Department of Labor showed substantial reductions in illnesses and injuries in states adopting state OSHA programs¹⁴ -- on average almost 18 percent.

A study of experiences in several states by Safe Working Environments for Public Employees found decline in work place injuries and illnesses of 8 percent after coverage was extended to

¹² National Safety Council..., 1993, p.35. Costs for disabling injuries include estimates of wage losses, medical expenses, and employer costs. They exclude property damage costs except to motor vehicles.

¹³ National Safety Council, *Accident Facts*, 1993, p.34.

¹⁴ Weaver, L.A., III (Raleigh, NC), *Cost-Benefit Analysis for a New York Public Sector OSHA Inspection Program*, Prepared for the Civil Service Employees Association, Inc., Albany, New York, February 1980, p.17.

public employees.¹⁵

When attention has been given to safety and health in the private sector it has usually paid off. Testimony from hearings in Washington D.C.¹⁶ documented savings to individual companies that became aggressive about work place hazards:

According to the Business Roundtable, implementation of a comprehensive health and safety programs at Air Products and Chemicals Incorporated reduced work place injuries by more than half over five years, saving \$1.7 million.

A comprehensive safety and health program at John Deere reduced injuries and saved \$32.2 million in Workers' Compensation costs in 1990.

Tile Tech Roofing Corporation of Tacoma, Washington, introduced a health and safety program including meetings, training and a written health and safety program. Workers' Compensation costs declined by 18 percent in one year.

W.G. Clark Construction Company, after implementing written accident prevention plans and a Joint Labor Management Committee, reduced its injury and illness rate and saved \$190,000 a year in Workers' Compensation premiums.

Mobil Chemical Company brought all of its plants into OSHA's Voluntary Protection program and over a four year period reduced recordable injuries 32 percent, lost workday cases 39 percent, and the severity of cases by 24 percent. Savings amounted to more than \$1.6 million.

The Costs of Covering Public Employees

The Congressional Budget Office estimated in a 1992 analysis, that the FY94 total outlays required to cover public employees -- federal, state, and local -- would be \$59 million,¹⁷ with 40

¹⁵ Safe Working Environments for Public Employees, "Benefits of Compliance with HB 1300," 2/11/90.

¹⁶ Informal memorandum prepared by the American Federation of State, County, & Municipal Employees (AFSCME) for 1992 negotiations with the City of Philadelphia.

¹⁷ Congressional Budget Office (CBO), Letter from Robert Reischauer, Director to Honorable William Ford, Chair, Committee on Education and Labor, U.S. House of Representatives, "Congressional Budget Office Cost Estimate, Comprehensive Occupational Safety and Health Reform Act" with accompanying "Congressional Budget Office Cost Estimate," 6/24/92, p.1.

percent of this outlay, or \$23.6 million, needed to cover state and local employees.¹⁸ At the state and local level, based on data from states that already administer their own programs, the Congressional Budget Office assumed that about 4,000 additional inspections would be required in states under federal OSHA jurisdiction. Additional staff salaries and expenses would be just over \$7 million. New funding for research, training, surveillance, and evaluation activities by the National Institute for Occupational Safety and Health would cost approximately \$16 million.¹⁹ In addition, the 1992 bill would have increased costs to state governments that administer their own safety and health programs, if the regulations required in the federal bill were more stringent than the state's requirements. The additional cost to these states would equal 50 percent of their enforcement and compliance costs since there is a federal-state matching requirement of 50 percent.²⁰

The costs to public sector jurisdictions to upgrade facilities and make necessary changes in working conditions to come into compliance with OSHA regulations is a concern of some state and local officials. However, a 1980 study done in New York State, when legislation was pending to provide health and safety protection to public employees, found the projected costs to be far lower than the dollar savings that would result from safer work places. The estimate of one-time expenditures required to meet basic safety and health standards ranged from \$50 to \$5,000 per facility visited, and the average cost per facility was approximately \$2,000.²¹ In 1992 dollars, this \$2,000 average is equivalent to \$3,865 that would be required, on average, to bring a New York public facility into compliance.²²

¹⁸ CBO, based on data on pp.1-2.

¹⁹ Based on data in CBO, p.2.

²⁰ CBO, p.4.

²¹ State of New York, Department of Labor. "Political Subdivision, Capital Cost Survey for a Public Employee Safety and Health Program," 1979, p.I.5. And these New York cost estimates were high because 1) they were developed before the 1978 OSHA Amendments and Revisions to Safety Standards and 2) they were based on literal interpretations of OSHA regulations, despite the fact that in many work places, work place compliance is subject to negotiation. In addition, these costs are for existing buildings only, and it is assumed that the necessary safety features would be built into any new structures.

²² The 1979 CPI was 72.6. In 1992, the CPI was 140.3.

If average compliance costs per facility are estimated to be \$3900, this amount is only 16 percent of the average medical claim for one back sprain or 12 percent of the average cost of one occupational illness or more than \$1000 less than the average cost of one hospital stay in 1991.²³

The vast majority of the safety and health problems found in the New York Department of Labor survey were easily correctable, at little or even no cost. In contrast, in most instances, the incident that might occur as a result of the hazard could be extremely expensive -- to human life and health, to plant equipment, and to third party payers. The following are some examples:

- A propane gas cylinder located adjacent to an air conditioning system intake created a hazardous condition, which could be corrected simply by relocating the cylinder.
- Workers using grinding machines were not wearing goggles.
- Shields were needed for protection from arc welding radiation.
- Emergency washing facilities were needed where workers were exposed to corrosive acids.
- Vehicles lacked backup signals and rollover protection.
- Railings were missing around floor openings.
- Flammable and hazardous materials were improperly stored.
- Fire extinguishers or extinguishers were lacking or not visible.
- There was a lack of proper personal protective equipment.
- Fire doors were locked.
- There were defective brakes on public vehicles.

The projected financial savings alone from public sector OSHA coverage are several times greater than the projected costs -- national figures would suggest at least six dollars saved for every one dollar expended.

²³ Average cost per claim for a back sprain was \$23,916 in 1991 according to the National Council on Compensation Income cited in Health Insurance Association of America, Book of Health Insurance Data, Washington, D.C., 1992, pp. 57, 68.

II. COVERAGE OF PUBLIC EMPLOYEES

Experience to date indicates that accident and illness incidence rates should decline with OSHA coverage of public employees. Several states bear witness to improvements. In addition, if the experiences of state-plan states for the private sector (data that are available) are any indication of what happens with the commencement of occupational safety and health enforcement, the potential to save workers from death and injury at work is significant. In the years 1972-1975, just after the passage of OSHA, there were declines in injury and illness incident rates for private sector workers in all 23 states with State OSHA programs.²⁴ For 21 of the 23 states, the decline in injuries and illnesses was greater than 10 percent. (See Table 1.)

Data From States That Have Extended OSHA Coverage to Public Employees

Twenty-three states have OSHA-approved state plans and extend coverage to public employees. Examples from two states illustrate the statistics which 1) supported coverage before state legislation passed: the case of New York and 2) illustrated the positive post-coverage experience: the case of North Carolina.

New York

Until the 1980's, New York State did not provide Occupational Safety and Health coverage to public employees. In 1980, before passage of the New York State OSHA bill, the president of New York's Civil Service Employees Association (CSEA) said that "the most dangerous employer in the state of New York is the state of New York."²⁵ The 900,000 public employees in New York at the time included many who worked in unsafe buildings, used hazardous equipment, and were exposed to toxic substances.

The CSEA allegation was corroborated by the New York Labor Commissioner at the time, who said that "Department of Labor studies indicated the accident rate among public employees, occupation by occupation, is frequently higher than in the private sector."²⁶

²⁴ Attachment to Cohen, Ann, "PE-OSH", Public Property, Police, Fire & District Attorney's Civilian Personnel Philadelphia Parking Authority Employees, AFSCME-DC 33 Local 1637, AFL-CIO to Stuart Davidson, November 11, 1985.

²⁵ Reported in *Knickerbocker News*, "State Workers In Dangerous Jobs Lack Safety Regulation," Albany, NY, 3/17/80, p.1A.

²⁶ *Knickerbocker News*, Albany, NY, 3/17/80, p.11A.

Table 1

PERCENTAGE DECLINES IN INJURY AND ILLNESS RATES
FOR PRIVATE SECTOR WORKERS
IN STATES WITH OSHA STATE PLANS
1972-1975

<u>State</u>	<u>%</u>	<u>State</u>	<u>%</u>
Alaska	- 22 %	Nevada	- 1 %
Arizona	- 22 %	New Mexico	- 23 %
California	- 17 %	North Carolina	- 25 %
Colorado	- 22 %	Oregon	- 17 %
Connecticut	- 13 %	South Carolina	- 25 %
Hawaii	- 9 %	Tennessee	- 20 %
Indiana	- 14 %	Utah	- 26 %
Iowa	- 12 %	Vermont	- 16 %
Kentucky	- 14 %	Virginia	- 13 %
Maryland	- 17 %	Washington	- 13 %
Michigan	- 31 %	Wyoming	- 14 %
Minnesota	- 25 %		

Source: U.S. Department of Labor, Bureau of Labor Statistics

According to the New York City Director of Personnel in 1980, "There is no question that the city is losing money because people have...had accidents."²⁷

Before the enactment of the New York PE-OSH Law, the New York Department of Labor did a comprehensive study of injury rates for public employees and found that the accident rate of New York State employees was more than 30 percent higher than the rate for the private sector.²⁸ In addition, a later study, done for the New York legislature found that for the six year period 1970-1975 -- the early years of OSHA -- the total number of reported accidents in New York State decreased by 14.9 percent while the reported accidents for state employees increased by 71.4 percent.²⁹

Many examples of avoidable hazards were noted by union leaders at the time. A few are listed below:³⁰

- Transportation Department road crews were directed to spray the herbicide 2,4,5-T without training, respirators, or protective clothing.
- Environmental conservation employees were ordered to go into sewers without safety packs, safety lines, or backup crews.
- Transportation Department workers were told to sandblast with silica sand, but were not given respirators. When respirators did arrive, there were no filters.
- An office machine operator had her right index finger amputated after her hand got caught in an offset printing press. State officials were notified a year before the accident that the machine did not meet federal safety standards. The needed safety shield would have cost \$125. Besides the crippling disability to the worker, the state

²⁷ AFSCME, District Council 37, "It's a Matter of Life and Limb - and \$100 Million a Year: A fact sheet on health and safety problems in the municipal work place and DC 37's efforts to cope with them", New York City, circa 1980, p.1.

²⁸ New York Department of Labor 1978 study reported in Letter from AFSCME-DC33 Local 1637 President Ann Cohen to Stuart Davidson, 11/11/85, p.4.

²⁹ Reported in New York Department of Labor 1978 study reported in Letter from AFSCME-DC33 Local 1637 President Ann Cohen to Stuart Davidson, 11/11/85, p.4.

³⁰ AFSCME, District Council 37, "It's a Matter of Life and Limb...", p. 2

incurred a liability of thousands of dollars in disability and Workers' Compensation benefits.

The State of New York stood to save millions of dollars if it extended coverage to public employees. A study done in 1980 by safety engineer Albert Weaver,³¹ concluded that the state of New York and its localities could have saved from \$6.7 million to \$110 million each year, just in the years 1974 to 1977, if state OSHA protections were in operation. If these numbers are expressed in 1992 dollars, they represent a three year savings, of \$16 million to \$255 million. Mr. Weaver further concluded that: "The accident rate and costs are high enough [in New York] to justify in economic terms a public sector OSHA program."³²

Others, including some in state government agreed:³³

- John Hudacs, an aid to then-Governor Hugh Carey: costs of compliance "are not going to be extravagant."
- Carl Mattei, Director, New York Labor Department's Safety and Health Division: the cost of paper work, equipment and materials is "almost insignificant" and "the necessary mechanical abilities are already there in the departments" to do such things as fabricate safety shields for machines. Some of the expenses would be paid by owners of private buildings leased to the state or localities.

How much money was the City of New York losing by not covering its public employees?³⁴

- 1) Workers' Compensation, not including uniformed city workers, cost the city at least \$20 million in fiscal 1979.
- 2) Disability pensions were running at the rate of \$57 million a year in 1978.

³¹ Weaver, L.A., III (Raleigh, NC), *Cost-Benefit Analysis for a New York Public Sector OSHA Inspection Program*, Prepared for the Civil Service Employees Association, Inc., Albany, New York, February 1980.

³² Ibid.

³³ *Knickerbocker News*, "Safety Losses Cost Millions In State," Albany, NY, 3/18/80, p.5A.

³⁴ AFSCME, District Council 37, "It's a Matter of Life and Limb . . . , p.2.

- 3) Payments to private citizens for personal and property damage suffered through the city's fault were more than \$27 million in fiscal 1979.

According to another study, the "hidden costs" of lost work time; i.e., damaged equipment, lost production, sick pay, etc., were four to nine times greater than the direct costs covered by insurance. Based on Workers' Compensation costs alone; i.e., leaving out direct medical costs, the incidents that came through the Workers' Compensation Board cost the State of New York between \$75 million and \$169 million.

A 1979 New York Labor Department study found that in the period for which data were available, 1970-1971, state and local governments in New York paid over \$50 million in compensation and medical costs as a result of injuries to public sector employees on the job.³⁵ It found that \$14,700,000 was paid by New York State and \$39,300,000 by local governments in compensation and medical costs for just those cases closed during 1970-1971, and this figure did not include "medical only" costs for accidents during the same period nor did it include "hidden costs" representing lost time due to accidents which did not require medical or compensation payments.

Another study found that \$10 million would be enough to improve the most hazardous conditions that posed imminent danger in the city.³⁶ The \$10 million, even if it only averted 10 percent of the above liabilities would more than pay for itself, not to speak of the human suffering that would be avoided.

How much did the New York State OSHA law cost? By 1985, New York State had total administrative and enforcement costs for occupational safety and health of \$3.8 million (or \$5 million in 1992 dollars) -- and the federal government funded half of that total.³⁷

³⁵ State of New York, Department of Labor, "Political Subdivision, Capital Cost Survey for A Public Employee Safety and Health Program," 1979, p.VIII.1.

³⁶ AFSCME, District Council 37, "It's a Matter of Life and Limb...", p. 3

³⁷ Safe Working Environments for Public Employees (SWEPE), "Fact Sheet #1," Philadelphia, circa 1980.

North Carolina

In North Carolina, legislation providing for safer and healthier work places for public employees was enacted in 1973. The experience in North Carolina during the period 1975 to 1983 showed an overall decrease of almost (23.6 percent) 24 percent in injuries to public sector employees, from 5.5 injuries per 100 workers to 4.2 per 100. Injuries to state and local government employees, decreased twenty and thirty-one percent respectively.³⁸ During that period, North Carolina's rate of injury for public employees was significantly below the national average.³⁹

Data From States That Do Not Provide OSHA Coverage to Public Employees

The debate to extend OSHA protections to public employees has occurred in many state legislatures across the country. Information from two of those states -- Ohio and Pennsylvania -- is presented below:

Ohio

In Ohio, a 1983 Executive Order, 83-62, improved some safety and health protections for Ohio state employees. In the five years which followed the issuance of this Executive Order, injury and illness rates among state employees fell from 5.7 per 100,000 workers to 1.3 per 100,000.⁴⁰ The Executive Order did not include all public employees.

In 1989, the Ohio legislature considered House Bill 308, the Public Employee Occupational Safety and Health Act," which would have extended OSHA coverage to all public employees. Testimony presented during hearings on the bill asserted that every 34 minutes a public employee in Ohio suffered a death or a work

³⁸ Attachment to Letter from Cohen, Ann, "PE-OSH", Public Property, Police, Fire & District Attorney's Civilian Personnel Philadelphia Parking Authority Employees, AFSCME-DC 33 Local 1637, AFL-CIO to Stuart Davidson, 11/11/85.

³⁹ Davidson, Stuart W., "Response of Safe Working Environments for Public Employees to the Testimony Presented by the Pennsylvania Municipal Authorities Association Before the House Labor Relations Committee on House Bill 1166 Public Employee Occupational Safety and Health Act", PHILAPOSH (Philadelphia Area Project on Occupational Safety and Health, 11/18/85, p.15.

⁴⁰ Caridas, Kim, OCSEA, quoted by Barab, Jordan in "Testimony of Jordan Barab, Occupational Safety and Health Coordinator, American Federation of State, County and Municipal Employees on House Bill 308 [Ohio]," 4/18/89, p.4.

related injury or illness resulting in lost work time. In addition, every fifteen days an Ohio public employee died of a work-related accident or illness.⁴¹ The Legislative Director for Ohio AFSCME's Council 8, David Lauridsen, pointed out that "In the state of Ohio ... public employment in our local governmental subdivisions is more likely to cause your death than working in any other sector of our economy."⁴²

There were many preventable hazards facing public employees in Ohio. As an example, it was common, according to Mr. Lauridsen, for employees in city parks departments to mix hazardous chemicals for swimming pools or golf courses with no protective or respiratory devices.⁴³

In 1987, there were over 15,000 Workers' Compensation claims filed by public employees in Ohio and during the years 1984-87 the average public employee Workers' Compensation claim was more than \$10,800.⁴⁴ If only half the claims filed in 1987 were awarded, public jurisdictions in Ohio paid over \$82 million. An 8 percent reduction due to OSHA protection would have meant a savings of \$6.6 million or \$8.2 million in 1992 dollars.

In addition, in 1987, there were over 212,000 lost work days from accidents or illnesses in public jurisdictions, translating to over 5,600 work years lost to accidents and illnesses in the seven years previous.

Pennsylvania

Public employees in Pennsylvania are not protected by the Federal Occupational Safety and Health Act. Like public employees in 26 other states, Pennsylvania's governmental workers have very little leverage with their employers when faced with safety and health hazards on the job.

⁴¹ Lauridsen, David, "Testimony of David J.W. Lauridsen, Director of Legislation and Political Action, Ohio Council 8, The American Federation of State, County and Municipal Employees, AFL-CIO, on House Bill 308: The Public Employee Occupational Safety and Health Act, 3/14/89, p.2.

⁴² Ibid.

⁴³ Ibid., p.4.

⁴⁴ Ibid.

Pennsylvania's public employees need OSHA protection. They have a disproportionate share of occupational deaths and injuries. A 1990 report to the Pennsylvania Department of Health⁴⁵ found that while state and local government employees represented 9.8 percent of the labor force of the Commonwealth, they had 11.9 percent of the fatalities and 12.8 percent of the non-fatal injuries of all Pennsylvania employees. The injury rate for state and local government workers in 1990 was then 36.6 per 1000 workers, well above that for most private sector employees.⁴⁶

Data developed in the mid-1980's to support occupational safety and health legislation in the commonwealth illustrated the serious risks faced by Pennsylvania's public employees. In 1985, at least 44 Pennsylvania public employees were killed on the job and there were at least 19,651 lost work-day injuries.⁴⁷ Between 1984 and 1985, private sector death and injury was declining at a rate of about 8 percent; public sector death and injury was increasing at a rate of about 5.5 percent.⁴⁸ In 1985, if there had been an 8 percent decline in lost work-day injuries, then there would have been 1,572 fewer injured workers. At \$15,000 average cost per lost work day injury, the jurisdictions of the Commonwealth would have saved \$23,580,000 -- approximately \$6 million accruing to the Commonwealth and \$17.6 million to political subdivisions. In 1992 dollars this savings would be equivalent to \$30.7 million -- significantly more than the total estimated cost of OSHA coverage for all state and local government employees nationwide.

If the number of deaths and fatalities in 1991 were the same as 1985 (44 deaths and 19,651 injuries as stated above), the costs of these work place deaths and injuries, according to National Safety Council Statistics, would be over \$543 million -- \$730,000 for each death and \$26,000 for each injury.¹⁷

⁴⁹ (The cost would be \$327 million if one uses the more

⁴⁵ Bresnitz, Eddy A., "Occupational Disease and Injury in Pennsylvania: Report to the Pennsylvania Department of Health," June 1990, pp.39,58,60.

⁴⁶ Davidson, p.7.

⁴⁷ Safe Working Environments for Public Employees, 1986.

⁴⁸ Ibid.

⁴⁹ National Safety Council, Accident Facts, 1992, p.35. Injury costs include estimates of wage losses, medical expenses, insurance administration costs, and uninsured costs, and exclude property damage costs except to motor-vehicles.

conservative figure of \$15,000 per lost work injury that has been used by studies in New York and Pennsylvania.) If public sector coverage for OSHA could bring about an 8 percent decline in work place fatalities and deaths, then the savings from the \$543 million cost estimate would be \$43.4 million -- more than 43 times greater than the \$1 million estimated cost to administer a public sector OSHA regulation in the state.

In just one department -- the Pennsylvania Department of Transportation -- at least 49 employees were killed on the job between 1971 and 1988. Among the people who died were highway maintenance workers, mechanics, equipment operators, and highway foremen.

Cost of Occupational Injury and Illness in Pennsylvania. A 1990 study by the Personnel Management Review Division of the Commonwealth of Pennsylvania⁵⁰ found that in 1989 the cost of sick leave per Commonwealth employee was \$870, for an average of 9.7 sick days per employee. Given the 85,115 positions under the Governor's jurisdiction at the time, this amounted to over \$74 million per year. If only 1 percent of these absences were for preventable injuries and illnesses on the job, the savings to the Commonwealth would be \$740,000 per year. (And, it should be noted that the average number of lost work days after an occupational safety or health incident is substantially longer than for sick time generally -- 17.7 days vs. 9.7 sick days over a year.⁵¹)

The costs of foregone earnings from occupational injuries and illnesses in Pennsylvania in 1988 alone, including estimates of direct medical costs, was between \$2.0 billion and \$2.8 billion.⁵² If state and local employees only had their proportionate share of these injuries and illnesses relative to their employment levels, foregone earnings for state and local employees was between \$180 million and \$252 million per year.⁵³ If OSHA coverage would have accomplished an eight percent decline in the burden, the Commonwealth would have saved between \$14 million and \$20 million, just in foregone earnings and medical costs.

⁵⁰ Reported in *Philadelphia Inquirer*, "Report Shows Costly Rise In Days Off For Pa. Workers," 2/17/90, p.B1.

⁵¹ Bureau of Labor Statistics, U.S. Department of Labor, 1987 statistic cited in Bresnitz, Eddy A., *Occupational Disease and Injury in Pennsylvania: Report to the Pennsylvania Department of Health*, June 1990, p.100.

⁵² Bresnitz, p.91.

⁵³ Ibid.

Economic Benefits of OSHA Coverage. In 1990, Safe Working Environments for Public Employees (SWEPE), a Philadelphia-based public employees advocate group, did an analysis of savings to Pennsylvania counties that would come with compliance to the then pending Pennsylvania OSHA Bill HB 1300.⁵⁴ Analyzing injuries for all county jurisdictions, SWEPE found that the counties of the Commonwealth could save more than \$22.8 million per year, or \$24.5 million in 1992 dollars, and save over 1500 people the trauma of injury and illness if OSHA coverage reduced lost work day incidents by only 8 percent. The analysis is based on two main assumptions: an average cost of \$15,000 per lost work time injury and an 8 percent reduction in lost time injuries.

A Specific Example of Economic Loss to the Commonwealth and Human and Economic Loss to a Worker. In 1986 an employee of the Commonwealth on her first day back from vacation became permanently and totally disabled. The cause: a defective elevator that fellow employees had been complaining about for several days. No repairs were done. The elevator malfunctioned, the employee fell, and now she must move about in an electric scooter and specially equipped van. Besides the pain and the exacerbation of her health condition, this once-active employee suffers from a sense of isolation and loss of human contact. The Commonwealth now pays over \$1000 a month in Workers' Compensation and nearly \$600 per month in state retirement disability, and this could continue for 20 years or more. The employee has had over \$30,000 of uncompensated costs, including the scooter, the van, a ramp to get into her house, a shower chair, special commode, etc. The costs to repair the elevator would have been minuscule compared to the economic costs to the Commonwealth to sustain this employee, at a seriously debilitated level of living and enjoyment of life.

Estimated Cost of Extending Coverage to Public Employees in Pennsylvania In FY85, after New York State undertook coverage of public employees, its total administrative and enforcement costs were \$3.8 million, of which the federal government funded half. Extrapolating to Pennsylvania, one would expect costs to be approximately \$2 million, with approximately \$1 million per year falling to the Commonwealth,⁵⁵ or \$1.3 million in 1992 dollars.

⁵⁴ Safe Working Environments for Public Employees (SWEPE), "Benefits of Compliance with HB 1300," 2/11/90.

⁵⁵ Safe Working Environments for Public Employees, "A Look at the Costs and Benefits of PE-OSHA Legislation," January 1990, p.1.

Summary and Conclusions

Occupational injury and illness incidence rates have declined with OSHA coverage, both in the private sector or public sector. And, in a state like New York, fears of extraordinary administrative and compliance costs were unfounded. Instead, jurisdictions in the state saved millions and saved lives as well. The costs that are extraordinary are the costs associated with the lack of OSHA coverage, not the opposite.

III. PHILADELPHIA:

A CASE STUDY OF THE ECONOMICS OF PUBLIC SECTOR OSHA COVERAGE

The City of Philadelphia has some significant financial problems. City documents focus on the continued shrinking of the City's revenue base.⁵⁶ A case study of such a financially strapped city -- showing that OSHA coverage for its employees, rather than costing the city money, can actually save the city millions of dollars a year -- stands as a testimonial to the economic sense of providing coverage for public employees under the Occupational Safety and Health Act.

It is dangerous to work for the City of Philadelphia. The 1991 injury rate for the city's 29,000 full-time employees⁵⁷ was double the rate of construction, one of the State's most dangerous industries.⁵⁸ A study done during the 1980's found that the frequency of lost work day cases for Philadelphia employees was 16.3 per 1000 employees, nearly five times as high as the private sector rate of 3.4. The severity rate (the number of days away from work), was 235.0 for Philadelphia, more than four times as high as the private sector rate of 55.4.⁵⁹

In 1985, the City of Philadelphia had a lost work day frequency of 12.2 per 200,000 hours worked. The construction industry nationally had a frequency of 6.8; mining and manufacturing had frequencies of 4.8 and 4.6 respectively.⁶⁰ In fact, amongst leading Pennsylvania industries in 1986, Philadelphia had the highest injury and illness rates -- 124.5 injuries or illnesses per 1,000 workers. In contrast, bituminous mining in Pennsylvania had a rate of 100.5; construction, 58.4; and manufacturing, 38.0.⁶¹

⁵⁶ See, for example, City of Philadelphia, "Response of the City of Philadelphia to Afscme's Cost-Saving and Revenue Enhancement Proposals," August 1993, p.2.

⁵⁷ City of Philadelphia, memo, 1/19/93.

⁵⁸ City of Philadelphia Office of the Controller, "Employee Disability Benefits: Performance Audit," June 1992, p.1.

⁵⁹ Pennsylvania Economy League study, cited by Cohen, Ann, "PE-OSH", Public Property, Police, Fire & District Attorney's Civilian Personnel Philadelphia Parking Authority Employees, AFSCME-DC 33 Local 1637, AFL-CIO to Stuart Davidson, November 11, 1985, p.5.

⁶⁰ Philadelphia, City of, Office of the Controller..., p.26.

⁶¹ Ibid, p.27.

Costs of Occupational Injury and Illness in Philadelphia

The City "spends a much greater percentage of pay for sick and injury leave benefits than does the average private firm."⁶² The costs to the city for reimbursements through its work injury program in 1991 were approximately \$70 million,⁶³ or \$72.1 million when expressed in 1992 dollars. These numbers would include neither Workers' Compensation, with FY92 expenditures of \$18 million nor equipment and vehicle damage, with FY92 expenditures of \$5 million.⁶⁴

There are many costs incurred by the city when employees are out of work due to job-related injuries and/or illnesses. These costs include: sick leave, work injury pay, medical expenses, Workers' Compensation, disability pension, time for medical and dental appointments, payments to those who perform work for the absent employees (overtime, temporary help, general overstaffing), and intangible costs of decreased productivity.⁶⁵

Philadelphia provides four major categories of benefits to those injured on the job:

1. Regulation 32 is a Civil Service Regulation developed by the City of Philadelphia in 1954 to financially support employees with service-connected injuries and disabilities. Once an employee has a permanent and disabling injury, the individual is removed from the department's payroll and placed into the Regulation 32 program. If the injuries sustained are diagnosed as permanent and total, Regulation 32 salary continues for up to three years or until the employee becomes eligible to collect a pension, whichever occurs first. Regulation 32 in the past provided for 100 percent income replacement and medical care, treatment at the City "Compensation Clinic" and health-medical plan benefits for the duration of the disability.⁶⁶ Currently injured employees can collect 75 percent of the salary for their job classification at the time of injury. Regulation 32 includes all raises and benefits.

The program is applicable in three situations of work-related injury or illness: temporary disability, permanent disability prior to separation from city service, and permanent disability with alternative employment in city service.

⁶² Pennsylvania Economy League, Inc., Eastern Division. *City of Philadelphia: Work Absences Due to Ill Health*, p.iii.

⁶³ Philadelphia, City of, Office of the Controller..., p.1.

⁶⁴ AFSCME, "Background for 1992 Negotiations," p. 1.

⁶⁵ PEL, p.v.

⁶⁶ Ibid., pp. 34-35.

Between July 1, 1991 and December 31, 1992, there were 10,475 injuries associated with Regulation 32 claims. Of these, 8,674, or over 80 percent, involved lost work time.⁶⁷ At an average cost of \$15,000 per lost work time incident -- without adding any cost for the non-lost work time Regulation 32 incidents -- the cost to the city over those 18 months would have been over \$13 million. This would be \$8.7 million on a 12-month basis. An 8 percent reduction in these costs, if accomplished by OSHA coverage, would have saved the city nearly \$700,000. Nearly 1,500, or approximately 14 percent, of the injuries involved more than a month of lost time or limited duty.

Of the Regulation 32 claims the city receives, some are very large. During the five years from 1988 to 1992, there were eleven Regulation 32 claims that were for over \$50,000 each. The amount paid, through March 1993, on these eleven claims alone amounted to over \$1.1 million.⁶⁸

2. Workers' Compensation, makes payments to workers for work-related injury or aggravation of a non-work-related injury. The Workers' Compensation system provides for 1) income replacement, 2) permanent injury compensation, and 3) medical care. It pays two-thirds of salary up to a cap in 1992 of \$475 a week.

Workers' Compensation is applicable in four situations of work-related injury or illness: temporary disability, permanent disability prior to separation from city service, permanent disability with alternative employment in city service, and permanent disability following separation from city service. It pays partial/temporary disability for up to 500 weeks. It pays total/permanent disability for as long as a lifetime. There is no service requirement and the compensation is tax free.

Workers' Compensation allows injured employees to recover costs which are reasonable and customary for medication, supplies, hospitalization, medical and surgical services. Contrary to Regulation 32, the Act provides employees with reimbursement of fees for the physician of the employee's choice. There is no family medical coverage, but there is medical treatment coverage for the workers related to the disability.

The medical costs associated with Regulation 32 and Workers' Compensation in FY92 alone, with no income replacement at all, cost

⁶⁷ Philadelphia, City of, printouts, "Claim Statistics and Work Related Injury Medical Care Cost Information," February 1993.

⁶⁸ Philadelphia, City of, Letter from Stephen Sawyer, Deputy City Solicitor to Manuel Stamatakis, Capital Management Enterprises, "Re: Medical Claims Exceeding \$50,000 Over Last Five Fiscal Years Paid From City of Philadelphia Workers' Compensation Account," 3/18/93.

the City of Philadelphia \$10.5 million.⁶⁹ An 8 percent decline would have saved the City \$840,000. The Regulation 32 costs of provider network medical care, physical therapy, medical supplies, and out of network services were \$9.2 million and medical costs associated with Workers' Compensation were \$1.3 million. This does not account for lost wages or indirect costs, which are much greater than the medical costs alone.

In FY92 there were approved direct expenditures to outside vendors for medical care as a result of job injury or illness of \$1,321,312.⁷⁰ An eight percent decline would have saved the City over \$100,000.

3. Disability Pension--Service Connected is for disabilities "due solely" to the job. This type of pension pays 70 percent of ones highest salary for life; there is no service requirement; and it is tax free. It pays family medical benefits for four years. There is offset for Workers' Compensation disability. There is no earned income offset. The average age for service-connected disabilities in Philadelphia in 1984 was 43.⁷¹

Service-connected pensions are fixed at 70 percent of salary, and since ordinary disability pensions could exceed this amount with sufficient service alone, there may be underreporting in the cost of service-connected disabilities as some hurt on the job opt for ordinary disability pensions instead.

Service-connected disability pensions are applicable with permanent disability following separation from city service. In 1984, fully eleven percent of all active pensioners for the City of Philadelphia were out on service-connected disability pensions, 1,867 of 16,963.⁷²

In 1991, the cost of service-connected pension benefits were 100 percent greater than they had been in 1986, and amounted to \$33.4 million.⁷³ If OSHA coverage could have reduced this number over the years by 8 percent, the savings would have been \$2.7 million.

As of February 1993, there were 2,610 service-connected

⁶⁹ Philadelphia, City of, printouts, "Claim Statistics..."

⁷⁰ Philadelphia, City of, printouts, 3/8/93.

⁷¹ PEL, p.71.

⁷² Ibid., p.81.

⁷³ Philadelphia, City of, Office of the Controller..., p.55.

disability pensioners⁷⁴ (living in 27 states plus Puerto Rico). This implies pension costs of well over \$36 million (since there are very few employees who earn less than \$20,000 and service-connected disabilities are 70 percent of salary -- $\$20,000 \times 70\% = \$14,000$; $\$14,000 \times 2610 = \$36,540,000$). If OSHA coverage could have reduced this number over the years by 8 percent, the savings would be at least \$2.9 million.

A typical service-connected disability pension costs the city between \$500,000 and \$1 million.⁷⁵ With 2,610 pensioners, even if the average pension cost were \$500,000, the City's burden would amount to a liability of over \$1.3 billion. If OSHA coverage over the years could have reduced this number by 8 percent, not only would over 200 people be leading more productive and higher quality lives, but the city would have \$104 million less in pension liabilities (albeit there might be regular pension liabilities accruing, but not until individuals reached retirement age would there be disbursements).

The City of Philadelphia granted 918 service-connected disability pensions in the five years January 1, 1988 through December 31, 1992.⁷⁶ The individuals ranged in age from 26 through 66. Nearly 130 of those individuals were under 35 years of age. Six hundred people, or 65 percent of the total, were 45 years old or younger. If only 8 percent of the service-connected disabilities could be avoided with OSHA coverage,⁷⁷ then instead of 918 people going out on pensions 1988-1992, seventy-three fewer people would have been hurt. If disability pensions were only \$1000 per month (a conservative figure since the average is higher) the city would have saved nearly \$900,000 in 1993 alone.

While many of these pensions were to workers from the uniformed professions of fire and police, over 12 percent were service-connected disability pensions to workers injured through their work in the Streets Department. Another 25 disabled and pensioned individuals were from either the Recreation Department or Fairmount Park; 15 were from the Water Department.

⁷⁴ Philadelphia, City of, printouts...

⁷⁵ Philadelphia, City of, Office of the Controller..., pp.39-53.

⁷⁶ Donovan, Linda, Pension Program Administrator, Board of Pensions and Retirement, Municipal Pension Fund, City of Philadelphia, Letter to Ms. Ann Cohen, President, AFSCME District Council Local 1637, with lists of those granted service-connected disability pensions from 1/1/88-12/31/92, 9/16/93.

⁷⁷ This percentage reflects the experience of states adopting public employee coverage.

The number of people out on service-connected disability pensions seems to be growing quickly. In 1990 there were 2,266⁷⁸ and by early 1993, there were 2,610 -- a growth in less than three years of over 15 percent.

4. Disability Pension--Ordinary, are for non-work-related disabilities, but are sometimes granted with service-connected disability because workers with longer seniority in city service may be eligible for higher pensions through this program. As a result, some employees with permanent disabilities are awarded ordinary disability pensions while receiving Workers' Compensation benefits. Ordinary disability pensions require five years of service, are taxable, pay a minimum of 25 percent of salary and a maximum of 100 percent, pay family medical benefits for four years, have no offset for Workers' Compensation, and no earned income offset.

Sick Buildings

There have been many concerns expressed about "sick buildings" where many public employees work. Buildings with poor ventilation and poor air quality, especially when there are circulating pollutants -- such as pesticides, disinfectants, cleaning compounds, dust, fungi, and cigarette smoke -- can make workers sick. Absentee rates in "sick buildings" can be three times as high, or more, than in "healthy buildings." According to the president of Healthy Buildings International, Inc., a building design firm absentee rates (in sick buildings) can run 10 percent annually while absentee rates in healthy buildings run between two and five percent.⁷⁹

How prevalent are sick buildings? A survey of four cities by Harris Corporation in 1992 found that over 25 percent of downtown office workers said they take at least one day off a year due to ailments caused by the indoor air pollutants that cause "sick building syndrome."⁸⁰ For those who stay at work and feel ill, their productivity is likely to decline.

Using results of the survey and the design consultant, if improving one-fourth of all buildings could reduce sick leave by as much as 30 percent or more, sick leave could be reduced in those cities by over 8 percent. If only one percent of all sick leave in Philadelphia is because of or exacerbated by the internal

⁷⁸ Philadelphia, City of, Office of the Controller..., p.72.

⁷⁹ Occupational Safety and Health Reporter, "Sick Days Taken By More Than One-Fourth of Office Workers in Four Cities, Survey Finds," Bureau of National Affairs, Washington, D.C., 5/20/92, p.167.

⁸⁰ Ibid.

environment of the building, and these problems were corrected, the city could recapture as much as \$300,000 per year in sick leave alone.⁸¹

Cases of Preventable Incidents

A tour of public sector Philadelphia work places by state politicians and local labor and environmental groups in 1985, identified many occupational injuries and illnesses "about to happen".⁸² Most were preventable. At the SEPTA bus depot at Penn and Comly Streets, there were fire hazards around the spray painting operations and faulty hydraulic lifts used to raise buses during repairs. An oil drainage pit was located only three feet from the only doorway that the drivers could use, and spilled oil around the doorway regularly caused drivers to slip and fall. At a truck repair garage at Ridge and Sedgley Avenues, there was asbestos flaking onto a large sink and there were cracked building beams, a leaky roof, and no ventilation for the carbon monoxide fumes. Dozens of 55-gallon drums were leaking gasoline and oil.

In another visible example of occupational hazards unaddressed by the city, former AFSCME Local 488 member Edward Christian spent 17.5 years working in the Medical Examiners Lab inhaling hazardous Formalin fumes, as he dumped 120 to 200 bottles a day of tissue specimens preserved in a formaldehyde solution. Mr. Christian now suffers from long-term health problems associated with the use of formaldehyde.⁸³ He was hospitalized for ten days and home on ten days bed rest afterwards. He almost required a permanent tracheotomy.⁸⁴ He can no longer sing in his church choir. Now those in his old job use a hood exhaust while handling specimen bottles.

⁸¹ The Pennsylvania Economy League (p.vi) estimated that the direct costs of sick leave were \$29.4 million in FY84.

⁸² Reported in *Philadelphia Daily News*, "Public Employment Has Its Hazards," 7/26/85, p.A1.

⁸³ Formaldehyde is a colorless gas with a pungent suffocating odor. When inhaled it can cause eye, nose and throat irritation. Ingestion can lead to lacrimation, a cough, and a burning sensation in the nose. Direct contact with Formaldehyde can cause bronchial spasms, pulmonary irritation, dermatitis, and prolonged contact can lead to cancer.

⁸⁴ Reported in AFSCME, "PHILAPOSH: Helping Workers Fight for Their Lives," *Public Employee*, 10/89, p.13.

A 35-year-old SEPTA employee was killed in 1990 when struck from behind by a train as he worked to repair signals in a tunnel. He was concentrating on his job and working alone, and there were no lanterns or warning signals to alert him of oncoming trains.⁸⁵

Safety Inspection of City Facility Shows Dozens of Preventable Hazards

Workers at a City of Philadelphia Police Vehicle Maintenance Facility had complained about hazards in their work site, particularly about a floor opening associated with the hydraulic lift that was due to a defectively designed cover plate and hinge. One man had already fallen into a floor opening and been badly injured, when, in 1988, another man fell into a floor opening and became permanently disabled in another. And yet another man fell in 1991, was seriously hurt, and has since received a service-connected disability pension.

How expensive would it have been to eliminate the hazard? Some have estimated as little as \$100; not more than \$300.

What has the city paid and what will it continue to pay? More than \$1 million in future liability is involved in these three cases alone. Tens of thousands of dollars have already been spent on Regulation 32 income replacement. Tens of thousands of dollars in medical expenses and tens of thousands more in indirect costs of worker replacement, lost productivity, etc. have also been expended. Over \$5,000 a month in retirement disability and Workers' Compensation benefits, some of it to last for as much as 40 years or more, are now liabilities of the city.

What has it cost the injured workers? pain and suffering, lost income, uncompensated expenses, loss of career, loss of hobbies and pastimes, a lost sense of purpose and a considerably lower quality of life generally. Instead, in exchange for avoiding a \$100 expenditure (perhaps, at maximum, \$300), the City has paid and is liable for expenditures well over \$1 million. The city has lost; taxpayers have lost; and the workers and their families have lost.

There have been other affected workers at the police vehicle maintenance facility. One man recently went out on disability because of severe asbestosis. Several other men seem to be affected by asbestosis as well. There have been many muscular skeletal and back problems associated with poor ergonomics at the facility and a number of falls. There was an amputation of a finger tip and several eye injuries, sprains, cuts, etc. One

⁸⁵ Reported in *Philadelphia Daily News*, "SEPTA Worker's Death Raises Fears," 3/2/90.

injured worker⁸⁶ said that during the time that he was on limited duty, there were always four or five others on limited duty as well -- all from work place injuries.

On September 24, 1993, safety professional Vincent Gallagher did a walk-through inspection of the police vehicle maintenance facility, accompanied by one of the injured workers. Noted were no less than 25 health and safety problems -- some with negligible associated correcting costs; the most expensive costing perhaps as much as \$500. Some costs would have been the obligations of vendors. What might the costs of a likely injury be? In many cases over \$5000 in medical expenses, not to speak of lost wages or third party payments.⁸⁷

Hazards cited in the September 1993 inspection report included acid exposure, exposed electrical conductor, housekeeping violations associated with oils and hoses and boxes, insufficient lighting, an electrical plug with insufficient insulation, unsafe storage shelves, grinding wheel not properly adjusted, oxygen cylinder unsecured, backup alarm need on forklift truck, lack of safe means to lift heavy containers of waste oil, poor access to the ignition of elevated vehicles, ergonomic problems, exposure to flying particles from grinders, problems leading to carpal tunnel syndrome, lack of trained first aid and CPR individuals.

Listed below are just five of the health and safety problems identified, and the likely costs of compliance contrasted with potential injuries and their potential costs.

1. There was an exposed V-belt and two exposed pulleys on a grinder and wire brush.

The Likely Injury: Exposure to V-belts and pulleys is likely to lead to severe laceration or amputation. Exposure to the moving part of the pulley could result in clothing or hair being attached to it. If hair would be caught, it would pull off a section of the scalp of the worker. Clothing being caught in this area would likely lead to a severely disabling hand or arm injury.

Estimated Cost to Repair: To design, fabricate and install an enclosure over this area would be a relatively simple matter. The material costs would be probably less than \$20. The design and installation costs would also be relatively insignificant if in-house engineers were used.

⁸⁶ A number of interviews with injured workers were conducted by Ruth Ruttenberg & Associates, Inc., September-October 1993.

⁸⁷ Gallagher, Vincent, Occupational Safety and Health Consultation Group, Safety Inspection Report, 9/28/93.

Estimated Cost of Injury: There would be significant medical expenditures as well as lost time involved if a worker were to suffer one of the types of injuries likely to occur.

2. On this premise, various vendors drive pickup trucks and vans. These vehicles are not required to have backup alarms. The vehicles must back up on occasion and a pedestrian could be struck. The vans especially are dangerous because they have an obstructed view to the rear.

Likely Injury: Serious.

Estimated Cost to Correct: Backup alarms for pickup trucks and vans cost \$29.95. The cost should be borne by the vendor.

Estimated Cost of Injury: The estimated cost of injury would be significant because serious injury or death would be the likely result of a pedestrian being struck by a reversing vehicle.

3. There were 55 gallon drums stored on damaged skids. The skids were rotten and parts were missing. Attempts to handle the drums by a forklift truck could result in a drum falling from the skid.

Likely Injury: While it is unlikely that the drum would actually strike a worker, if one did it would cause serious physical harm since the drums weigh well over 100 pounds each.

Estimated Cost to Correct: A new skid should cost less than \$20.

Estimated Cost of Injury: Catastrophic injury could result and could be very expensive.

4. There is poor access to overhead oil, transmission fluid and grease lines. Because these lines are located too high above the floor level for some mechanics, these mechanics must jump up to grab a hold of the hose. This could result in a slip and fall, especially since these lines leak and thereby create a slippery surface underneath them.

Likely Injury: A worker falling on his or her buttocks could result in a serious back or neck injury.

Estimated Cost to Correct: The estimated cost would be insignificant to lower the hoses.

Estimated Cost of Injury: This type of injury could involve significant disability and medical treatment.

5. There was no operator restraining device on the forklift truck. The hazard is that, in the event of a tipover, the operator would be likely to jump from the vehicle. Jumping from the overturning vehicle is likely to result in catastrophic injury or death when the worker is crushed between the overhead guard and the ground. The manufacturer in this case is Clark. Clark has had over 500 people injured in this way with their vehicles.

Likely Injury: The likely injury is amputation or death.

Estimated Cost to Correct: Clark will come to the facility and replace the seat with a seat which conforms to the American National Standards Institute standard for an operator restraint system. The company does this free of charge.

Estimated Cost of Injury: The costs of these injuries are significant since they involve either death or permanent disability, often accompanied by significant medical costs.

Correcting the problems identified in this inspection would cost less than one month of disability pension paid to just one of the workers disabled from the hazards at this work site.

A clearer example of the economic advantage to the city of clean-up would be hard to find. Which would the rational decision maker choose for the workers at this maintenance facility? Problems that could lead to death, amputation, lower back injury, and electrocution; causing untold human suffering and hundreds of thousands of dollars in medical and disability payments; or corrections costing less than \$1500. This inspection and analysis, taking but half a day of walk through and report writing, if duplicated throughout the City of Philadelphia (and the State) as a result of public sector coverage of OSHA could literally save dozens of lives and millions of dollars.

Health Inspection of City Facility Shows Major Exposures and Few, if any, Worker Protections

On October 1, 1993 industrial hygienist Jerry Roseman conducted an inspection of the 11th and Reed Body Shop, a facility owned and operated by the city of Philadelphia.⁸⁸ Upon completion of his inspection, Mr. Roseman concluded: "Given the exposure picture, there will be people who will get sick."⁸⁹

Five major areas of exposure and hazards were identified:

⁸⁸ Partial Report of 11th & Reed Street Body Shop, by Industrial Hygienist Jerry Roseman, Occupational Health Consultation Services, Inc., Philadelphia, PA, 10/29/93.

⁸⁹ Telephone interview with Mr. Roseman, 11/1/93.

1. Noise: One major area of OSHA violation at the Body Shop was noise, which Mr. Roseman assumed would be likely "to cause partial and/or complete permanent hearing loss to long-term employees."⁹⁰ Noise levels sometimes exceed 105 dBA, largely the result of air chiseling operations and the use of compressed air tools. Beyond issues of pain, the potential for hearing loss at such a high noise level is significant. Yet, hearing protection is not mandatory. A partial list of noise violations found by Mr. Roseman include:
 - 1910.95 (c) Failure to establish a hearing conservation program
 - 1910.95 (d) Failure to establish a noise monitoring program or to conduct sound level sampling
 - 1910.95 (g) Failure to provide an audiometric testing program
 - 1910.95 (i) Failure to provide hearing protection to employees in high noise areas
 - 1910.95 (k) Failure to provide any worksite training to employees exposed to high noise levels
2. Oxy-Acetylene Cutting & Use of Plasma-Arc Torches: Hazards associated with the use of these torches include exposures to the base metals being cut as well as to any coatings, paints, or oils that volatilize as a result of the heating process. There are also exposures to noise, ozone, and nitrogen dioxide. The ozone and nitrogen dioxide present potential serious harm to the respiratory system. Metal fume exposure endangers organ systems. No protective equipment was provided.
3. Body fillers: These fillers include organic solvents, epoxy resins, and fiberglass. Materials at the body shop were handled without respirators, gloves, or any other protective gear. There is no ventilation. The chemicals involved can cause damage to the central nervous system and to the respiratory system. Skin contact can cause dermatitis, and some of the epoxy compounds are carcinogenic. When these materials are filed and sanded, they pose airborne hazards, particularly from the fiberglass.
4. Spray painting: Numerous toxic substances are present, including such aromatic solvents as toluene, xylene, methyl ether, and methyl isobutyl ketone. There are also isocyanate and heavy metal compounds, including lead and chromium. Exposure to these materials can cause long-term damage to the central nervous system, liver, kidneys, and lungs. Toluene diisocyanate, in particular, is a very potent sensitizing

⁹⁰ Partial Report of 11th & Reed Street's Industrial Hygienist Jerry Roseman, Occupational Health Consultation Services, Inc., Philadelphia, PA, 11/1/93.

agent capable of causing occupational asthma. Heavy metal components cause numerous systemic effects and cancer. Ventilation and personal protective equipment could go a long way toward preventing both acute and chronic health effects. OSHA coverage for the 15 public employees of this body shop could provide the leverage necessary to effect change and save lives and health. Currently, these workers lack protection under the law.

Coverage of Philadelphia City Employees Would Save the City Money

According to a study by Safe Working Environments for Public Employees (SWEPE), there were more than 31,000 public employees in Philadelphia, in 1988, and coming into compliance with coverage under the then proposed Pennsylvania HB 1300 would save the city over \$6.7 million in costs associated with work place incidents that would be avoided.⁹¹ The analysis was based on two main assumptions: an average cost of \$15,000 per lost work time injury and an 8 percent reduction in lost time injuries. In 1988, the 5,613 lost work time injuries of public employees in Philadelphia is estimated to have cost the city over \$84 million. An 8 percent reduction in lost work injuries upon compliance with OSHA standards would mean 449 fewer lost work injuries. At \$15,000 per lost work injury, the city would save \$6.7 million, or \$7.6 million in 1992 dollars. This savings figure does not include savings from reduction in work-related fatalities nor does it include illnesses and injuries resulting in loss of less than a full work day. Neither does it include saving of monies paid to settle personal injury lawsuits nor does it include the benefits of reducing the pain and suffering of victims and their families.

The 1988-89 costs for Injury on Duty/Workers' Compensation for the City of Philadelphia were estimated in January 1990 to be \$120 million. An 8 percent reduction here would have saved the city \$9.6 million,⁹² or \$10.9 million expressed in 1992 dollars.

The City of Philadelphia has studied how to save costs related to worker injury, but rather than searching for win-win solutions of cleaning-up work places and fixing hazards; the city seems instead to be focused on how to cut benefits to those who have been hurt on the job.⁹³ A June 1992 report from the City Controller to the Mayor lists seven major recommendations for savings: reduce Regulation 32 benefit level, conduct injury investigations,

⁹¹ Safe Working Environments for Public Employees (SWEPE), "Benefits of Compliance with HB 1300," 2/11/90.

⁹² Safe Working Environments for Public Employees, "HB 1300: A Look at the costs and Benefits of PE-OSHA Legislation as it Relates to the City of Philadelphia," 1/90, p.3.

⁹³ Philadelphia, City of, Office of the Controller...

investigate opportunities for subrogation, pay for a third party administrator, timely payments to provider network, offsets for ordinary disability pension, and amendments to administrative processes to aid in the determination of proper award decisions. These recommendations were seen to save the city \$8.7 million in operating funds and \$5.2 million to the retirement system.⁹⁴ How much better to save even more money and at the same time save workers and their families the ravages of preventable injuries and illnesses. A first step toward this preferred solution is public sector coverage under OSHA.

⁹⁴ Ibid., p.iii.

IV. OTHER PENNSYLVANIA LOCATIONS

The Commonwealth of Pennsylvania (discussed in Section II) and the City of Philadelphia (See Section III) are two large public sector employers in Pennsylvania, but by no means the only ones.

Pittsburgh

A study of work place deaths in Allegheny County, which includes the city of Pittsburgh, for 1983 and 1984, found that 40 percent of known work place fatalities were at locations not under OSHA jurisdiction.⁹⁵ They were instead under the jurisdiction of the U.S. Department of Transportation, U.S. Mine Safety and Health Administration, local governments, or occurred in small family businesses. Seventy percent of these deaths involved municipal employees or the self-employed.⁹⁶ Jurisdictional issues can become complicated. When the researchers of this work place death study reviewed OSHA investigations, they found, for example, a fatal accident involving an employee of a private company performing maintenance at a municipal facility. A tire repairman was killed by an exploding bus tire at a municipal facility, but causative factors could not be determined because of jurisdiction. The OSHA investigation was restricted to the private industry component of the accident.

A conclusion of the Allegheny County study: "If Allegheny County is typical of other counties in Pennsylvania and the nation, then under-counting and under-investigating, especially of self-employed and municipal work place deaths, may be significant."⁹⁷

Chambersburg

At a much smaller scale of government is the Borough of Chambersburg, in central Pennsylvania, with a 1993 net budget of \$27,850,000. The Borough became self-insured for Workers' Compensation in 1992. In that year, it had 43 claims -- \$43,500 for indemnity and \$29,800 for medical expenses -- for a total of \$73,300. In 1993, there were 34 claims -- \$100 for indemnity and

⁹⁵ Parkinson, David K.; Gauss, William F; Perper, Joshua; and Elliott, Stanley; "Traumatic Deaths in Allegheny County, Pennsylvania, 1983 and 1984, University of Pittsburgh School of Medicine, p.1.

⁹⁶ Ibid, p.7.

⁹⁷ Ibid, p.8.

\$6,900 for medical-- for a total of \$7,000.⁹⁸ Had there been OSHA coverage and just 8 percent of the claimed amount of \$80,000 had not occurred, the Borough might have saved \$6,400.

If only half (38) of the incidents involved lost work time, using an average of \$15,000 per lost work time incident, the Borough more realistically bore a burden of \$570,000. If 8 percent of lost work time incidents could have been averted, the Borough would have saved \$45,600. These figures would not include a 1992 work place electrocution fatality of a Borough employee.

Large or small, the local and state governments of the United States stand to benefit, both financially and in terms of human resources, by expanding OSHA's jurisdiction to include public employees.

⁹⁸ Letter from Borough of Chambersburg to Ms. Nancy J. Oberdick, Staff Representative, Council 89, AFSCME, Harrisburg, 9/14/93.

V. FINDINGS AND CONCLUSIONS

Covering public employees under OSHA is not only the right thing to do, it is sound economic policy as well. Preventing accidents and illnesses spares workers and their families untold suffering, and would save local and state governments many millions of dollars.

In the U.S. Congress, the House Committee on Education and Labor, in a 1992 report, urged coverage of public employees by OSHA, stating that public sector workers have been denied OSHA Act coverage for too long and that it is time to fill the statutory gap.⁹⁹

Paying just for the economic costs of work place injury and illness is very expensive:

Wage Replacement for lost work time and limited duty, with benefits, usually runs over \$100 per day per person.

Medical Costs are high, especially when timely and adequate treatment is not received. Emergency service, diagnostics, treatment, therapies, and medications can quickly reach into the thousands of dollars.

Workers' Compensation -- besides injury compensation and medical costs -- can pay hundreds of dollars weekly for 500 weeks or even a lifetime. While not making the victim whole financially, it is still an expensive proposition to a state or local government. A payment of say \$475 per week for 500 weeks comes close to a quarter of a million dollars of liability. Over 50 years, beginning when a young individual is permanently and totally disabled, it could cost well over a million dollars.

Disability Pensions, in examples provided for Philadelphia, often left that city with potential liabilities of \$500,000 to \$1 million each.

Other Costs may be as much or more than the direct and insured costs associated with work place accidents and illnesses -- some have argued that these indirect and often uninsured costs may even reach four to nine times the burden of direct costs.

⁹⁹ U.S. House of Representatives, Committee on Education and Labor, "Report: Comprehensive Occupational Safety and Health Reform Act," July 9, 1992, p.59.

Accidents are Costly and Often Preventable. This author talked with several injured public employees -- many of them permanently disabled while still in their 30's. The liability incurred by the public sector employer in each case was easily \$1 million or more when all costs and liabilities are considered. In all cases the accidents were preventable and workers had asked that the safety hazards causing the accidents be corrected prior to anyone getting hurt. In most cases, the costs of correcting the hazards that led to the injuries would have been minimal.

The Human Toll associated with occupational injuries and illnesses is devastating. Workers, often in the prime of life, lose their livelihood, their physical well-being, their social networks, and often their sense of self-worth. Depression and anxiety may plague not only the worker, but his or her entire family, children included. Disability of an individual can send an entire family into crisis -- financially, socially, and emotionally.

Conclusion

OSHA coverage of public employees is prudent public policy. By eliminating work place accidents and injuries, the country can reduce current financial burdens of state and local governments, reduce health care costs, and reduce human suffering. OSHA coverage for public employees is cost-effective.

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Appendix I

States That Cover Public Employees Through OSHA-Approved State Plans

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

States Covered By Federal OSHA

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

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