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Subcommittee on Workforce Protections
House Committee on Education and the Workforce

Hearing on
"Is OSHA Undermining State Efforts to Promote Workplace Safety"
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Chairman Walberg, Ranking Member Woolsey, and members of the Subcommittee, thank you for the opportunity to testify today.

I am Eric Frumin. I serve as the Health and Safety Director for Change to Win, and have worked in this field for 37 years. Change to Win is a partnership of four unions and 5 million workers, in a wide variety of industries, building a new movement of working people equipped to meet the challenges of the global economy in the 21st century and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement and dignity on the job. The four partner unions are: International Brotherhood of Teamsters, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers International Union.

The effectiveness of the Federal and State agencies in setting and enforcing job safety and health standards is a critical question. Every year, thousands of workers die from injuries, tens of thousands die from job-related diseases, and hundreds of thousands are disabled. Under that cloud, this Committee has the obligation to assure that the agencies the Congress created are effectively doing their part to help – and where necessary, force – employers to take the basic steps to comply with our nation's job safety laws.

We would like to offer four essential points:

Federal OSHA must continue to closely monitor State OSHA plans, as required by law, and must also assure that they provide "satisfactorily effective enforcement" programs.

Any evaluation of effectiveness must include whether the penalty levels for serious violations provide adequate deterrence.

It would be a serious mistake to rely primarily on injury/illness rates as performance indicators for OSHA programs.

USDOL efforts to develop useful performance measures should be supported

Federal OSHA must continue to closely monitor State OSHA plans to assure, as required by law, and must also assure that they provide "satisfactorily effective enforcement" programs.

This Committee has held many hearings over the 40 years of OSHA's existence regarding the agency's competence and direction. In the last Congress, the Committee adopted many proposals to modernize the OSHA, and sharply improve OSHA's ability to deal with negligent employers.

One of those hearings focused specifically on the severe failures of a few state OSHA programs – notably including Nevada's abject failure to protect construction workers, which resulted in the needless deaths of 12 workers over an 18-month period in the Las Vegas building boom.

While both the Congress and successive Secretaries of Labor have encouraged states to adopt their own OSHA programs, and 22 states/territories have done so for the private sector economy, too little attention has been paid since the enactment of the OSHAct in 1970 to the adequacy of both those state programs and the federal actions to monitor those programs as required under Section 18(c) and 18(f), as well as by subsequent appeals court directives. And those repeated failures over the decades have resulted in abject failures by various state OSHA programs, with horrendous consequences for the citizens of those states.

The most recent example, which sparked the welcome but long-overdue Federal detailed review of state plans, was the chaos which descended upon the massive City Center construction project in Las Vegas in 2008-09. Construction is by definition a human creation. The ruthless pace of death and destruction there was no happenstance, no "accident." It was the inevitable result of weak or non-existent safety management practices in a highly hazardous industry, creating serious problems which were neglected by a virtually toothless Nevada state OSHA program.

It was scandalous that the huge contractors should have created the hazardous conditions in the first place, and that they were essentially abetted by the Nevada's failure. But these abject failures were also a predictable outcome of the years of an arm's-length, "see no evil" federal approach to its monitoring responsibilities under Sect. 18(c) and 18(f). Indeed, one must ask what would have happened had not an intrepid set of reporters and editors from the Las Vegas Sun dug deeply into this morass and so vividly exposed the contractors' and the state's failures.

Fortunately, without even having a confirmed Assistant Secretary or Solicitor, Secretary Solis responded quickly to this dire situation. Federal OSHA closely scrutinized the Nevada program, and then, in an unprecedented but long-overdue action, announced the expansion of that scrutiny to all other state plans as well. That "enhanced" review has now been completed, and is the subject of this hearing.

It is not the first time that this Committee has had to devote attention to the consequences of the failure of a state OSHA enforcement program and failed federal oversight. In the late 1980's, the NC OSHA program was in a shambles, starved of funds by a callous state legislature and ignored by a Federal OSHA which valued the appearance of state enforcement rather than its substance. When 25 workers died and 54 were injured behind locked fire doors at the Imperial Poultry plant in Hamlet, NC, On September 3, 1991, the reality of NC's disgraceful program was revealed. With the state's inspection rate at about half the required level, the plant had never been inspected in 11 years. Federal OSHA announced that, with NC OSHA's acquiescence, it was

undertaking concurrent enforcement in NC, to assure that Tarheel workers would not remain unprotected from such vicious neglect.

As the funerals proceeded, then-Chairman Ford held an urgent hearing on the severe problems with the OSHA legislation, and continued his work on legislation to vastly improve the setting and enforcement of OSHA standards. That legislation was sadly never enacted, but it addressed many of the same problems that continue to undermine workplace safety in both the federal and State programs since then, including the severe weaknesses in many state programs.

Mr. Chairman, Ms. Woolsey, it is worse than regrettable that the persistent and severe gaps in the OSHAct still include obstacles the Act's guarantee of effective state plans.

We are not here to say that all state agencies are equally good or bad – or uniformly better or worse than the federal program. Some state programs have features that are far better than that which the Secretary of Labor, with her best efforts, has been able to undertake. For instance, farmworkers have been largely excluded from coverage and enforcement of basic job safety standards in Federal jurisdictions and most state plans. But California, Oregon and Washington have made major strides to protect them with both standards and enforcement. California, unique for its size and resources, has adopted job safety and health standards ahead of both the federal and other programs, just as California has stricter environmental rules. Other states have a variety of innovative laws, policies and programs which should serve as models for other states and federal OSHA.

And both federal OSHA and many state agencies have suffered from serious underfunding – as the states have consistently reminded the Congress. Those funding problems continue today, especially with the collapse of legislated budgets in so many states following the financial crisis and the severe recession it sparked.

And if the Budget Committee's allocations for FY 2012 are adopted, including a 23% cut in OSHA's annual budget, there will be a massive shortfall in funding and staffing for both federal and state OSHA programs. Indeed, if this Committee is seriously concerned about attempts to "undermine State efforts to promote workplace safety," as the title of this hearing suggests, it would immediately call upon Chairman Rogers and your colleagues on the Appropriations Committee to significantly increase funding for state OSHA plans.

But even with those all-too-familiar strengths and external obstacles, we continue to see state agencies which are apparently incapable of rising to the level of effectiveness which was clearly envisioned by the Congress when it adopted Section 18:

> (f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan.

For instance, as a result of the extraordinary review undertaken in 2010, OSHA revealed that the program in Hawaii was on the verge of collapse, much as OSHA had found in Nevada the prior year – and in NC twenty years before. Fed OSHA also found that various states were failing to assure compliance with the "benchmarks" for staffing required under federal law, even though

those benchmarks would not themselves assure a fully effective state program given the continuing hazards and violations in these states.

Any evaluation of effectiveness must include whether the penalty levels for serious violations provide adequate deterrence.

The Fed OSHA review also identified state enforcement practices which on their face are patently questionable or worse. For instance, it is an article of faith in any statutory enforcement program including penalties that such penalties are essential to the deterrent function of the program. As we all know, there are far too few OSHA inspectors in either the Federal or State programs to assure regular inspections, even in highly hazardous industries. Deterrence is key.

Yet many states continue to impose penalties for serious violations – ones capable of causing "death or serious physical harm" – at levels far lower than those of either federal OSHA or other states. For instance, in 2009, Oregon's average "current" penalty (i.e., penalties remaining after settlements or appeals) was only $330. Incredibly, South Carolina's average "current" penalty was only $282. What model of deterrence does such weak performance convey to employers who are considering the risks of non-compliance?

There is precious little guidance in the OSHAct regarding the role of penalties within the deterrence model. Last year, this Committee decided that the days of absurdly low penalties were over, and reported legislation to modernize OSHA's penalty provisions. As we all know, that legislation was opposed by the Chamber of Commerce and employers generally, such that it never even reached the full House for a vote. Today, the message to employers and workers continues to be very clear: the lives and safety of workers are worth less than that of wild horses in a federal park.

However, the vital role of deterrence is a well-founded concept in federal and state enforcement programs. US Circuit Courts have repeatedly upheld penalties on the basis that they must offer some deterrent function,[1] as described generally by EPA's enforcement policy (Policy On Civil Penalties, EPA General Enforcement Policy #GM -21," US Environmental Protection Agency, Effective Date: Feb 16 1984):

> Deterrence
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> The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.
>
> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from

[1] *Kasper Wire Works v. Sec. of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (OSH Act civil penalties designed to "inflict pocket book deterrence"); *Reich v. OSHRC*, 102 F.3d 1200, 1203 (5th Cir. 1997) ("OSHA must rely on the threat of money penalties to compel compliance by employers").

> noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance.

NC OSHA itself stated in its response to the Federal review:

> As federal OSHA and state procedures indicate, penalties are not designed as a punishment for violations but rather to serve as an effective deterrent and to provide an incentive toward correcting violations voluntarily prior to an enforcement inspection.

In short, we firmly believe that penalty levels must be high enough to offer serious deterrence, and that the levels of penalties must be addressed in any serious evaluation of the effectiveness of state OSHA programs. Unfortunately, some leaders among state plans appear to have forgotten this basic precept. Last year, the Occupational Safety and Health State Plan Association (OSHSPA), for instance, attempted to claim that current low penalties are adequate, and professed ignorance of any documented relationship between penalties and compliance (i.e. the deterrent value of penalties). OSHSPA even suggested that non-enforcement methods, such as compliance assistance, are more effective in stopping non-compliant employer behavior.[2]

It is hard to believe in the 21st Century that such a claim would be seriously considered, but some OSHSPA leaders continue to challenge the fundamental principle of deterrence.

We should expect that they will explain why they have refused to accept this fundamental principle. However, their suggestion that alternatives, such as the potential cancellation of government contracts and reduced workers compensation premiums to promote prompt compliance, is equally incredible. It is simply ludicrous to propose an alternative remedy that applies to only a small subset on employers, and is not authorized in OSHA or even proposed in legislation. Federal and state procurement procedures provide few if any actual penalties in the procurement decision-making for labor violations of any sort – never mind OSHA violations in particular. In addition, there are few such current mechanisms in state law, with only a handful of states even having such authority to implement such a practice – and at least, not in the timeframes envisioned under the OSHAct for compliance with life-saving safety and health standards. In the absence of such a concrete mechanism, one can't simply jettison adequate penalties/deterrence until appropriate standards are included in government contracts or procurement procedures and an appropriate mechanism for judging compliance is established.

Workers' compensation premiums are also only tenuously related to compliance with OSHA standards. For instance, the biggest factor in workers compensation costs is overexertion injuries[3] and, as we all know, those are not addressed in OSHA standards. Workers compensation premiums are also typically calculated based on a rolling three-year average experience, so

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[2] Letter from Kevin Beauregard, Chair, Occupational Safety and Health State Plan Association, to US Assistant Secretary of Labor David Michaels, August 16, 2010: "State Plan States' experience has shown that an effective method to achieve greater compliance among small employers is by focusing on education and training while increasing the likelihood of an onsite inspection."

[3] Liberty Mutual Research Institute for Safety, *2010 Liberty Mutual Workplace Safety Index*: "Overexertion, which includes injuries related to lifting, pushing, pulling, holding, carrying, or throwing, maintained its first place rank, costing businesses $13.40 billion in direct costs. Consistent with past years, this event category accounted for more than one- quarter of the overall national burden."

compliance in the short term in most industry sectors will have little or no short- or medium-term benefit for employers.

Both of these potential tools were available to state job safety enforcers in the 1960's. These tools were judged by Congress as insufficient to stop the deaths and injuries on the job. Hence, the Congress passed the OSHAct specifically to create a joint federal/state regime of standards and enforcement that could sidestep these obstacles and deliver a credible inspection/penalty enforcement and deterrence program capable of getting employers' attention. And section 18 of the Act likewise requires a minimum set of standards and enforcement policies – including penalties – such that state-by-state competition would never be allowed to undermine the basic protective purposes of the law. As the Senate Report stated: *"In a state by state approach, the efforts of the more vigorous states are inevitably undermined by the shortsightedness of others,"* which underscores the *"inadequacy of anything but a comprehensive, nationwide approach."* S. Rept. No. 91-1282, at 4 (1970).

It is also clear that there is certainly no consensus supporting the view expressed by the OSHSPA leadership. As one prominent state OSHA program said last year:

> … the average federal and state plan penalties for serious violations which carry the substantial probability of death or serious physical harm are embarrassingly low and widely recognized as having little deterrent impact.
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> …there is a roughly five-fold variation from state to state in average penalties for all employer size groups…This is a disturbing inconsistency that raises substantial concerns about equal expectations for employers and equal protection for employees. Even acknowledging that there may be some rational differences in enforcement strategy from state to state that would merit modest penalty variations these vast differences suggest that the opportunity given to states to establish their own penalty policies should be carefully limited. This unfortunate situation has resisted change for 40 years and it seems time that OSHA exerted somewhat firmer control.[4]

<u>Faulty reliance on injury/illness rates as performance indicators for OSHA programs</u>

Some, including the Labor Department's Inspector General, have taken issue with the use of penalty levels – or other "activity measures," like the percentage of Serious violations – as indicators of effective agency performance, preferring to rely heavily instead on the remarkably unreliable workplace injury/illness rates.

This is a marked departure from the view that the IG took in another audit it conducted in 2010. At that time, it concluded:

OSHA directives state that penalty reductions were designed primarily to provide an incentive toward correcting violations voluntarily. Furthermore, reductions were to be based on the general character of a business and its safety and health performance.

[4] Letter from Dr. Michael A. Silverstein, Ass't. Director, Washington State Department of Labor and Industries, to US Assistant Secretary of Labor David Michaels, August 18, 2010.

However, OSHA has not effectively evaluated the use of penalty reductions for size, history, good faith, and informal settlements, and the impact on comprehensive corrections of workplace hazards.[5]

In other words, the IG has confirmed the importance of penalties as deterrence, and the importance of insuring that OSHA takes care to reduce penalties only when justified by the facts and allowed by the statue. The IG's latest report fails to take into account this earlier finding, and the obvious relationship between statutory penalties and the effectiveness of either Federal or State OSHA enforcement programs.

That said, the IG's recent report on OSHA's evaluation of state plans also acknowledges the difficulty of doing such evaluations. In their interviews with federal OSHA staff, IG staff observed that the required empirical outcome data simply was not available:

> [Federal OSHA does] not currently hav[e] extensive, quantitative performance measures to evaluate the State Plans. The officials agreed that many measures were by necessity activity-based because outcome data were lacking. Officials stated that activity measures provided valuable information on State program operations and were helpful proxy measures of effectiveness. (p. 6)

Nor does the IG offer any recommendation for alternative measures other than what one state-plan administrator reportedly referred to as the "gold standard for success": worksite injury/illness data. One assumes that if legitimate, practical alternative measures were easily available, the IG would have found them, but it apparently did not.

This Committee has recently looked carefully at the reliability of reported workplace injury/illness rates. It found what most workers understand very well: the underlying raw data for the nation's job injury/illness data system are simply not reliable.[6] OSHA has said so, and is continuing to find employers who willfully violate the rules on injury/illness records. BLS has said so, and is supporting research to measure the undercount. It is time to simply stop the fiction that declining injury/illness rates are a source of comfort for this Committee, the Secretary of Labor or her counterparts across the nation.

The same is true as well for fatality data. If state-based fatality rates were any guidance to the effectiveness of state OSHA plans, then the Wyoming plan, which had the highest fatality rates in the nation, should have be shut down years ago, and several other states considered for the same treatment.

The simple reality is that within important limits, injury/illness data are useful at the establishment level for employers, unions and workers as only one part of an overall evaluation of the overall effectiveness of workplace job safety and health programs. These data are also useful to OSHA in targeting enforcement resources to those sites which are willing comply with the recording rules and report accurate numbers. But they are a far cry from an accurate measure of whether or not an entire compliance enforcement program is effectively addressing the range

[5] US DOL Office of the Inspector General, "*OSHA Needs to Evaluate Penalty Reductions*," Report No. 02-10-201-10-105, Sept. 20, 2010, p. 4.

[6] HIDDEN TRAGEDY: Underreporting of Workplace Injuries and Illnesses. A Majority Staff Report By The Committee On Education And Labor U.S. House Of Representatives, June, 2008.

of issues it confronts when dealing with the full range of industries, employers and hazards in its jurisdiction.

The risks of overreliance on injury rates were starkly revealed at BP's Texas City refinery, where a company large enough to know better used measures of slips, trips and falls to justify a disinvestment of hundreds of millions of dollars – a purposeful neglect which eventually cost the lives of 15 workers and the safety of hundreds. This is no way to run a railroad.

DOL efforts to develop useful performance measures should be supported

The final missing piece to the challenge of effective measurement of performance is the on-going research by both federal OSHA and Washington State on the actual effectiveness of enforcement. The recent study (attached) by the Washington State's Safety and Health Assessment & Research and Prevention (SHARP) Program has clearly demonstrated that enforcement – including penalties – is an effective method for securing the changes in employer behavior by non-compliant employers, at least as reflected in the outcome of workers compensation claims:

> **Impact of DOSH enforcement with and without citation on non-MSD compensable claims rates:**
> Inspections that result in citations for violations of safety rules would be expected to have greater impact due to the penalties which employers face. When we break out the impact of DOSH enforcement visits that result in citations from those that do not we find the following:
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> - **Fixed-site industries:** DOSH enforcement inspections that had **no citation** had only a 5.0% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH activity. But DOSH enforcement inspections that had **one or more citations** had a **20.3% greater decrease** in non-MSD compensable claims rates relative to employers with no DOSH activity.
> - **Non-Fixed-site industries:** DOSH enforcement inspections without citation had a only a 3.1% greater decrease in non-MSD compensable claims rates relative to employers with no DOSH visits. But enforcement inspections **with one or more citations** had a **19.1% greater decrease** in compensable claims rate relative to employers with no DOSH activity.[7]

It is unfortunate that there has been as little research on this question in the US as has been the case until now. Indeed, there have been multiple evaluations of federal OSHA's enforcement and consultation, and voluntary compliance programs by the Government Accountability Office which repeatedly concluded that the agency had not taken seriously its obligation to evaluate its policies and actions. Outside of Washington State, the same has largely been true for state OSHA agencies as well.

Fortunately, the US Labor Department has, for the first time, taken very seriously the need to conduct such evaluations -- as part of an overall evaluation effort within the federal government. The Department has its first Evaluation Officer in history, and the funding for such evaluations has tripled compared to recent prior years. Additional funding was secured through the Recovery

[7] Washington State's Safety and Health Assessment for Research for Prevention (SHARP) Program, *"The Impact of DOSH Enforcement and Consultation Visits on Workers' Compensation Claims Rates and Costs, 1999-2008," SHARP Technical Report Number: 70-5-2011*, May 2011.

Act funding. We understand that OSHA already has underway a critically-important empirical study of the effectiveness of its own enforcement activities within this context.

DOL's 201-2016 Strategic Plan explicitly addresses the need to empirically identify, select, implement and evaluate new performance metrics, particularly for its enforcement agencies. Indeed, the evaluation effort described in the Department's Strategic Plan is unprecedented in OSHA's history, and envisions implementation of new baseline metrics in 2012. As the Plan states:

> For any given Federal program's reported performance, there are several factors (external independent variables) over which the agency has neither jurisdiction nor control that will affect the level of performance. Program evaluation aims to isolate the influence of the agency's performance from the influence of these external independent variables in order to reach a clearer understanding of the true *impact* of the agency. Even with the more sophisticated approaches to measuring worker protection *outcomes*, the ability to isolate the effects of an agency's activities or to measure the *impact* of an agency's activities (what would have happened, all else equal, in the absence of the agency) requires rigorous evaluation.
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> Future program evaluations at the Department will focus on impacts more than ever before. While DOL has worked to develop a robust set of outcome goals and measures for this strategic plan, the information provided by these measures alone is limited. To truly understand whether their strategies are working, these outcome measures need to be linked to *impacts*. For example, to understand the *impact* of inspections on future compliance of an employer, one cannot just look at the number of repeat violators and conclude that because it is fewer than the number of employers first found to be out of compliance that the difference is the *impact* of the inspection on future compliance. Some of those employers may have come into compliance on their own even if they had not been inspected.[8]

The principles and methods for these evaluations has been further explained in great detail in DOL's companion document "A New Approach to Measuring the Performance of U.S. Department of Labor Worker Protection Agencies", June 28, 2010. It includes a discussion of the specific evaluation models appropriate for worker protection agencies, including how to deal with the issue of recidivism.

It is unfortunate, to say the least, that the Inspector General did not take this substantial effort into account. In the face of literally decades of critiques concerning inadequate evaluation of its various programs, OSHA finally gets departmental support for a qualitative improvement in its evaluation effort – and the IG has written it off as irrelevant. When I asked the Inspector General whether or not it had reviewed either the Strategic Plan or the document on performance measures for enforcement agencies, the IG's only response was:

> "No, we did not incorporate this into the audit. While we reviewed the measures, those measures had not yet been implemented and we did not evaluate the merits of the specific measures. "[9]

We hope that in light of this important new effort, the IG will reconsider its conclusions and recommendations, and provide the concrete assistance that beleaguered enforcement agencies

[8] U.S. Department of Labor Strategic Plan Fiscal Years 2011-2016, DRAFT for Stakeholder Review, August, 2010, p. 94.

[9] Email from Jeffrey Lagda, Sr. Program Analyst, US DOL OIG, to Eric Frumin, April 29, 2011.

like OSHA urgently need from oversight bodies like the IG – or from this Committee, for that matter. Constructive suggestions based on proven best practices are critical to organizational improvement in many spheres of activity, and enforcing labor standards is no different.

Conclusion

Federal and state OSHA programs are critical components of our national system for preventing the unacceptable toll of worker death, injury and illness. While they can never replace the absolute necessity for good-faith investment by employers in effective management systems, they are the critical missing link when dealing with employers who fail to pay attention to their responsibilities. When employers abusively neglect their responsibilities, and when large companies engage in such neglectful conduct on a broad scale, the coordinated actions of federal and state enforcement agencies are absolutely critical to stopping such abuses. If the forty years have taught us anything, it is that only strict enforcement, backed up by adequate resources and the political will to use them, can make a dent in the daily toll of death, injury and disease from job safety violations and hazards.

Recommendations

We strongly urge the Committee to support OSHA's efforts under Section 18 of the OSHAct to closely monitor the performance of its state partners, and to assure that both it and its state partners maintain "satisfactorily effective enforcement" programs -- as required by the US Court of Appeals in 1978.[10]

We also urge the Committee to assure that both federal and state OSHA programs receive the full level of resources required to protect American workers' health and safety on the job. The threats to OSHA's funding are acute, and you must not allow opponents of strong labor protections to use a severe economic recession as a pretext to reduce state resources for defending workers' lives and safety.

I'll be pleased to answer any questions..

Respectfully submitted,

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[10] AFL-CIO v. Marshall, 570 F.2d 1030, 187 U.S.App.D.C. 121