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**Subcommittee on Workforce Protections**
**House Committee on Education and the Workforce**

**Hearing on**
**"Workplace Safety: Ensuring a Responsible Regulatory Environment"**
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Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee, thank you for the opportunity to testify today.

My name is David Sarvadi. As an attorney, I assist employers in complying with Occupational Safety and Health Administration regulations and standards, and in resolving disputes with OSHA as to the interpretation and application of those rules and standards in enforcement cases. My testimony today represents my personal views and not those of my law firm or our clients. I am not being paid to participate in this hearing.

I believe I was asked to testify today because, in part, I have been deeply involved in the health and safety field for more than 35 years, including more than 30 years as a Certified Industrial Hygienist. Before I started practicing law, I directed the industrial hygiene program at a Fortune 500 company, served as a technical staffer for a major trade association representing the chemical industry, and managed the safety and health department in a small construction company. At one time or another, I managed a number of the occupational health programs at the companies, including among others hearing conservation programs, respiratory protection programs, confined space entry programs, programs to control airborne exposure levels to toxic chemicals, and the various compliance programs required under OSHA's health standards.

I have practiced workplace safety and health law for more than 20 years at Keller and Heckman LLP. As part of my practice, I taught week-long seminars on all of OSHA's general industry standards all around the country, covering essentially the same material included in OSHA's 30-hour training course. We have probably had more than 1000 people participate in those classes over the years. The attendees were mostly the people who had to translate OSHA standards into actions, practices, and procedures in their companies, ranging in size from employers with fewer than 10 employees to those with hundreds of thousands of employees.

One important principle I learned from the participants attending those courses is that the improvement in safety occurs in small steps. It comes from diligence and persistence, not grandiose public demonstrations. Certainly, it takes a commitment from management to allocate the resources to the effort and to support the people who carry out the day-to-day tasks of building a safety and health program. But in the end, it is the responsibility of everyone involved, including the people on the front lines in the businesses --- whether it be a manufacturing plant, retail store, or office -- to take personal responsibility for making sure they follow the rules. And most of us do, most of the time.

As OSHA turns 40, I think it is time to re-evaluate the current system and take a new approach to advance employee safety. In OSHA's early days and into the 1990s, OSHA was among the most mistrusted federal agencies. A 1999 University of Michigan Business School study placed OSHA last among federal agencies in customer satisfaction. That year marked the culmination of its misguided effort to regulate workplaces through an all-encompassing ergonomics standard. That effort reinforced the highly adversarial atmosphere that had abated somewhat during the years between the Carter and Clinton administrations.

During the Bush Administration, OSHA Administrator John Henshaw made a concerted effort to put the ergonomics rulemaking behind us and help OSHA staff understand that they were not on the front lines, but that the people responsible for making sure workplaces are safe are on the front lines. As a result, I believe, I heard many business people – especially small business people – remark that the OSHA field personnel were helping employers and employees to solve problems and not just looking for citations to issue. The changes in the last few years have been highly detrimental to the relationship between OSHA and private sector employers.

**Heavy-handed Enforcement Is Not The Answer**

My experience is that when OSHA enforcement personnel raise legitimate safety and health concerns during an OSHA inspection, employers respond in a prompt and responsible manner to take remedial measures before any citations are issued, even though it is likely to be viewed as an admission of some shortcoming in existing practices. The overwhelming majority of employers do not wait for OSHA to issue citations before taking those steps, much less seek to delay those measures by filing a citation contest. The remedy for the very small minority of employers who abuse the current system in that manner is for OSHA to use its existing tools to prove that strategy is no longer viable. The answer is not to adopt legislation that would subject the entire employer community to the collective punishment of an immediate abatement requirement that tramples due process rights of employers. That approach of developing laws, regulations, and enforcement policy based on the assumption that all employers are bad actors has a huge price. Rather than advancing workplace safety and health, we achieve gridlock.

Similarly, the changes in OSHA's approach to enforcement made over the past 2 ½ years have created an atmosphere of antagonism and distrust that undermines the willingness of many employers to settle rather than contest citations. When OSHA arbitrarily announces that the reference period for a repeat citation has been increased from 3 years to five years, every large, multi-site employer recognizes that the likelihood of an endless string of repeat citations has now become a likely reality.

Employer resentment of OSHA is, in my view, at an all-time high. Employers recognize the new focus on increased penalties, but it has caught the attention of employers in a way that has been counterproductive. OSHA's enforcement zeal has forced even conscientious employers to be

defensive. Many feel that this new-found OSHA aggressiveness results solely in increased penalty numbers and diverts attention from actually correcting real problems.

If OSHA's new approach to enforcement was effective in improving workplace safety and health, we should see that reflected in the BLS statistics on work-related injuries, illnesses, and deaths in the workplace. The most recent set of data to be published were the data on fatalities for the 2010 calendar year. The latest data gives us the ability to compare fatality rate data for two full years prior to OSHA's heightened enforcement efforts with fatality rate data for two full years after OSHA's heightened enforcement efforts. If these enforcement activities and policies were as effective as proponents assert, I believe we should have seen some positive impact on the reported rates. Instead what the data show, at least for fatalities, is a leveling off of the rate in 2010, at a time when the number of people working has declined significantly. See Figure 1.

More emphasis on safety rather than compliance is needed. I think we need to reexamine the entire approach to OSHA enforcement. As noted above, OSHA's recent aggressive, and, in my view, frequently unreasonable actions, have created an disincentive for many companies, who are now resisting settlement discussions and contesting OSHA citations. This has two unhappy and unhelpful effects. First, it diverts management attention away from the actual needs of workplace safety because management resources are tied up in legal battles. Second, to the extent resources are available, they are directed toward compliance for the sake of compliance rather than advancing workplace safety in the most cost-effective manner. Within the last several weeks, the safety director for a large retail company commented that he is spending all his time on a spate of OSHA inspections while his responsibilities for managing and improving the workplace safety and health programs are suffering from lack of attention. Is the result of OSHA's more aggressive enforcement efforts improved safety? I suggest not.

I suspect there are bad apples in the employment world, just as there are bad apples in every institution in the country. However, every company I have ever dealt with has been serious about safety. The employers we work with do not contest OSHA citations simply to delay abatement. If a problem is brought to their attention, and there seems to be a reasonable way to eliminate the problem, they will fix it, often right on the spot. . In many instances, employers with whom I have worked have driven innovation to push the bounds of feasibility forward for themselves and others in their industry.

Citations are generally contested because the employer disagrees with OSHA's frequently overly broad or inapposite interpretation of the cited standard, OSHA's classification of the alleged violation. The size of the proposed fine is not a factor because the legal costs almost always outweigh the total penalties.

I have heard that the prevailing employer perception is that "OSHA is about the fine, not the fix." This push for heavier enforcement is particularly burdensome for small companies, many

of which are caught between the "rock" of aggressive OSHA enforcement tactics resulting in high penalties and abatement costs, and the "hard place" of admittedly expensive litigation costs.

I handled several recent cases where OSHA pursued enforcement actions -- inappropriately in my view -- when the alleged violations were trivial. For example, one of my clients made a minor mistake regarding one case on a site injury and illness log. They corrected the mistake **before** the OSHA inspection, but within the six month time period within which OSHA has the authority to issue a citation. Demonstrating an incredible lack of good judgment, OSHA issued a citation for that item. It seemed clear to us that the only reason the area office issued the citation was that OSHA headquarters wanted a "take no prisoners" approach to try to support its misinformed view that there was a pervasive under-recording of work-related injuries. The company contested the frivolous citation. The ALJ in his decision acknowledged the technical violation, but classified it as *de minimis*, and expressly stated in his opinion that OSHA should never have issued the citation in the first place. The ALJ noted that these are not the type of issues that OSHA should be litigating but OSHA does not seem to care how trivial a perceived issue is. The law should not deal with trifles as no one benefits from these instances of OSHA's over aggressive enforcement.

**OSHA Is Aiming At The Wrong Problems and Using Inappropriate Methods to Address Them**

I also have several clients that have been caught in a dispute over the need for emergency eyewash stations. Many establishments use cleaning chemicals to sanitize their facilities. The concentrated form of these chemicals is surely hazardous to eyes, and having a good source of clean water is important if eye contact occurs. Under current case law, a potable water source, such as a sink or hose, is generally sufficient to meet the current standard where the potential contact involves limited quantities and work practices with a low probability of occurrence. However, OSHA area offices are issuing citations claiming that the employers must install expensive eyewash stations wherever any such materials are used, without a corresponding improvement in safety or – to use a word presently out of favor – benefit. What makes this situation worse is that OSHA is trying to make changes in its rules via a "re-interpretation" rather than following the statutorily required rulemaking procedures.

I believe the courts have abandoned their responsibility to oversee the executive branch in this regard, and have allowed the agency to blur the line between enforcing the existing laws and amending them through the issuance of guidance materials and the enforcement process. Agencies are making changes to existing rules, which have significant economic consequences and impose significant compliance costs without giving the public adequate notice, or informing them of the unintended consequences of the changes. A recent example is the unilateral "re-interpretation" of the OSHA noise standard that OSHA announced and then revoked in response to the strong adverse reaction from the Congress and the business community.

As with many occupational hazards, there are many ways to protect employees from noise. Based on dogma, OSHA has a long-stated preference for engineering controls, as opposed to personal protective equipment. Since 1983, OSHA has interpreted its regulation to require employers to install engineering controls when noise levels are extraordinarily high, and to allow use of a hearing conservation program using periodic testing of employees hearing and ear muffs and plugs below a certain level. While there have been proponents of changing this policy for many years, the scientific data on whether such programs work and what makes them successful has been missing; meanwhile, technology has changed. We now have noise-cancelling ear muffs, and, I suppose, ear plugs. We have the capability to test the effectiveness of each individual's hearing protection to make sure that the reduction in noise levels is sufficient based on current knowledge. And we surely have the techniques to determine if the use of such programs of the last nearly 30 years has been effective. All we have to do is look.

OSHA did not take any of this into account when it announced that it would change its interpretation of the noise standard and henceforth require that employers spend money on engineering and administrative controls without regard to whether they were sufficiently effective to eliminate the need for ear muffs and plugs and all the other aspects of hearing conservation programs. OSHA would have required employers all over the country to spend resources without considering whether the people whom OSHA claims it is protecting would receive any benefit.

**Does OSHA Need a New Approach?**

I believe it is time to consider changing our approach to occupational safety and health. No one can doubt that, while significant progress has been made, we still have a way to go to achieve the still greater gains in safe and healthful workplaces throughout the U.S. But no one can doubt either, that the present system seems to be running out of steam. We are at very contentious juncture where it appears that there is only a choice between one of two approaches. I do not believe that is the case. So I have some recommendations for the Subcommittee to consider.

**Recommendations:**

- Change the present definition of a "serious violation" under the OSH Act to accept the use of risk assessment to prioritize safety issues. In other words, rather than assuming an accident will occur, we should take into account the likelihood that an accident will occur.

Under OSHA's current interpretation of the law, if there is any possibility of an accident, regardless of how remote, resulting in an injury that is defined as serious, the violation will be classified as serious. In reality, people make choices that balance the severity of the outcome with the probability that it will occur. Highly improbable outcomes, or outcomes of lesser severity should not be treated as having the same priority as conditions that can lead to death or serious injuries to a large number of people. A condition in which an intentional act can lead to

death should not be treated the same as circumstances where inadvertent contact could occur without proper protection. I believe the Congress needs to create another category of violation to capture those of lesser severity or lesser probability, and am hopeful that this would be considered in any reform bill.

A specific example might illuminate the issue. Every adult knows that a missing cover plate on an electrical outlet is hazardous, but no one really expects that an adult will actually stick a finger in an open socket. So while OSHA will issue a "serious" violation for a broken cover plate, even when it is in an inaccessible location, it should not be characterized as the same kind of problem as bare electrical conductors in near proximity to a work station where it is reasonably foreseeable that a person could inadvertently contact them. In its interpretation of the term "serious" as applied to citations, OSHA has completely disregarded the probability of an event in determining the severity of the violation.

- Intentional acts and those based on an employee's disregard for safety and health rules should not be automatically attributed to a failure of management.

The present state of the law with regard to what is known as the employee misconduct defense is weighted so heavily against the employer that employers are almost never excused from liability even when it is apparent that an employee disregarded his or her own safety or the safety of others. Worse, even if OSHA determines that an employee knowingly failed to follow OSHA requirements, the employee is never subjected to any government sanction. I have long suggested that employees should receive tickets during OSHA inspections for things like failing to wear protective equipment and the like where the equipment is required and supplied by the employer and the employee knew he/she was required to wear it. And the issuance of those tickets should be publicly available information and publicized in OSHA press releases just as OSHA now sees fit to publicize information on OSHA citations.

Failing to take such action sends a message to the employee that there are no consequences for their bad behavior and that they are free to ignore the requirement in Section 5(b) of the OSH Act that employees are to follow safety rules in their workplaces. This approach is inconsistent with how OSHA believes employers respond. If employers will behave better by having bigger and more frequent punishment, why not try it with employees?

Some will say this is blaming the victim. However, I have had bargaining unit safety representatives from union organized employers who have bemoaned the fact that the system protects people who flout the rules. The employee who breaks a safety rule is not clearly or not always the victim. We have worked with employers in countless cases where one employee's disregard for safety rules harmed one or many co- employees. OSHA's approach of overlooking a employee's responsibility to comply is a grave disservice to employees at large. Our common experience of collective punishment in grade school where the teacher punishes everyone because she or he cannot catch the disruptive student is not an effective approach to enforcing our laws.

Under the present system, all employers are deemed guilty until proven innocent. Early in her tenure, the Secretary placed employers in 3 categories: (1) the overwhelming number of responsible employers who substantially comply with the applicable legal requirements; (2) the category of employers who try to comply, but need some technical assistance; and (3) the very small category of employers who ignore their legal responsibilities. OSHA's current practices suggest that there are few employers in the first category and a small number in the second. After stating that OSHA will provide assistance to the second, and go after the third category of employers, OSHA then asserts that all employers have a catch me if you can attitude that somehow justifies the ill-conceived, universally applicable Injury and Illness Prevention Program initiative.

We definitely need to change the enforcement standard in the statute. Some interpret current law as requiring OSHA to always issue a citation if they see a violation, but I believe this leads to a "gotcha" attitude that is counterproductive. There have been various proposals to raise OSHA's penalty structure. I have generally been opposed to them because I do not see the penalties as an effective motivator for all but the most recalcitrant employers. However, if OSHA's penalties are to be increased, there needs to be a trade-off. I suggest an appropriate trade off for raising penalties would be first, to direct OSHA to waive first instance citations where the employer makes a good faith effort to comply, and second, to expand the present voluntary protection program by making it part of the statute. Right now the three-legged stool of enforcement, standards, and education is falling over because the education leg is too short.

- Create standards to hire compliance officers who are familiar with the real world.

Look at the Mine Safety and Health Administration approach where inspectors must have a certain amount of experience in mining before they can become inspectors. This will help create an enforcement staff with a more sound understanding of effective safety and health principles. The experience of working gives people perspective on what is important and what is a lesser priority.

The bottom line is that the present path OSHA is on is not advancing us to the original goal – to ensure safe and healthful working conditions. Instead, this renewed aggressive focus on citations and penalties has made employers increasingly wary of OSHA and has reduced cooperation, distorted incentives to promote safety and health, and diverted resources to unproductive legal battles. Now is the right time to talk about a paradigm shift. As OSHA turns 40, I believe we need to reflect on what has worked and what can be done going forward to enhance effectiveness in protecting our families, friends and neighbors in America's workplaces.

Thank you for your time today.

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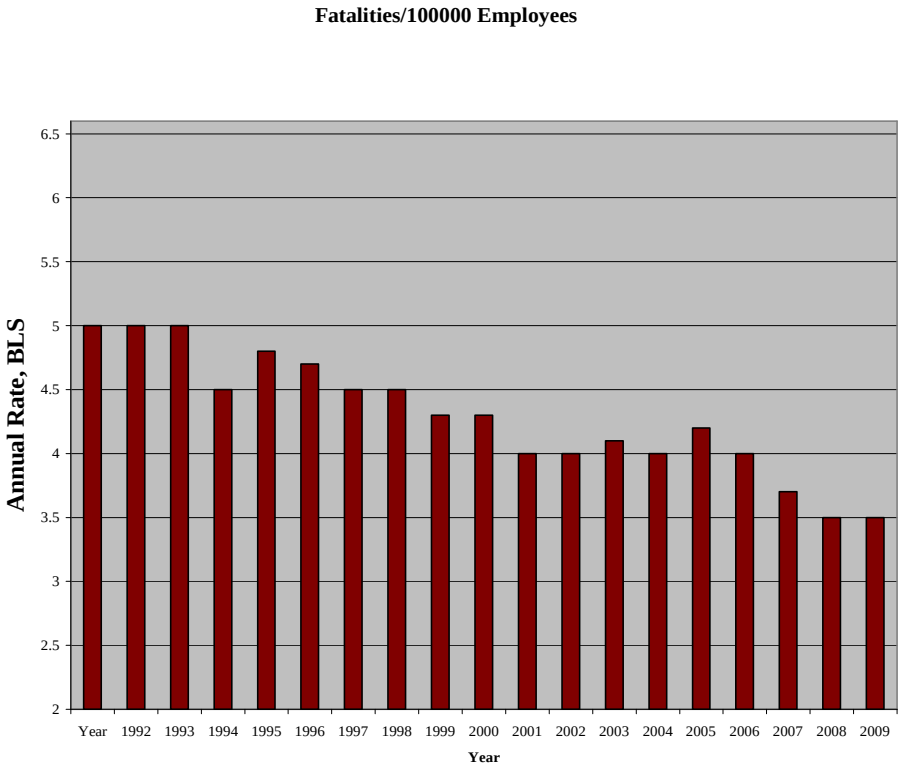


Figure 1
Source, Bureau of Labor Statistics