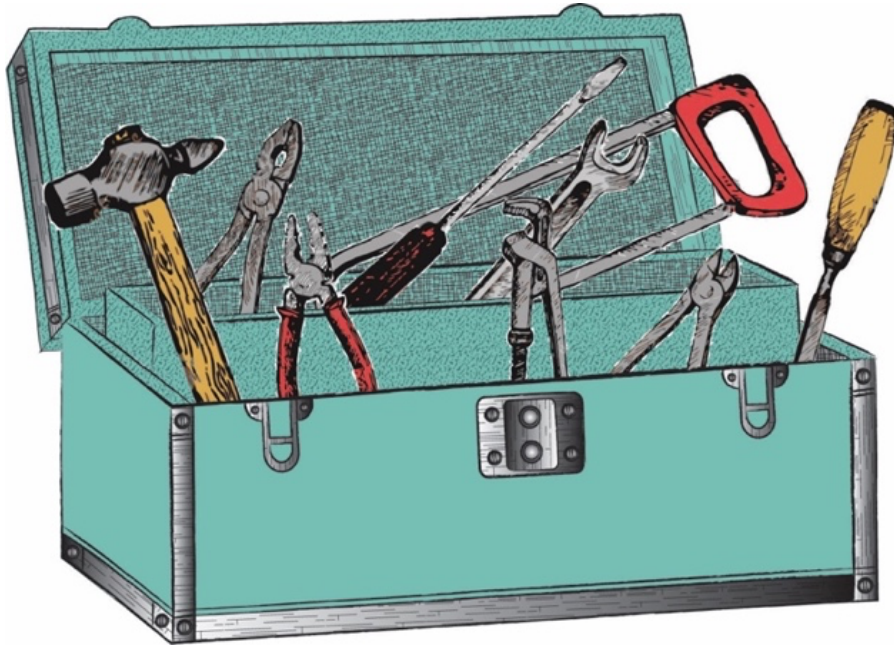


# **The Labor Standards Enforcement Toolbox**



## **Tool 14: Addressing Worker Safety and Health through the Lens of Strategic Enforcement**

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## EXECUTIVE SUMMARY

Ensuring the safety and health of workers in this country, who are employed at millions of workplaces presenting a dizzying array of hazards, is beyond daunting. And yet, it is exceptionally important, because the lives and well-being of countless workers, and their families, hangs in the balance. Every day, workers are maimed or die of their workplace injuries or occupational illnesses. These outcomes are unacceptable. Agencies must use all the means at their disposal to keep workers safe and healthy in their workplaces.

This paper addresses this challenge through the lens of strategic enforcement, with the goal of maximizing enforcement effectiveness to save lives and limbs.

First, we examine how, under the Occupational Safety and Health Act, federal and state enforcement schemes are designed to interact.

Next, we dive into the impressive array of strategic enforcement tools that are available to federal, state, and local enforcers, and we observe that many of them are either unrecognized or underutilized. We emphasize that these are all significant, because, given our limited enforcement resources, we need to use every tool we can muster – from strategic targeting, to enterprise-wide enforcement, to heightening deterrence through more robust penalty assessments and publicity, to valuing and making the most of partnerships and co-enforcement efforts with a wide range of organizations and agencies. And we need to engage in a process of continual evaluation and improvement of our tools and assets, always striving to maximize our enforcement leverage in aid of worker safety and health.

Finally, we examine an impressive list of initiatives state and local governments have taken, beyond what the OSH Act mandates, in their efforts to go the extra mile for the safety of the workers in their states and cities. These examples are intended to inspire federal, state and local agencies to do the same, or, hopefully, even better.

The stakes are high. Workers deserve to work in safe and healthy environments. This paper is intended to provide practical ways in which state and local agencies can better – and potentially far better – satisfy that obligation.

## INTRODUCTION

Fifty-four years ago, President Richard Nixon signed the Occupational Safety and Health Act of 1970 (“the OSH Act” or “the Act”)<sup>1</sup> into law, following a long history of unregulated workplace tragedies and devastating occupational illnesses. After decades of struggle and advocacy by workers, unions, and a wide array of worker protection advocates, the law was passed as “part of a wave of federal legislation to protect workers, the public, and the environment from harm.”<sup>2</sup>

Its stated mission is “[t]o assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; [and] by assisting and encouraging the States in their efforts to assure safe and healthful working conditions...” This would be accomplished through a multi-pronged approach, including: “stimulat[ing] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions,” including joint labor-management efforts; authorizing the Secretary of Labor to develop and set mandatory occupational safety and health standards, to be enforced through an “effective enforcement program;” encouraging the States to assume responsibility for, and to improve, administration and enforcement of their occupational safety and health laws, including by providing grants; and providing for training programs “to increase the number and competence” of personnel engaged in the field of occupational safety and health.<sup>3</sup>

It’s certainly a noble mission, and the Act has had an undeniable impact on worker safety and health in this country. According to a 2023 AFL-CIO report [“Death on the](#)

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<sup>1</sup> <https://www.osha.gov/laws-regs/oshact/toc>.

<sup>2</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7144450/>; see also <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7144431/>.

<sup>3</sup> For example, OSHA awards grants to nonprofit organizations, including community organizations, worker centers, and unions, on a competitive basis through its Susan Harwood Training Grant Program. Grants are awarded to provide training and education programs for employers and workers on recognizing and addressing safety and health hazards in their workplaces and to inform workers of their rights and employers of their responsibilities under the OSH Act. Examples include “capacity building” grants that focus on building the capacity of an organization to deliver occupational safety and health training, education, and related assistance; “targeted topic” grants designed to train workers and employers on occupational safety and health hazards associated with one of OSHA’s selected training topics; and “training materials development” grants intended to develop and evaluate classroom quality training materials on one of the OSHA selected training topics.

<https://www.osha.gov/harwoodgrants/overview>.

Job: The Toll of Neglect,” (“Death on the Job”)<sup>4</sup> an estimated 668,000 workers’ lives have been saved since the Act’s passage.<sup>5</sup> Nonetheless, more than a half-century after the law’s enactment, in 2021 an average of 16 workers died *each day* from traumatic injuries at work, totaling 5190 in the course of the year. Add to that figure an estimated 120,000 deaths annually from occupational illnesses. In 2021 employers reported almost 3.2 million workplace-related injuries and illnesses. But because under-reporting is so common, it’s believed that in private industry alone (not including public sector workers), the toll of work-related injuries and illnesses is somewhere between 5.4 million to 8.1 million each year.

The numbers cited above – with each fatality and serious illness or injury representing a tragedy at worst and pain, sickness, and disruption of life and income at best, for the individuals and families impacted – irrefutably imply that the Act’s promise of safe and healthy workplaces has yet to be fulfilled. And therein lies the challenge worker protection agencies face. Thirty years ago, federal OSHA had the capacity to inspect workplaces under its jurisdiction once every 84 years. Today, with over 7 million workplaces under federal jurisdiction that are subject to the Act’s requirements, that figure is closer to 190 years, given current staffing – even with significant hiring of inspectors following the end of the Trump administration, during which hiring was frozen and attrition wasn’t backfilled.<sup>6</sup>

In light of these daunting facts and figures, how can federal, state, and local worker protection agencies get closer – and hopefully a lot closer – to achieving the goal of safe and healthy workplaces for all workers in this country? In this paper we’ll look at how state and municipal agencies fit into the national workplace safety and health regulation scheme. We’ll spend a good bit of time examining strategic enforcement

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<sup>4</sup> For the past 32 years, the AFL-CIO has produced this indispensable report on the state of safety and health protections for America’s workers. It features national and state information on workplace fatalities, injuries and illnesses, as well as workplace safety inspections, penalties, funding, staffing and public employee coverage under the Occupational Safety and Health Act.

[https://aflcio.org/sites/default/files/2023-04/2303\\_DOTJ\\_2023\\_final%20%283%29.pdf](https://aflcio.org/sites/default/files/2023-04/2303_DOTJ_2023_final%20%283%29.pdf).

<sup>5</sup> This calculation is based on changes in annual fatality rates and employment since 1970.

<sup>6</sup> In the U.S., the number of safety and health inspectors is about one-tenth the number needed to meet the benchmark set by the International Labor Organization, See Death on the Job 2023 Report at FN4, pgs. 105-107.

tools available to leverage agencies' limited resources to maximum effect. And we'll look at examples of how states and municipalities can go the extra mile – beyond what the federal government has thus far done – to protect the workers in their jurisdictions.

## THE FEDERAL SCHEME UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

The OSH Act covers most private sector employers and workers in all 50 states, the District of Columbia, and the other U.S. jurisdictions (e.g., Puerto Rico, the Virgin Islands, American Samoa, etc.). The Act's worker safety and health mission is implemented and enforced either by the federal Occupational Safety and Health Administration (OSHA) or by individual states that choose to operate their own OSHA-approved job safety and health program, called a "State Plan."<sup>7</sup>

The Act's inclusion of the State Plan option represented a compromise, since states were already operating their own workplace safety programs – with highly varying degrees of effectiveness – and many Congresspersons insisted that those programs be allowed to continue. State Plans also would be funded in part by the states that adopted them, saving federal dollars.<sup>8</sup>

States that wish to operate their own State Plan need to apply to OSHA and must satisfy criteria that include: designating a state agency responsible for administering the plan, and describing its authority; assuring that standards adopted or developed will be at least as effective as federal OSHA's; providing for an enforcement program as least as effective as the federal one; assuring a right to enter and inspect workplaces, and assuring that no advance notice will be given; and assuring that sufficient qualified and trained personnel, and sufficient budget necessary for the administration and enforcement of the program, will be provided.<sup>9</sup>

Once OSHA approves a State Plan, it will provide as much as 50 percent of the funding for the state program. Of crucial importance is the requirement that State-run safety

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<sup>7</sup> State Plans are authorized by Section 18 of the OSH Act. [https://www.osha.gov/laws-regs/oshact/section\\_18](https://www.osha.gov/laws-regs/oshact/section_18).

<sup>8</sup> <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3432&context=lcp>.

<sup>9</sup> See Section 18 of the OSH Act; 29 C.F.R. Section 1902; The and "OSHA Instruction Directive Number CSP 01-00-005, State Plan Policies and Procedures Manual." [https://www.osha.gov/sites/default/files/enforcement/directives/CSP\\_01-00-005.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CSP_01-00-005.pdf).

and health programs must be “at least as effective” (ALAE) as the federal OSHA program in protecting workers and preventing injuries, illnesses, and death. It’s OSHA’s job to monitor the operations and performance of every approved State Plan, and to issue annual reports on each, through the Federal Annual Monitoring Evaluation (FAME) process. This process is used to: determine whether the State Plan is continuing to operate at least as effectively as OSHA; track a State Plan's progress in achieving its strategic and annual performance goals; and ensure that the State Plan is meeting its mandated responsibilities under the Act and its implementing regulations.

Significantly, federal OSHA does not cover state and local government (public sector) workers in the 50 states and the U.S. territories. However, states that have approved State Plans to protect private sector employees are obligated to cover public sector workers in their states as well. In addition, states in which federal OSHA has responsibility for enforcing the law as to private sector employers can apply for and obtain approval to run a State Plan for the benefit of their public sector workers, who might otherwise not be covered by mandated safety and health protections.<sup>10</sup>

### State Plan States

The following 22 states or territories have OSHA-approved State Plans that cover both private and state and local government workers: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

Currently, six additional states and one U.S. territory have OSHA-approved State Plans that cover public sector workers only: Connecticut, Illinois, Maine, Massachusetts,<sup>11</sup> New Jersey, New York, and the Virgin Islands.

To complete the coverage picture, the following states’ private sector workers are entitled to workplace safety and health protections, as enforced by federal OSHA,

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<sup>10</sup> See 29 C.F.R. Section 1956.

<sup>11</sup> On Aug. 18, 2022, Massachusetts became the sixth state to receive approval for its own OSHA plan that covers more than 430,000 state and local government employees.

but their public sector workers do their often-hazardous jobs without the benefit of federal OSHA oversight: Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia, and Wisconsin. Public sector workers in these states will generally receive state and/or municipal health and safety protections, but without any requirement that they be as effective as federal OSHA's.<sup>12</sup>

As is clear from the requirement that State Plans be “at least as effective” as federal OSHA, state programs can be more protective than federal OSHA's, but not less so. If a state fails to fulfill that obligation, federal OSHA's primary recourse is to revoke the state's OSHA State Plan approval, a course of action that requires an arduous rulemaking process, including public comment. Also, if effected, revocation would result in a greater workload for federal OSHA, and the elimination of public sector coverage in that state. Hence, it's a last-resort remedy OSHA has been reluctant to pursue, even when a state's implementation of its Plan appears to be falling short of the ALAE standard.<sup>13</sup>

A few final, crucial points about state enforcement of safety and health standards bear emphasizing. OSHA State Plans can adopt OSHA's entire roster of specific safety and health standards, and most do. Alternatively, they can adopt only some or none, so long as the standards they do adopt in their place are “at least as effective” in preventing injury, illness, and death as their OSHA counterparts. In stark contrast, in states where federal OSHA is the enforcer, states are precluded from tinkering with OSHA's standards or issuing new ones that cover the same hazards. However, even in states where federal OSHA is “the cop on the beat,” if no standard exists to address a particular workplace hazard, states are empowered to step into the breach and

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<sup>12</sup> In Ohio, for example, see the state's Public Employee Risk Reduction Program (PERRP), under the jurisdiction of the Ohio Bureau of Workers' Compensation, <https://info.bwc.ohio.gov/for-employers/safety-and-training/safety-consultations/perrp>; and the City of Columbus' Citywide Occupational Safety and Health Program (COSHP). <https://www.columbus.gov/hr/coshp/>.

<sup>13</sup> Arizona's and South Carolina's State Plans both came close to revocation, the former in 2022 when Arizona failed to adopt OSHA's COVID-19 emergency temporary standard for health care workers, and the latter during the Obama administration, when South Carolina announced it was going to eliminate its OSHA whistleblower program. In both cases revocation was avoided when the states agreed to amend their practices. See *Death on the Job* at FN 4, p. 71 and related citations.

regulate it. The importance of this “however” became particularly obvious when the Trump administration failed to issue a COVID-19 emergency temporary standard to help prevent the spread in the workplace of that deadly virus, and its importance continues today in the absence of OSHA-promulgated standards covering pressing dangers like heat exposure, workplace violence, and ergonomic hazards. More on all this in the sections ahead.

## TOOLS TO STRATEGICALLY LEVERAGE LIMITED SAFETY AND HEALTH ENFORCEMENT RESOURCES

We have already acknowledged the enormous number of workplaces in this country that are subject to federal, state, or local enforcement of safety and health requirements. Likewise, we recognize that the agencies charged with the solemn responsibility to ensure that workers in this country actually benefit from the protections the law promises – and get to come home safe and healthy after each day’s work – operate under severe resource limitations. Consequently, those resources need to be leveraged to provide the greatest possible compliance impact. And that’s where “strategic enforcement” enters the picture.

The discussion of “strategic enforcement,” as applied to workplace safety and health, begins with a refresher on what we mean by the term. A good working description is provided in the Labor Standards Enforcement Toolbox, [Tool 4: Introduction to Strategic Enforcement](#).<sup>14</sup>

“Strategic enforcement” refers to agencies being selective about where and how they use resources. Agencies prioritize and direct efforts to where the problems are largest, where workers are least likely to exercise their legal rights, and where the agency can impact industry-wide compliance. Proactive investigations are important, but strategic enforcement is broader than conducting directed investigations. It is about using limited resources in a manner that furthers the agency’s mission of promoting compliance with labor standards.

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[https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CIWO/2018\\_introductiontostrategiceenforcement.pdf](https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CIWO/2018_introductiontostrategiceenforcement.pdf) at p. 2.

The discussion at Tool 4 focuses on strategic enforcement of wage and hour laws, but its principles apply equally to workplace safety and health protections. Here are the Key Elements outlined in that paper:

- Identifying enforcement priorities;
- Conducting proactive investigations;
- Using all enforcement tools;
- Strategic outreach and communications;
- Resolutions that promote ongoing compliance;
- Building a culture of planning, evaluation, and review; and
- Partnering with community stakeholders and other agencies.<sup>15</sup>

We'll examine a number of these elements, with an eye toward maximizing the responsible agency's effectiveness in achieving its mandate to protect worker safety and health.

## 1. IDENTIFYING ENFORCEMENT PRIORITIES/CONDUCTING PROACTIVE INVESTIGATIONS (INSPECTIONS)

The ultimate goal of any worker protection enforcement agency – at the federal, state, or local level – is to obtain full compliance with the laws that agency is charged to enforce, at all establishments over which the agency has jurisdiction. Achieving that goal is inevitably elusive, if not impossible. Hence, it falls upon the agency to determine, with the resources it has, how it can have the greatest impact where it's needed most.

This determination involves a careful assessment of available data on what kinds of workplaces – in what industries, with what demographics – are the hazards the greatest, and most in need of enforcement attention. It includes identifying those industries' records that demonstrate the greatest risk of serious illness, injury, or death, and the kinds of jobs in which those recorded instances arose. It also includes consideration of new hazards not previously present, or

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<sup>15</sup> See also the list set out at pp. 3-4 in Tool 10, "[Managing for Strategic Enforcement: A Conceptual Toolkit](#)"

recognized, in the workplace – COVID-19 being perhaps the most obvious such example.

- **Recognizing Limitations on Strategic Targeting**

Agencies should maximize their use of targeted, proactive enforcement since it is central to any strategic program that aims to have the greatest impact where it's most needed. However, depending on the laws involved, an agency's ability to perform exclusively targeted, strategic enforcement may be limited by other investigative requirements. Under the OSH Act, for example, when OSHA receives a formal (written, signed) complaint from a current employee or the employee's representative, and OSHA has reason to believe the complaint describes conditions that may violate the Act, the agency is obligated by statute to conduct an inspection.<sup>16</sup> These represent between 20-25% of all OSHA inspections. Of these, complaints about "imminent danger" are the top agency priority.<sup>17</sup>

In addition, targeted, proactive enforcement (also known as "programmed inspections") may be limited by other inspection priorities set by regulation or internal policy. For example, in accordance with its Field Operations Manual (FOM),<sup>18</sup> OSHA's second inspection priority is, after receiving a mandatory report from an employer, to conduct investigations of fatalities and catastrophes (defined as three or more employees hospitalized in a single incident). Its third listed priority is to conduct inspections based on referrals from other federal, state, or local government agencies, or other sources, and to address formal complaints other than those alleging imminent danger. In 2022, complaints, fatality/catastrophes, and referrals (collectively referred to as "unprogrammed") represented 56% of all OSHA inspections. This left 44% of total inspections as "programmed" – that is, strategically selected. State Plan programs operate under similar constraints.

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<sup>16</sup> See Section 8(f)(1) of the OSH Act, 29 U.S.C. section 657(f)(1).

<sup>17</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-00-163.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf).

<sup>18</sup> The FOM is a reference document for field personnel, providing enforcement policies and procedures in conducting OSHA investigations. <https://www.osha.gov/fom/chapter-1>.

- **Setting Strategic Priorities**

State and local safety and health enforcement agencies should reassess their enforcement priorities from year to year as industry targets, and the conditions they present, change. Similar assessments are made by federal OSHA, as it determines what to focus its “programmed” resources on. In particular, OSHA periodically adopts National Emphasis Programs (NEPs) that are country-wide in scope. For example, in July, 2023, OSHA announced a NEP targeting Warehousing and Distribution Center Operations.<sup>19</sup> In May, 2023, OSHA rolled out a NEP on Falls.<sup>20</sup> And effective April, 2022, OSHA initiated a NEP focused on Outdoor and Indoor Heat-Related Hazards.<sup>21</sup>

It’s important to note that NEPs apply not only to states under federal OSHA jurisdiction, but also to State Plan states. In other words, federal OSHA has determined that these strategic priorities are important enough that for a State Plan to qualify as ALAE, it must adopt the NEP, or a program of its own that targets the industry and/or hazards identified in the NEP and that is at least as effective as OSHA’s.<sup>22</sup>

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<sup>19</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_03-00-026.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-026.pdf) “All inspections under this NEP will focus on workplace hazards common to the above industries including, but not limited to, powered industrial vehicle operations, material handling/storage, walking-working surfaces, means of egress, and fire protection. Heat and ergonomic hazards shall be considered during all inspections covered by this NEP and a health inspection shall be conducted if OSHA learns that heat and/or ergonomic hazards are present.” The NEP notes that “[t]he Bureau of Labor Statistics (BLS) history shows that injury and illness rates for these establishments are significantly higher than for other establishments.”

<sup>20</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_03-00-025.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-025.pdf) This instruction provides guidance to Occupational Safety and Health Administration’s (OSHA) National, Regional, Area, and State Plan offices for implementation of an OSHA National Emphasis Program (NEP) to reduce or eliminate workplace fall hazards associated with working at heights. Considering that falls remain the leading cause of fatalities and serious injuries in all industries, the agency has determined that an increase in enforcement and outreach activities is warranted.

<sup>21</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_03-00-024.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf) The NEP’s purpose is “to identify and eliminate or reduce worker exposures to occupational heat-related illnesses and injuries in general industry, construction, maritime, and agriculture. It targets specific industries expected to have the highest exposures to heat-related hazards and resulting illnesses and deaths.”

<sup>22</sup> For example, in the NEP targeting Warehouses and Distribution Centers, OSHA declares: “Due to the seriousness of the hazards associated with these facilities and the prevalence of these hazards

In addition to targeting national enforcement priorities through NEPs, OSHA also commits enforcement resources aimed at addressing hazards or industries that pose particular risks to workers at the local or regional level. These Local Emphasis Programs (LEPs) may be implemented by a single OSHA area office, or at the Regional level, in which case they apply to all federal OSHA area offices within the Region.

## Example: Local Emphasis Program

A recent example of an LEP is one dated June 1, 2023, targeting the Seafood Processing Industry in Region I (covering the six new England states, with Vermont operating its own state Plan). Five OSHA area offices where seafood processing plants operate are included in the LEP (two in Maine, two in Massachusetts, and one in Rhode Island).

In its Background section<sup>23</sup>, the LEP references the Department of Labor’s FY 2022 – 2026 Strategic Plan which requires OSHA to “secure safe and healthy workplaces, particularly in high-risk industries,” and notes that the seafood processing industry meets that definition on account of “its injury and illness statistics and the serious safety hazards, such as amputation hazards, that exist within these facilities.” Also significant is the LEP’s recognition that “[t]he seafood processing industry frequently utilizes temporary employees, many of whom do not use English as their primary language,” and stipulates that “[i]f temporary workers are present or utilized at the establishment, the compliance officer shall obtain all the necessary documentation and information required to evaluate the safety and health program relating to temporary workers and determine compliance with OSHA regulations in providing a safe and healthful workplace for these workers.”<sup>24</sup>

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nationwide, State Plans are required to participate in this NEP. State Plans have the option of adopting an identical or different emphasis program, but the program must be at least as effective as this directive.”

<sup>23</sup> <https://www.osha.gov/sites/default/files/enforcement/directives/cpl-04-00-026.pdf> In the LEP’s “Purpose” section, it notes that seafood processing activities “involve exposures to hazards that are among OSHA’s strategic emphasis areas, amputations, falls, struck-by, and crushed-by.”

State Plan states in a Region where a Regional LEP (aka REP) is in effect aren't included in its mandate, but have the option of adopting the REP or devising one that is, again, at least as effective as the federal OSHA program. Moreover, and quite importantly, State Plan states can develop their own LEPs, designed to strategically address particular hazards and/or industries demanding enforcement attention within their state borders.<sup>25</sup>

## 2. USING ALL ENFORCEMENT TOOLS

To maximize their impact on compliance, worker safety and health protection agencies need to use, and leverage, all the enforcement powers at their disposal in a thoughtful, strategic way. But too often, this simply doesn't happen. Sometimes, that's because certain tools, and only those tools, are used because "that's the way it's always been done" – even if other tools might actually be far more effective. Indeed, sometimes these other unused tools aren't even recognized as available, and powerful. In this section, we'll examine a few significant enforcement methods, that may be unfamiliar, underutilized, or both.

- **Enterprise-Wide Enforcement**

When inspecting a multi-establishment business, seeking, and requiring, correction of hazards found at one location and present at all the others seems like an obvious enforcement approach. Unfortunately, that often doesn't

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<sup>24</sup> These characteristics of the seafood processing industry also reflect a targeting process that recognizes that immigrant and temporary workers are among those most likely to be working in hazardous occupations, but also least likely to file complaints.

<sup>25</sup> A good example is Oregon OSHA's LEP targeting pesticide exposures, originally issued by Directive in 2000, and updated most recently in 2018. Its purpose is "to establish methods the enforcement staff will use to provide effective, efficient and consistent enforcement inspections in the variety of occupational sites where pesticides are made, used, and stored. Pesticides are of concern in agriculture due to the large numbers of potentially exposed farm workers." <https://osha.oregon.gov/OSHArules/pd/pd-235.pdf>.

happen. Below, we'll take a look at why, and how, the multiplicative impact of enterprise-wide enforcement can and should be deployed.

Historically, OSHA inspections were conducted on a worksite-by-worksite basis, one at a time. The inspection focused on conditions at the site, and if violations were found, abatement of the hazards at that location would be required. What this approach missed was that many businesses, both large and relatively small, operate in the same way and with the same workplace hazards, at more than one location, sometimes even at hundreds of locations. Obtaining abatement of the same hazards at multiple locations by inspecting one establishment at a time could easily sap the agency's resources. Hence, known or suspected hazards at uninspected locations went unaddressed, and workers remained exposed.

Early in the Obama administration, the U.S. Labor Department took a close look at this problem. It wasn't automatically clear that the OSH Act would permit OSHA to require "enterprise-wide" abatement of hazards at multiple locations, without inspecting them individually.<sup>26</sup> But a careful reading of the statute indicated that in a contested case, the Occupational Safety and Health Review Commission (the adjudicating body that handles appeals of OSHA administrative law judge decisions) can "direct[ ] other appropriate relief," and OSHA's lawyers determined that relief could include an order requiring abatement at all of a company's locations where hazards could be shown to be present, without inspections of each location.

The first test case was filed in the New England Region, against the U.S. Postal Service, alleging that employees were instructed to operate under unsafe procedures for handling equipment presenting electrical hazards at its 200 or so processing and distribution facilities around the country, following inspection that found the same unsafe practices – standardized in a procedures handbook – at 42 postal service facilities.<sup>27</sup> Other cases seeking enterprise-wide abatement

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<sup>26</sup> Prior to this time, consented-to corporate-wide settlement agreements ("CSA's") were occasionally entered into, often at the employer's request, to provide time for the employer to correct the same hazards appearing at multiple worksites.

<sup>27</sup> <https://www.dol.gov/newsroom/releases/osha/osha20130701>

followed,<sup>28</sup> and in each the companies ultimately agreed to remedy the identified hazards present at their many locations. These have variously included requirements to: develop and implement a safety and health program for all employees company-wide, and place guardrails on identical elevated storage areas in more than 60 supermarkets (following inspections at a handful of stores);<sup>29</sup> develop and enforce hydraulic lift inspection programs that had been found lacking due to inadequate corporate-wide policies at more than 800 muffler company locations (following inspection at only one location);<sup>30</sup> inspect and repair defective forklifts at over 100 warehouses of a national trucking company operating in 26 states;<sup>31</sup> develop and implement safety and health programs to protect against workplace violence at a series of private mental health facilities (following an investigation at a single facility, that disclosed the same deficiencies at other facilities);<sup>32</sup> correct blocked egress at hundreds of Dollar Stores nationwide;<sup>33</sup> and require a multi-state temporary staffing agency to develop and implement safety and health programs with each “host” company it contracts with, to ensure that the companies using the temp workers are properly protecting their safety and health.<sup>34</sup>

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<sup>28</sup> <https://www.osha.gov/news/newsreleases/region1/12232015> In the case cited in this press release, an OSHA administrative law judge addressed whether the Labor Department’s demand for enterprise-wide relief was cognizable under the OSH Act. She ruled in the Department’s favor. OSHA’s Regional Administrator remarked: “When an employer has hazards occurring at multiple locations, common sense and reasonable worker protection law enforcement both dictate that the employer take corrective action to safeguard the health and well-being of employees at all its worksites.”

<sup>29</sup> <https://www.osha.gov/news/newsreleases/region1/05072012>

<sup>30</sup> <https://www.osha.gov/news/newsreleases/region1/08242012>; “What’s important about this agreement is its multiplier effect,” said Marthe Kent, OSHA’s regional administrator in Boston. “It will enhance safety for Monro employees at service centers in multiple states. That means safer working conditions for thousands of workers at hundreds of workplaces.”

<sup>31</sup> <https://www.osha.gov/news/newsreleases/region1/12072016>

<sup>32</sup> <https://www.osha.gov/news/newsreleases/region1/08132013>

<sup>33</sup> <https://www.osha.gov/news/newsreleases/national/12102015>

<sup>34</sup> <https://www.osha.gov/news/newsreleases/region1/06162015> As noted in the Department of Labor’s press release: “This settlement ripples beyond this one case. It is designed to enhance safety and health for hundreds of [company] employees at numerous work sites in several states. Other suppliers and employers of temporary workers can and should take heed and ensure that all employees - permanent, short-term or day laborer - work in an environment that enables them to come home each day safe and healthy.”

Inspections designed to ferret out enterprise-wide violations would include the inquiry into whether the company operates other establishments with operations that are similar or identical to those in the inspected workplace. If yes, and if it's established that significant unabated hazards at the inspected establishment are also present at other locations, the matter is likely suitable for enterprise-wide enforcement. California has explicitly recognized this approach through legislation.<sup>35</sup> Enterprise-wide enforcement would generally include seeking an order requiring abatement at every location at which the same or similar hazards are present.<sup>36</sup>

**It's essential to recognize that in cases where abatement has been ordered at multiple locations, sometimes numbering in the hundreds, follow-up inspections to determine whether or not abatement has been accomplished within the required timeframe are going to be necessary. Clearly, where many worksites are involved, it won't be possible to do follow-ups at every one. One approach is to randomly sample a small number of locations. If they're all found to be in compliance, it's reasonable to assume the employer is taking appropriate action to address the problem systemically. If the small sample reveals non-compliance at one or more sites, on the other hand, inspections at additional locations may be warranted. If they show a pattern of non-abatement, stiff additional penalties and other legal response is likely called for. Agreements requiring independent parties to monitor abatement, and/or self-audits reporting back to the agency, can also be deployed.**

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<sup>35</sup> It's noteworthy that California's SB 606, a law effective as of January 1, 2022 "creates a rebuttable presumption that a violation committed by an employer that has multiple worksites is enterprise-wide if the employer has a written policy or procedure that violates these provisions, except as specified, or the division has evidence of a pattern or practice of the same violation committed by that employer involving more than one of the employer's worksites." The law also authorizes Cal/OSHA to issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut the presumption. [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220SB606](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB606)

<sup>36</sup> Regarding ongoing inspections of conditions at Amazon warehouses around the country, as reported by the [Seattle Times](#): "Though OSHA inspected just six Amazon facilities, workplace safety advocates expect regulators could find similar processes at warehouses across the country. Amazon is consistent in the systems it deploys to make sure customers get packages quickly, meaning associates at different facilities are likely working under the same conditions, advocates say."

Federal OSHA has recently updated its directive entitled “Guidelines for Administering Corporate-Wide Settlement Agreements.”<sup>37</sup> While the directive emphasizes the strategic importance of this approach – including seeking enterprise-wide abatement through litigation where merited – it encourages, but doesn’t require, State Plans to adopt it. The directive is well worth reviewing, and its adoption, or adoption of a yet more effective program for addressing significant enterprise-wide violations, is recommended.

- **Meaningful Penalty Amounts**

Penalties are an important tool for deterrence of violations, but only if they’re substantial enough to cause any given employer to take notice and amend its behavior. Insignificant penalty amounts levied by government agencies, not surprisingly, generate insufficient compliance results.

Federal OSHA penalties are set by statute, and have long been criticized for being too low to serve as a viable deterrent, especially for larger companies. Part of the reason is that they were rarely updated, following the Act’s passage in 1970, to account for inflation. That changed in 2015, when the Federal Civil Penalties Inflation Adjustment Improvements Act authorized OSHA to raise maximum penalties by about 80% -- reflecting the inflation rate since OSHA last increased penalties in 1990 – and to regularly update penalties to account for future inflation. Under the latest adjustment, effective January 14, 2023, the maximum penalty for serious violations increased to \$15,625, and for willful and repeat violations to \$156,259.

State Plans also are required to raise their statutory maximum penalties to be at least as effective as the federal OSHA program, but compliance by states that cover private sector workers has been spotty. As of January 30, 2023, only 12 of 24 state OSHA plans had adopted increased penalties for 2022, consistent with the regular updates

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<sup>37</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-00-167.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-167.pdf)

the federal law requires: Alaska, Arizona, California, Hawaii, Iowa, North Carolina, Nevada, New Mexico<sup>38</sup>, Oregon, Vermont, Washington and Wyoming.<sup>39</sup>

Also significant is the disparity between the average penalties assessed by federal OSHA and State Plan OSHAs. In FY 2022, the average penalty for a serious violation under federal OSHA was \$4,354, compared with an average penalty for state OSHA plans of \$2,221. Similarly, federal OSHA's average penalty per willful violation in FY 2022 was \$68,062; the average for state-run OSHA plans was \$39,573.

The fact that federal OSHA's assessed penalties are close, on average, to double those of the states, raises serious questions about whether the "at least as effective" standard is being met. As an important deterrence tool, penalties need to be systematically assessed, and substantial enough to induce employer compliance. State Plans need, at a minimum, to keep up with federal OSHA's penalty schedules. And from a strategic enforcement standpoint, states that apply penalties higher than the minimum mandated to keep pace with the federal program are likely to be that much more effective in protecting their workers.

- **Instance-by-Instance Citations**

Another powerful tool State Plan states should be deploying are instance-by-instance citations.

In 1990, OSHA implemented a policy<sup>40</sup> that provided for citing and fining employers for violations on an instance-by-instance basis, rather than grouping like instances of non-compliance into a single violation, fined once. Separate violations could be cited, for example, for each employee overexposed to asbestos, because the applicable standard "prohibits exposure of *any employee* to airborne concentration of asbestos in excess of [a specific amount]." (emphasis added) Likewise, for every employee not properly trained in safety and health, since the applicable standard requires that "each employee" be trained. In contrast, the standard that requires a point-of-operation

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<sup>38</sup> See, e.g., the adjustment of New Mexico's penalties, as reflected in its Field Operations manual.

[https://www.env.nm.gov/occupational\\_health\\_safety/wp-content/uploads/sites/12/2022/04/FOM6ApA22.pdf](https://www.env.nm.gov/occupational_health_safety/wp-content/uploads/sites/12/2022/04/FOM6ApA22.pdf).

<sup>39</sup> <https://www.osha.gov/stateplans/adoption/standards/2022-01-14>.

<sup>40</sup> <https://www.osha.gov/enforcement/directives/cpl-02-00-080>.

guard for a mechanical power press would allow separate citations for each press improperly guarded, but not for each employee exposed to an unguarded press.

The violations had to justify a “willful”<sup>41</sup> classification, and had to satisfy at least one of the following criteria:

- The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
- The violations resulted in persistently high rates of worker injuries or illnesses.
- The employer has an extensive history of prior violations of the Act.
- The employer has intentionally disregarded its safety and health responsibilities.
- The employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act.
- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

As the above list indicates, this policy of assessing multiplied penalties for what are known as “egregious willful” violations, targets employers who have grossly failed in their duty to protect their workers from harm at the workplace. While not frequently deployed historically, when used its impact is notable. For example, in a recent case in West Virginia,<sup>42</sup> a recidivist Ohio roofing company with a long history of fall protection violations was assessed six penalties of \$145,000 each, for each of six workers for whom fall protection on a steep roof wasn’t provided. Total penalties resulting from the inspection, that found other violations as well, were over \$1 million.

Among other state enforcement agencies, Washington’s Department of Labor and Industries has vigorously utilized this impact-leveraging tool. In a 2019 case, following a history of inspections over several years that repeatedly found serious lockout/tagout and machine guarding violations, accompanied by a record of serious injuries and amputations, Washington LNI fined a dairy and bottling distribution operation almost

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<sup>41</sup> A “willful” violation is defined as a violation in which the employer either knowingly failed to comply with a legal requirement (purposeful disregard) or acted with plain indifference to employee safety.

<sup>42</sup>

<https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/09/OSHA20221965Charm%20Builders.pdf>.

\$2 million for 22 willful violations.<sup>43</sup> Sixteen of those were deemed “egregious” – owing to the company’s continued failure to adopt known and required safe practices – with separate citations for each employee exposed to amputation/crushing hazards.<sup>44</sup>

### *An Important Recent Development*

An OSHA Enforcement Memo dated January 26, 2023,<sup>45</sup> addressed to OSHA Regional Administrators and State Plan Designees, expands the application of instance-by-instance citations, with the goal of “incentiviz[ing] employers to proactively prevent workplace fatalities and injuries and provide OSHA another tool to use on its mission to ensure safe and healthful working conditions for America’s workforce.” Significantly, the policy is no longer limited to “willful” violations, but now extends to high-gravity serious violations involving falls, trenching, machine guarding, respiratory protection, permit required confined space, lockout tagout, and other-than-serious recordkeeping violations. Deployment of the new policy should be considered when one or more of the following criteria are at play:

- The employer has received a willful, repeat, or failure to abate violation within the past five years;
- The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39;
- The proposed citations are related to a fatality/catastrophe; or
- The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.

And, once again, State Plan states are encouraged to create an even more inclusive set of criteria for when instance-by-instance citation is appropriate, consistent with the mandate that they be *at least as effective* as federal OSHA.

## • Holding All Responsible Parties Accountable

### Pursuing Legal Liability up the Chain

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<sup>43</sup> <https://www.lni.wa.gov/news-events/article/19-023/>.

<sup>44</sup> And, a more recent Washington DLI series of egregious willful violations cited against three roofing companies: <https://lni.wa.gov/news-events/article/22-01>.

<sup>45</sup> <https://www.osha.gov/memos/2023-01-26/application-of-instance-by-instance-penalty-adjustments>.

As former U.S. Department of Labor Wage and Hour Administrator David Weil cogently describes in this groundbreaking book, “The Fissured Workplace,”<sup>46</sup> the employment relationship in the United States has significantly fractured, such that companies that previously employed workers to perform various necessary tasks have now outsourced that work to, among other entities, subcontractors, franchisees, and workers misclassified as independent contractors. This outsourcing often results in a bidding war among subcontractors, and, effectively, a race to the bottom where the low-bid subcontractor gets the job. The result, too often, is that these subcontractors operate on so slim a profit margin that they cut corners, frequently in the form of subminimum wages and sub-standard health and safety conditions.

There are legal tools, however, that enable worker protection agencies to assert responsibility up the contracting chain, to parties who on paper aren’t the workers’ employer and thus claim to have none of the obligations that come with employer status. State Plan states should consider casting a wider net of responsibility when a good legal argument can be made in support of it -- focused on such factors as the economic realities of the relationship between the company and its subcontractors, and the actual or right to control the conditions under which the work is performed – agencies can expand the number of parties obligated to ensure a safe workplace, including those with greater financial wherewithal to do so. Let’s look at a few examples.

- In one case, three roofing workers fell several flights when a clearly deficient scaffolding plank broke under their weight. They had been hired by another roofer who worked for a building contractor. The contractor claimed the roofer was an independent contractor, and that he wasn’t responsible for the OSHA violation that was cited. But the OSHA inspectors had been trained to look at the factors that might indicate the higher-level contractor was responsible too. Because the building contractor actually controlled so many aspects of the “sub-contractor” roofer’s operations, OSHA held him responsible along with the subcontractor. OSHA’s lawyers concurred, tried the case, and made new law when the First Circuit Court of Appeals agreed with OSHA that its “single employer” theory applied on

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<sup>46</sup> <https://www.hup.harvard.edu/catalog.php?isbn=9780674975446&content=reviews>

these facts. This was a strategic enforcement victory that set an important precedent for similar cases.<sup>47</sup>

- In another case, a national behavioral health care management company and a psychiatric health care facility were separately incorporated but were both owned by a large parent health care corporation. OSHA cited the management company as a “single employer” along with the separately incorporated psychiatric hospital. The case involved “general duty” clause citations for failures to take appropriate steps to curb patient-on-staff violence, violations that OSHA classified as “repeated” because similar unabated hazards had been previously cited at other separately-incorporated facilities under management of the national company. The case was hard-fought, with the management company claiming it bore no liability, but a panel of the First Circuit affirmed<sup>48</sup> the Occupational Health and Safety Review Commission’s<sup>49</sup> decision that held the national company responsible, along with the hospital itself, for the violations.

### **Multi-Employer Citation Policy**

Another strategic tool that State Plan states should consider and deploy when applicable is OSHA’s longstanding Multi-Employer Citation Policy. We know that any employer that exposes one of its employees to the hazards created by an unsafe condition may be subject to an OSHA citation. But on any worksite with more than one employer (most commonly construction worksites, but not limited to them), employers who didn’t expose any of their own employees to the hazard may still be cited.<sup>50</sup> An employer who is responsible for having “created” the hazard, is responsible for “correcting” the hazard, but also an employer who has general “controlling” supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them, may also be charged with committing a violation.

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<sup>47</sup> <https://www.osha.gov/news/newsreleases/region1/04242017>

<sup>48</sup> <https://law.justia.com/cases/federal/appellate-courts/ca3/22-1845/22-1845-2023-05-04.html>

<sup>49</sup>

[https://www.oshrc.gov/assets/1/18/UHS\\_of\\_Westwood\\_Pembroke\\_Inc.\\_and\\_UHS\\_of\\_Delaware\\_Inc.\\_17-0737\\_Commission\\_and\\_ALJ\\_Decisions\\_030322\\_signed.pdf?11913](https://www.oshrc.gov/assets/1/18/UHS_of_Westwood_Pembroke_Inc._and_UHS_of_Delaware_Inc._17-0737_Commission_and_ALJ_Decisions_030322_signed.pdf?11913)

<sup>50</sup> Multi-Employer Citation Policy, CPL 2-0.124, found at <https://www.osha.gov/enforcement/directives/cpl-02-00-124>

Under the policy, employers who fall within these different categories have different types and degrees of obligation with respect to the hazard at play. The directive itself (see footnote 50) spells these out in detail. State Plan states should review and consider applying the directive where relevant.

The recent resolution of a significant federal OSHA matter arising in Patterson, New Jersey highlights the importance of holding multiple employers responsible for safety and health violations:

In April, 2022, the local power company alerted OSHA that workers constructing a five-story apartment building were too close to nearby power lines. When OSHA inspectors arrived, they found employees working from a metal scaffold erected five feet from high-voltage power lines, creating a clear risk of electrocution.

OSHA informed the project's developer which was also serving as the general contractor, as well as a carpentry contractor and a stucco contractor, that the work had to stop, and posted an Imminent Danger Notice in English and Spanish, warning workers at the site about the extreme danger. The Regional Solicitor's Office then obtained a consented-to court order that allowed the work to resume as long as workers remained 11 feet away from the power lines. Willful citations were issued.

A few weeks later, OSHA found that work had once again been performed dangerously close to the power lines, resulting in the company agreeing to another court order, this one requiring third-party monitoring and physical barriers to ensure that workers would be kept safe.

All three companies were issued additional citations asserting willful violations. The development company that had the authority to control the worksite and could ensure that the other contractors' employees weren't exposed to the electrocution hazard, was issued the highest fines.<sup>51</sup>

OSHA recently resolved the citations issued to the developer by means of a settlement agreement. It affirms the citations issued for the company's failures

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<sup>51</sup> <https://www.osha.gov/news/newsreleases/region2/10182022>

to protect workers, along with \$180,000 in penalties. Significantly, the company is also required to:

- Create a written safety plan and then submit the plan to OSHA.
- Retain a qualified safety professional to complete a job hazard analysis for all existing and future worksites.
- Inform OSHA of all its current and future worksites.
- Implement a subcontractor management plan, including a requirement that onsite managers of subcontractors complete 30-hour OSHA training and onsite employees of subcontractors complete 10-hour OSHA training.<sup>52</sup>

In this case, OSHA might have only cited the contractors whose employees were directly exposed to the electrocution hazard. By citing the controlling employer – the development company – and by obtaining enhanced abatement designed to significantly improve safety practices on all future worksites overseen by the company, OSHA leveraged its resources and obtained a strategic victory.

### Temp Worker Initiative

Where temporary workers are involved, State Plan states, like federal OSHA, should recognize that both staffing agencies and host employers are jointly responsible for compliance with safety and health obligations. Studies have shown that new workers are at greatly increased risk for work-related injury, and most “temporary workers” – those hired and paid by a staffing agency and supplied to a host employer to perform work on a temporary basis – will be “new” workers multiple times a year. As the American economy and traditional employment relationships continue to “fissure,” the use of temporary workers is increasing in many sectors of the economy,<sup>53</sup> which implies an increasing risk to worker safety and health overall.

Temporary workers – many of them immigrants without proper work authorization or otherwise vulnerable workers – get placed in a variety of jobs, including the most

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<sup>52</sup> <https://www.osha.gov/news/newsreleases/region2/10032023>

<sup>53</sup> <https://www.nelp.org/publication/lasting-solutions-americas-temporary-workers/>

hazardous. They're more susceptible to workplace safety and health hazards and retaliation than workers in traditional employment relationships. They often aren't provided adequate safety and health training or explanations of their duties by either the temporary staffing agency or the host employer. But under federal law, they're entitled to the same protections as every other worker in this country.

Recognizing the need to address these particular compliance/enforcement challenges, more than ten years ago OSHA launched its Temporary Worker Initiative.<sup>54</sup> A central feature of the Initiative was its acknowledgement that as a general rule, the staffing agency and the host company will be "joint employers" of these workers,<sup>55</sup> each having responsibility for protecting their safety and health on the job.

While the extent of responsibility of staffing agencies and host employers will depend on the specific facts of each case, staffing agencies and host employers are jointly responsible for maintaining a safe work environment for temporary workers – including, for example, ensuring that OSHA's training, hazard communication, and recordkeeping requirements are fulfilled.

From an enforcement perspective, OSHA, and State Plan states, can hold both the host and the agency responsible for violative conditions. Because temporary staffing agencies and host employers share control over the worker, they're jointly responsible for temporary workers' safety and health.

OSHA's public-facing materials<sup>56</sup> make clear that each employer should consider the hazards it's in a position to prevent and correct. In the training sphere, for example, staffing agencies could provide general safety and health training, while host employers would provide specific training tailored to the hazards presented by a particular piece of workplace equipment the worker will be exposed to.

Staffing agencies don't need to become experts on specific workplace hazards at the host's site, but they do need to determine what conditions exist at the host agency, what hazards those conditions present, and how best to ensure that the workers they're

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<sup>54</sup> <https://www.osha.gov/memos/2014-07-15/policy-background-temporary-worker-initiative>

<sup>55</sup> For example, the staffing agency often controls a worker's paycheck and selects the host employer location where the worker will be sent. The host employer, in turn, assigns the particular work to be done each day and controls operations in the physical workplace.

<sup>56</sup> <https://www.osha.gov/temporaryworkers>

sending to that site are protected, as the law requires. Says OSHA: “The staffing agency has the duty to inquire and verify that the host has fulfilled its responsibilities for a safe workplace.” And the host is required to fulfill those responsibilities to its permanent and temporary employees equally.

It’s worth applauding that in August 2023, Illinois Governor J.B. Pritzker signed HB 2862, which amends that state’s Day and Labor Services Act, into law, providing explicit state protections for temp workers.<sup>57</sup>

Ensuring that both the staffing agency and the host are meeting their safety and health obligations to their temporary workers, as the number of those workers continues to soar,<sup>58</sup> is a strategic enforcement imperative.

### **Seeking Immediate Abatement when Appropriate**

Sometimes, workplace conditions are so hazardous that agencies need to step in to secure immediate abatement. Such a situation, referred to as an “imminent danger” in Section 13(a) of the OSH Act, involves a condition or practice “which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” Addressing these conditions is generally the first priority of the safety and health agency. If the agency determines that an imminent

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<sup>57</sup> Under the amendment, before a staffing agency assigns a temporary worker, it must “inquire about the client company’s safety and health practices and hazards” at the work site where the temporary worker will be assigned so as “to assess the safety conditions, workers’ tasks, and the client company’s safety program.” Staffing agencies are also required to provide general workplace safety training, including information on how to report workplace safety concerns and the hotline number for reporting safety hazards to the Illinois Department of Labor, before assigning temporary employees to work sites. Client companies, meanwhile, need to document and inform staffing agencies of any anticipated job hazards; review staffing agencies’ safety trainings to ensure they address hazards that exist in client companies’ industries; develop and provide specific training tailored to the client companies’ industries; and track trainings to ensure they’re provided in a timely fashion. <https://labor.illinois.gov/laws-rules/fls/day-temporary-labor.html>; <https://www.perkinscoie.com/en/news-insights/illinois-expands-rights-and-remedies-for-temporary-workers.html>

<sup>58</sup> <https://www.nelp.org/publication/lasting-solutions-americas-temporary-workers/>

danger is present at the worksite, it will instruct the employer to remove the workers from exposure to the hazard and/or eliminate the hazard. If the employer fails to comply, the agency can and should seek a court order requiring compliance.<sup>59</sup>

A “garden variety” imminent danger might be a worker in a trench 10 feet deep, with no sloping or shoring of the sides, and in unstable soil. That worker needs to be removed from the trench immediately, and should only return when adequately protected from a potential cave-in. This is the type of danger that can “reasonably be expected to cause death or serious physical harm immediately.” The same can be said, for unprotected exposure to deadly or highly carcinogenic gases. In these kinds of cases, if the employer refuses to abate the condition and remove the workers until it’s fixed, the agency should seek, and will likely obtain, a court order even before any citation is issued.

But the OSH Act, and the many state plan statutes that echo it, also provides an additional important tool that has thus far been underutilized, to the detriment of worker safety and health. It’s the part of the imminent danger definition (the second prong) that addresses conditions “which could reasonably be expected to cause death or serious physical harm” not “immediately,” but “before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

This provision is reasonably interpreted to apply, for example, to hazardous conditions that might not be likely to cause death or serious physical harm “immediately” – warranting a pre-citation court order as described above – but could reasonably be expected to cause such a result if not abated for an extended period of time, during which workers continue to be exposed. This circumstance isn’t merely hypothetical. In fact, under the law, when OSHA issues a citation for such a hazard, and the employer contests the citation, the employer isn’t obligated to address the hazardous condition until they receive a final order to do so. Obtaining a final order “through the enforcement procedures otherwise provided by this Act” can take years, as the matter wends its way through the adjudicative process.

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<sup>59</sup> OSHA describes the conditions constituting an “imminent danger” on its website:

<https://www.osha.gov/workers/danger>

It's appropriate to assert that workers shouldn't be exposed to a hazard that, while perhaps not likely to cause death or serious physical harm immediately, is likely to eventually cause such harm over a period of months or years. The second prong of section 13 provides the statutory basis for going to court to get an order abating such a hazard, even while the violation is under contest. It's a tool well worth considering.

## State Plan State Example

The state of Washington has by statute adopted a slightly different system for addressing serious hazards that have been cited as violations but are under contest.<sup>60</sup> Once Washington's Department of Labor and Industries (LNI) identifies a potential serious or willful violation, it issues a citation and requires abatement of the hazard. If the employer disputes the violation, there is an expedited process for the employer to apply for a stay of abatement. The statute provides that a stay is to be granted where the department "cannot determine that the preliminary evidence shows a substantial probability of death or serious physical harm to workers." As the U.S. District Court for the Western District of Washington put it: "This process gives employers an opportunity to stay any required abatement until the case is heard on the merits, as long as there is not a risk that such a stay will potentially create harmful situations for workers."<sup>61</sup> The statute also includes a notice requirement that "ensures those affected most, employees, have the opportunity to be heard. And it is built into the expedited process to ensure worker safety is accomplished and is not a drawn-out process."

The case quoted above stems from Washington's Division of Occupational Safety and Health's March 2022 citation against Amazon's fulfillment center in the town of Kent, for exposing the facility's 2,600 workers to muscle, joint, and other ergonomic injuries. Amazon had challenged the Division's order that the hazards be abated even while Amazon's appeal of the citations was pending. The order to abate was upheld. Joel Sacks, director of Washington's LNI, welcoming the ruling, said: The "decision upholds an important Washington State law that says, unless they are granted a stay, employers have to fix the hazards that put their workers at risk even while they appeal the underlying citation." <sup>62</sup>

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<sup>60</sup> <https://app.leg.wa.gov/rcw/default.aspx?cite=49.17.140>

<sup>61</sup> <https://casetext.com/case/amazoncom-servs-v-sacks>

<sup>62</sup> <https://www.spokesman.com/stories/2023/mar/16/seattle-court-to-amazon-time-to-improve-safety-at-/>

## Holding Individual Bad Actors Civilly Responsible

The goal of strategic enforcement is to enhance compliance by making clear to the regulated community that violators of worker protection laws will be held accountable, and in a meaningful way. That means that labor agencies need to ensure that recidivist violators, especially, face serious consequences for flouting laws the agencies are charged with enforcing. Sometimes, this requires that agencies (and their lawyers!) go the extra mile to make that point. A few examples follow.

- **Civil Contempt** - A roofing company in Maine was cited by OSHA for fall hazards multiple times over several years. The company owner refused to correct the cited violations and pay \$405,000 in fines and interest, even after the Labor Department obtained an order in U.S. District Court. Hence, the Labor Department took the unusual step of petitioning the U.S. Court of Appeals to hold the owner in civil contempt for defying the district court order. The Court of Appeals entered a judgment finding the owner in contempt of the district court order, and required him to submit proof of correction for the cited hazards and pay \$405,485 plus interest and fees to OSHA within 20 days. His failure to comply, the court said, would result in additional sanctions, including potential imprisonment.<sup>63</sup>
- **Piercing the Corporate Veil** - In another case involving a scofflaw roofing employer in Maine with a history of violations, an unprotected worker fell to his death. Five days later – as well as in an additional inspection several months afterwards – OSHA found the same kinds of exposures to fall hazards. The agency issued citations for instance-by-instance egregious willful violations, and fined the employer more than \$1.5 million. Because the individual who ran the roofing corporation had often asserted that he wouldn't pay OSHA penalties and would just dissolve his company, the agency asked the administrative law judge presiding over the case to pierce the corporate veil and hold the company

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<sup>63</sup> <https://www.dol.gov/newsroom/releases/osha/osha20150827-1>

owner liable as an individual.<sup>64</sup> The judge found that because "the OSH Act places little importance on the organizational nature of an employer, it is appropriate to pierce the corporate veil to achieve the purpose of the OSH Act." The employer was held individually responsible to pay the full assessed penalties.<sup>65</sup> He is currently appealing, but the case sends the unmistakable message that the agency will use whatever tools are available to ensure that this employer, and all employers, take seriously their legal obligation to protect their workers from harm.

- **License Revocation** – A licensed construction supervisor and owner of a construction company based in Lynn, Massachusetts had a history of OSHA violations – including multiple fall protection violations – dating back to 2014, and unpaid fines totaling more than \$300,000. While OSHA hadn't abandoned efforts to collect the overdue fines, it was primarily concerned about the contractor's apparently continuing unwillingness to properly safeguard his workers. Hence, it filed a complaint with the Massachusetts Board of Building Regulations and Standards, seeking to hold him accountable for failing to meet their required standards, including compliance with the OSH Act. The Board held a hearing where OSHA presented evidence of the contractor's history of violations, and in November, 2023, the hearing officer issued a carefully reasoned decision<sup>66</sup> revoking the owner/supervisor's license for a minimum of two years. He was ordered to stop work on any active building permits he had, until either a successor license holder takes over or he regains his license. Apparently, between 2020 and 2022 and looking at just five communities, he held hundreds of permits. Point made – emphatically.<sup>67</sup>

### Holding Bad Actors Criminally Liable

The OSH Act provides criminal penalties for any employer who willfully violates a safety standard prescribed pursuant to the Occupational Safety and Health Act, where that

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<sup>64</sup> "Piercing the corporate veil" refers to a situation in which courts put aside [limited liability](#) and hold a [corporation's shareholders](#) or [directors](#) personally liable for the corporation's actions or [debts](#). [https://www.law.cornell.edu/wex/piercing\\_the\\_corporate\\_veil](https://www.law.cornell.edu/wex/piercing_the_corporate_veil).

<sup>65</sup> <https://www.osha.gov/news/newsreleases/region1/06282023>

<sup>66</sup> <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2023/OSHA20232553.pdf>

<sup>67</sup> <https://www.osha.gov/news/newsreleases/region1/01082024>

violation causes the death of any employee.<sup>68</sup> Unfortunately, though, Congress provided relatively paltry penalties – a maximum of six months’ imprisonment – for the crime of knowingly or recklessly exposing workers to a hazard that results in an employee’s death. Consequently, referrals by OSHA of such cases to U.S. Attorneys’ offices for consideration of criminal prosecution are infrequent, and when made are generally viewed as low priority and hence are often declined.<sup>69</sup>

Increasingly, though, state and county prosecutors have been stepping into the breach, in the effort to mete out justice to employers whose intentional or reckless failure to properly address workplace hazards results in worker deaths. In these cases, thorough, competent civil investigations by the federal labor agency have created the predicate for criminal prosecutions by state and local law enforcement. A few examples follow.

- **Explosion, Double Fatality** - An early illustration draws from a May, 2010 explosion that claimed the lives of two workers at a rural New Hampshire facility that manufactured a gunpowder substitute. OSHA inspected the double fatality, found egregious violations, and cited the company and its owner with more than 50 willful and serious violations. The civil OSHA case was resolved with high penalties and the owner’s agreement to never engage in the explosives business again.<sup>70</sup>

The prosecutor in Coos County had taken keen notice of the fatalities, and contacted OSHA about their findings. Thereafter, the OSHA compliance officer who had done the original investigation worked in close collaboration with the prosecutor, with the assistance of the Solicitor’s Office attorney who had handled the civil matter.

After a three-week trial, a jury of six women and three men convicted the owner on two counts of negligent homicide and two counts of manslaughter.<sup>71</sup> He was ultimately sentenced to five to ten years on the

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<sup>68</sup> 29 U.S.C. § 666(e).

<sup>69</sup> Since the passage of the Act in 1970 to the present, during which time there have been approximately 430,000 workplace fatalities, only about 130 cases have been referred for prosecution.

<sup>70</sup> <https://www.osha.gov/news/newsreleases/region1/06292011>

<sup>71</sup> [https://www.caledonianrecord.com/litteton\\_record/news/north-country-black-mags-sanborn-guilty-on-all-counts/article\\_9e77773d-5ba9-5bc6-9b87-b02f083c1859.html](https://www.caledonianrecord.com/litteton_record/news/north-country-black-mags-sanborn-guilty-on-all-counts/article_9e77773d-5ba9-5bc6-9b87-b02f083c1859.html)

two manslaughter counts, to be served consecutively, for a total of 10 to 20 years.<sup>72</sup> As of March, 2023, he was still serving time.<sup>73</sup>

- **Trench Collapse** - In a much more recent case, the owner of a now-defunct Vail, Colorado construction company was charged with reckless manslaughter in connection with the death of a 23-year-old worker in a trench collapse in November, 2021. OSHA conducted an investigation into the cause of the fatality and issued three willful violations for “not ensuring the excavation was inspected by a competent person, failing to instruct employees on the recognition and avoidance of unsafe conditions, and not having a trench protective system in place.” It also referred the case to the Summit County, Colorado District Attorney’s Office, and the owner’s arrest followed, with the DA commenting: “Business owners and supervisors have a responsibility to properly train and protect their workers from unsafe job conditions which could harm or threaten their lives. People should not feel like they have to be put in dangerous work situations, just to feed their families.”

The owner pled guilty to manslaughter in August 2023, and awaits sentencing.<sup>74</sup>

Such cases – resulting in jail time for recalcitrant employers who knowingly or recklessly place their workers in danger, with fatal consequences – while not common, are no longer rare.<sup>75</sup> And they’re important. We can be sure that if anything is likely to get the attention of violators of worker safety and health laws, it’s the awareness that their failure to take their legal responsibilities seriously could land them behind bars, possibly for years. In other words, referral of cases to state or local criminal prosecutors

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<sup>72</sup> <https://www.osha.gov/news/newsreleases/statement/11272013>

<sup>73</sup> [https://www.caledonianrecord.com/news/local/coos-superior-court-black-mag-s-sanborn-seeks-early-prison-release/article\\_14e39ba9-e373-51a1-b3ca-7376c80d3d72.html](https://www.caledonianrecord.com/news/local/coos-superior-court-black-mag-s-sanborn-seeks-early-prison-release/article_14e39ba9-e373-51a1-b3ca-7376c80d3d72.html)

<sup>74</sup> <https://www.dol.gov/newsroom/releases/osha/osha20230830-0>

<sup>75</sup> Boston, trench collapse: <https://www.nbcboston.com/news/local/atlantic-drain-owner-convicted-for-trench-collapse-that-killed-2/1959421/>; Philadelphia, building collapse: <https://www.pennlive.com/crime/2021/09/demolition-contractor-convicted-of-manslaughter-for-philly-building-collapse-that-killed-6-loses-appeal.html>; New York City, excavation collapse: [https://www.nyc.gov/assets/doi/press-releases/2016/jun/pr\\_harcoconstructionllc\\_conviction\\_61016.pdf](https://www.nyc.gov/assets/doi/press-releases/2016/jun/pr_harcoconstructionllc_conviction_61016.pdf); Brooklyn, wall collapse: <http://www.brooklynnda.org/2023/03/02/construction-company-operator-and-foreperson-convicted-in-connection-with-laborers-death-in-brooklyn-wall-collapse/>

is a potent enforcement – and compliance-enhancing – tool which, when justified, is well worth deploying, by federal, state, and local worker protection agencies.

### Immigrant Workers: Using the Statement of Interest/Deferred Action Process

Immigrant workers who lack work authorization are among those most likely to suffer workplace abuse, including conditions hazardous to their health and safety. While they're entitled by law to the same protections that are enjoyed by employees legally authorized to work in this country, many are reluctant to complain about their conditions out of fear that their employer might retaliate by "dropping a dime" with Immigration and Customs Enforcement (ICE). These fears represent a major impediment to effective enforcement of worker protection laws at those workplaces where it's most needed.

Fortunately, in 2023, the Department of Homeland Security (DHS) made available to worker protection agencies a valuable new tool designed to help overcome undocumented workers' hesitancy to both complain about workplace violations and to cooperate in investigations and subsequent enforcement activity. Under a new protocol, workers without employment authorization can request that a labor agency (federal, state, or local) with an open investigation at their worksite provide a "statement of interest" (SOI). The SOI makes clear the agency has an enforcement interest in, and a need for, workers at the investigated workplace to assist in the investigation, without fear of adverse immigration consequences if they cooperate. When the agency provides the statement of interest, the worker, usually with the assistance of an immigration attorney, prepares an application for temporary immigration relief (generally for two years), called "deferred action." The application package is then sent to a DHS office specifically created to promptly process such requests. Requests for work authorization can also be submitted to DHS at the same time.

Thus far, federal agencies including USDOL (OSHA and the Wage and Hour Division), the NLRB, and the EEOC, and state and local agencies that enforce worker protection laws, have provided SOIs, and a number of workers around the country have received

both deferred action and work authorization.<sup>76</sup> They are now in a position to support the enforcement efforts of the investigating/prosecuting agencies, without fear of adverse immigration consequences.

In January, 2021 a preventable nitrogen leak at a poultry processing plant in Gainesville, Georgia killed six workers. OSHA arrived immediately, and began to interview the workers, many of whom were immigrants, and fearful of retaliation for cooperating with the investigation. With the support of legal services and advocacy organizations, the workers provided necessary information to OSHA, resulting in the issuance of 59 citations to the companies involved, and over \$1 million in penalties. OSHA was prompt in providing a statement of interest for the plant's workers, and with assistance from advocates, many of the workers requested and have received deferred action from the Department of Homeland Security. They can now assist with the ongoing enforcement litigation without fear of retaliation from the company, and its potentially harmful consequences owing to their immigration status. An excellent and early example of the positive impact on enforcement these new immigration protections can have.<sup>77</sup>

**Bottom line: This tool offers a big step forward for strategic enforcement, especially in industries and at worksites with large numbers of undocumented immigrant workers – those who historically been most subject to abuse by unscrupulous employers.<sup>78</sup>**

### 3. CASE RESOLUTIONS THAT PROMOTE ONGOING COMPLIANCE

Ideally, a company inspected and cited by a safety and health agency will have the incentive to do better in protecting their workers in the future. Sometimes that's the case, but it can't necessarily be counted on. And with recidivist violators, it's reasonable to assume they haven't taken their safety and health obligations seriously enough, such that additional measures to improve their behavior are called for. In

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<sup>76</sup> California (Cal/OSHA), for example, is utilizing this tool, and has created an FAQ on its website describing Cal/OSHA's role in the process, including how workers may request a statement of interest. [https://www.dir.ca.gov/dosh/dhs\\_deferred\\_action\\_faq.htm](https://www.dir.ca.gov/dosh/dhs_deferred_action_faq.htm)

<sup>77</sup> [https://www.nilc.org/wp-content/uploads/2024/01/NILC\\_WorkersRightsReport-1.12.2024\\_.pdf](https://www.nilc.org/wp-content/uploads/2024/01/NILC_WorkersRightsReport-1.12.2024_.pdf)

<sup>78</sup> For a more in-depth discussion of this new tool/program, see the Addendum, at pp. 27-29 of Nuts and Bolts of a Retaliation Investigation, Part 2, which is Tool 13 of the Workplace Justice Lab's Labor Standards Enforcement Toolbox.

[https://smlr.rutgers.edu/sites/default/files/Documents/Centers/WJL/Tool13\\_Retaliation\\_Part2.pdf](https://smlr.rutgers.edu/sites/default/files/Documents/Centers/WJL/Tool13_Retaliation_Part2.pdf)

settlement agreements resolving citations for violations committed by such companies, these additional provisions are often referred to as “enhanced abatement” measures.

Perhaps the most important and potentially workplace-changing enhanced abatement is a company’s agreement to develop and implement a proactive safety and health management program. Rather than reacting to an injury or illness and fixing what caused it after the fact, the goal of these programs is to find and fix hazards before they do harm to the worker.

Federal OSHA doesn’t currently have a standard that requires all employers to implement a safety and health management program, but it strongly encourages them to do so. Some State Plan states have such requirements, of one kind or another. See *State Legislation and Rulemaking Opportunities to be More Effective than Federal OSHA*, section 7, *infra*. Those State Plan states lacking an applicable requirement should at least consider, for serious violators, including a provision in settlement agreements that mandates the adoption of such a program, as it can be a game-changer.

These are among the features of a program, as directed to employers and described on OSHA’s website<sup>79</sup>:

- **Establish safety and health as a core value.** Tell your workers that making sure they finish the day and go home safely is the way you do business. Assure them that you will work with them to find and fix any hazards that could injure them or make them sick.
- **Lead by example.** Practice safe behaviors yourself and make safety part of your daily conversations with workers.
- **Implement a reporting system.** Develop and communicate a simple procedure for workers to report any injuries, illnesses, incidents (including near misses/close calls), hazards, or safety and health concerns, without fear of retaliation. Include an option for reporting hazards or concerns anonymously.
- **Provide training.** Train workers on how to identify and control hazards in the workplace, as well as report injuries, illnesses, and near misses.

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<sup>79</sup> <https://www.osha.gov/safety-management/ten-easy-things>

- **Conduct inspections.** Inspect the workplace with workers and ask them to identify any activity, piece of equipment, or materials that concern them. Use checklists to help identify problems.
- **Collect hazard control ideas.** Ask workers for ideas on improvements and follow up on their suggestions. Provide them time during work hours, if necessary, to research solutions.
- **Implement hazard controls.** Assign workers the task of choosing, implementing, and evaluating the solutions they come up with.
- **Address emergencies.** Identify foreseeable emergency scenarios and develop instructions on what to do in each case. Meet to discuss these procedures and post them in a visible location in the workplace.
- **Seek input on workplace changes.** Before making significant changes to the workplace, work organization, equipment, or materials, consult with workers to identify potential safety or health issues.
- **Make improvements.** Set aside a regular time to discuss safety and health issues, with the goal of identifying ways to improve the program.

While a safety and health management system – diligently implemented – is the gold standard for worker safety, other enhanced abatement measures can also be highly effective in encouraging future compliance. A recent enterprise-wide federal OSHA settlement with multiple-violator Dollar Tree provides a good example. Covering thousands of stores, including both Dollar Tree and Family Dollar establishments, the settlement requires the company to:

- Conduct a comprehensive, nationwide assessment of the root causes of the violations OSHA has repeatedly cited at multiple stores;<sup>80</sup>

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<sup>80</sup> Regarding the root cause analysis, the agreement requires:

(A) Respondents shall, at their expense, initiate and complete within six (6) months of the Effective Date the following Hazard Identification and Analysis of Enterprise-Wide Contributing Factors:

1. Conduct an analysis internally and/or by hiring a qualified third party or third parties of the root causes and contributing factors to the hazards OSHA has identified in the Citations including but not limited to how Respondents' enterprise-wide business practices affect delivery, storage, and stocking of merchandise; and other potential causal factors such as staffing, and truck delivery times.
2. Develop a set of recommendations to amend and/or mitigate the effects of enterprise-wide business practices that are root cause contributors to hazards related to the storing and stocking of merchandise.

- Develop a plan to identify causes and make operational changes to correct them within a two-year period;
- Regarding any future violations related to blocked exits, access to fire extinguishers and electrical panels, and improper material storage at stores nationwide, the companies must correct hazards — within 48 hours of OSHA notifying them — and later submit proof the hazards were corrected. Failure to do so subjects the companies to monetary assessments of \$100,000 per day of violation, up to \$500,000, as well as OSHA inspection and enforcement actions;
- Establish a safety incentive program that recognizes safety and health achievements at the store level;
- Establish a safety advisory group of at least fifteen associates to analyze store safety compliance issues and advise;
- Enhance hazard identification and control programs;
- Develop an audit program;
- Create a new employee training program;
- Hire additional safety professionals;
- Maintain a 24-hour hotline to receive safety complaints and establish a tracking system to ensure complaints are addressed;
- Hold quarterly meetings between OSHA and its Dollar Tree and Family Dollar operations to discuss progress towards systemic improvements.<sup>81</sup>

Agencies should consider settlement agreement enhancements like these as they can prompt otherwise reticent employers to take compliance with the law, and protection of their workers, seriously and methodically, perhaps for the first time.

## 4. STRATEGIC COMMUNICATIONS/PUBLICITY

State Plan states, like federal OSHA, have many means to communicate with the public, with workers, and with the regulated (employer) community. These include, of

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3. Share a copy or a summary of the analysis and recommendations with OSHA which shall remain confidential. Respondents may redact specific information that is proprietary or contains sensitive business intelligence so long as it does not prevent OSHA from understanding the essential nature of the analysis and recommendations.

4. Establish and implement a process for selecting and adopting recommendations to resolve or mitigate each root cause contributor identified in the analysis.

<sup>81</sup> <https://www.osha.gov/enforcement/cwsa/dollar-tree-stores-and-family-dollar-stores-08172023>

course, outreach programs, in-person and Zoom seminars, website information, blog and social media posts, e-alerts, and so forth. Here we briefly examine two communications strategies specifically related to enforcement.

- **Severe Violator Enforcement Program**

Federal OSHA's **Severe Violator Enforcement Program** (SVEP), launched in 2010 and restated in 2022,<sup>82</sup> is designed to apply the agency's resources strategically to inspecting and monitoring employers that have "demonstrated indifference to their OSH Act obligations." Specifically, any of the following types of inspections will place the employer into the SVEP:

- A fatality/catastrophe inspection where OSHA finds at least one willful or repeated violation or issues a failure-to-abate notice based on a serious violation directly related either to an employee death, or to an incident causing three or more employee hospitalizations.
- An inspection where OSHA finds at least two willful or repeated violations or issues failure-to-abate notices (or any combination of these violations/notices), based on the presence of high gravity serious violations.
- All egregious (e.g., per-instance citations) enforcement actions.

Once placed in SVEP, severe violators are subject to mandatory follow-up inspections, special scrutiny as to whether or not enterprise-wide abatement is warranted, and settlements with enhanced compliance provisions including, for example, hiring a qualified safety and health consultant to develop and implement an effective and comprehensive safety and health program.

Also, very significantly for our purposes here, a company that is placed in SVEP – including one that is contesting the underlying citations that landed it there – is publicly listed on the Severe Violator Enforcement Program Log.<sup>83</sup> In essence, being

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<sup>82</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-00-169.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-169.pdf)

<sup>83</sup> <https://www.osha.gov/enforcement/svep#v-nav->

listed there is the functional equivalent of being on OSHA's wall of shame, visible to shareholders, customers, government contractors, and prospective workers.

An employer can be removed from the Log after being posted there for at least three years from OSHA's having received acceptable abatement verification, payment of all final penalties, and proof of compliance with all applicable settlement provisions. Additionally, the company must have had no additional serious citations related to the hazards identified in the original SVEP inspection or at any related establishments.

For obvious reasons, companies don't want to find themselves on the publicly available SVEP Log. Hence, the SVEP process is a valuable strategic enforcement tool. State Plan states are required to create their own SVEP program, either the same as or more effective than federal OSHA's, to publicize bad actors in their states, and to move them into compliance.<sup>84</sup>

- **The Power of the Press Release**

For essentially the same reasons that apply in the SVEP context, the issuance of press releases in cases where significant violations have been cited is another important strategic deterrence tool. To leverage it, agencies need to create a communications strategy aimed at highlighting their enforcement work, especially against serious offenders.

This is what OSHA did in 2009 when it began sending press releases to local media and trade publications when post-inspection fines of more than \$40,000 were issued. The policy was designed to highlight OSHA's enforcement activity and to let the public – and other local companies in the same or related industries – know about employers who committed serious violations, and the fines they received.

A June, 2020 paper published in the American Economic Review studied the effect of an OSHA press release issued about one company's violations on the subsequent

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<sup>84</sup> As stated in the 2022 SVEP directive: "State Plans are required to have enforcement policies and procedures in place that are at least as effective as those in this Instruction. State Plans have the option of adopting an identical or different program, but the program must be at least as effective as this Instruction."

[https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-00-169.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-169.pdf)

compliance behavior of nearby facilities in the same industry. Its findings were remarkable.<sup>85</sup> According to the study, a single press release naming a company that's violated workplace health and safety regulations leads to 73 percent fewer violations at comparable facilities within a three-mile radius, a greater improvement than if OSHA had inspected those sites directly. Moreover, positive compliance effects were seen at peer facilities as far away as 31 miles, as well as fewer injuries.

"OSHA would have to conduct an additional 210 inspections to elicit the same improvement in compliance as sparked by a single press release about severe violations," according to researcher Matthew S. Johnson, assistant professor at Duke's Sanford School of Public Policy. A great example of "leveraging resources."<sup>86</sup>

## 5. ENGAGING WITH COMMUNITY STAKEHOLDERS (CO-ENFORCEMENT), AND WITH OTHER AGENCIES

The critical importance to strategic enforcement of engagement with community organizations like worker centers, legal services offices, and other worker advocates can't be overstated. It also has been discussed in depth in at least three of the Labor Standards Enforcement Toolbox<sup>87</sup> tools, including [Tool 4: Introduction to Strategic Enforcement](#); [Tool 7: Sharing Information with Community Organizations](#); and [Tool 12: Introduction to Co-Enforcement](#). Review of these resources is recommended. A summary list of how worker advocates can support agencies' enforcement efforts, drawn from [Tool 4](#), includes:

- Identifying non-compliant industries and practices;
- Providing information about industry operations and key players;

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<sup>85</sup> The paper, entitled "Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws," is available for free downloading at <https://www.aeaweb.org/articles?id=10.1257/aer.20180501>.

<sup>86</sup> Another means of publicizing the importance of taking worker safety seriously was initiated in 2010 during the Obama administration, dropped during the Trump term, and reinstated under Biden's Labor Department: listing on the OSHA website homepage the names of workers who have died on the job and information on every fatality investigation, including the circumstances surrounding the death and the employer. Praised by families of workers killed on the job, this information is used to disclose to the public all work-related deaths and the need to prevent them.

<sup>87</sup> <https://smlr.rutgers.edu/wjl-ru/beyond-bill/toolbox>

- Connecting agencies with workers who are unfamiliar with enforcement officials or distrust institutions;
- Referring cases;
- Facilitating interviews with workers:
  - Providing or identifying language translation services;
  - Identifying neutral, convenient meeting locations for worker interviews and check distributions;
- Providing complementary investigatory tools (e.g., background research on employer, industry, and historical or parallel workplace issues);
- Providing information obtained through their own outreach and investigations of violations;
- Collaborating on investigations through formal or informal agreements between agencies and community organizations;
- Providing feedback on compliance assistance materials; and
- Partnering on outreach and education.

For the reasons listed above, collaboration with community organizations, legal aid offices, and worker centers is indispensable to effective strategic enforcement. Here we'll highlight a few tools particularly worth noting, designed to facilitate cooperative relationships/partnerships between agencies and these non-governmental groups.

### • Formalized Partnerships/Alliances

While many cooperative arrangements between worker advocacy organizations and federal and state worker protection agencies exist informally and function effectively, a written agreement formalizing the relationship can be especially valuable. On its face, it signifies the seriousness with which both parties view the relationship. It also formally outlines the ways in which the outside organization and the agency pledge to work together for the common goal of worker health and safety.

In service of that goal, federal OSHA has operated an Alliance Program<sup>88</sup> for many years with many different kinds of organizations, from trade associations to foreign consulates to worker centers, all intended to help the agency achieve its strategic

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<sup>88</sup> <https://www.osha.gov/alliances>

goals.<sup>89</sup> Alliances are established through written agreements between OSHA and an organization for an initial term of two-years. In assessing Alliances to pursue, OSHA considers:

- How the proposed Alliance's goals align with OSHA's strategic priorities;
- What capabilities the potential participants bring to the table;
- The degree to which the Alliance can address emerging workplace safety and health issues;
- Whether the potential participants have demonstrated a commitment to working cooperatively with OSHA;
- The ability of the potential participants to conduct outreach to high-hazard industries and at-risk workers.

Federal OSHA has found that Alliances help increase worker access to effective workplace safety and health tools and to information about worker rights and employer responsibilities; leverage resources to maximize worker safety and health protections; and establish progressive dialogue with the agency and others committed to workplace safety and health.<sup>90</sup>

Many of these Alliances have been with worker advocacy organizations. One that's noteworthy is with the Brazilian Worker Center (BWC) located in Framingham, Massachusetts. First entered into in April, 2006, BWC's Alliance with multiple OSHA offices in Massachusetts has been renewed through the years, and in 2021 the Alliance reached "Ambassador" status.<sup>91</sup>

More recently, this year the worker center Centro Comunitario de Trabajadores (CCT), located in New Bedford, Massachusetts, and serving a constituency of mostly indigenous Guatemalan seafood processing plant workers, entered into an Alliance

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<sup>89</sup> Alliances are included among OSHA's "Cooperative Programs." Other examples of cooperative programs that are generally less relevant to this paper's focus on strategic enforcement, can be found at: <https://www.osha.gov/cooperativeprograms#:~:text=OSHA%20offers%20the%20following%20cooperative,see%20Find%20a%20Cooperative%20Program>.

<sup>90</sup> <https://www.osha.gov/sites/default/files/publications/factsheet-alliance.pdf>

<sup>91</sup> [https://www.osha.gov/alliances/regional/region1/ambassador-document\\_20210902](https://www.osha.gov/alliances/regional/region1/ambassador-document_20210902) OSHA confers ambassador status to long-term alliance participants who agree to continue a cooperative relationship and who share timely and relevant safety and health information with its stakeholders.

with some of the same OSHA area offices. The Alliance will emphasize “addressing workplace safety and health hazards faced by CCT’s constituency of immigrant and low-wage workers in southern New England, as well as understanding the rights of these workers and the responsibilities of employers under the...OSH Act.”

The Alliance with CCT is noteworthy because of the way it’s carefully tailored to the needs and interests of the organization’s constituents. Some of its objectives are worth quoting verbatim:

- Convene or participate in forums, roundtable discussions, or stakeholder meetings on low-wage and immigrant workers to help forge innovative solutions in the workplace or to provide input on safety and health issues.
- Encourage worker participation in workplace safety and health regardless of immigration status and build relationships with OSHA’s Regional and Area Offices to address health and safety issues faced by low-wage and immigrant workers.
- Share information among OSHA personnel and industry safety and health professionals regarding the Centro Comunitario de Trabajadores’ best practices or effective approaches through training programs, workshops, seminars, and lectures or other forums developed by the participants.
- Collaborate with other Alliance participants on specific issues and projects on preventing workplace hazards for immigrant workers that are addressed and developed through the Alliance Program.
- Develop and disseminate case studies on the specific difficulties and strategies found effective in preventing hazards faced by immigrants and publicize their results.

The Participants will also work together to achieve training and education objectives, including understanding workers’ rights and the use of OSHA’s complaint process, by communicating in “a culturally and linguistically appropriate manner.”

The potential strategic significance of this kind of collaboration – one that makes clear that workers have the same rights to a safe workplace regardless of immigration status, that speaks in their native language(s), that targets the low-wage, high hazard processing plants where many of them work, and that pledges the agency’s

partnership in rooting out both safety and health, and retaliation, violations – can’t be overstated.<sup>92</sup>

A number of State Plan states have established their own Alliance programs<sup>93</sup>, predominantly with industry groups, and occasionally with unions. State Plans are strongly encouraged to seek out community organizations, legal non-profits and worker centers too, as Alliance partners, for all the reasons presented above.

- **Formalized Information Sharing/Common Interest Agreements**

Information sharing between worker advocacy organizations and worker protection agencies is both crucially important and challenging. This subject is expertly discussed in [Tool 7](#), and the advice presented there won’t be repeated here. (Please do take a close look at that paper.) Here we will briefly examine one legal tool, not frequently used, that may be particularly useful in promoting information-sharing between advocacy organizations and safety agencies, because of its potential to protect confidential communications from disclosure to the opposing party (here, the employer) during discovery and litigation.

The tool, known as the “common interest doctrine,” is an exception to the general rule that disclosure of a communication to a third party destroys any privilege that the communication may have enjoyed. In its traditional use, the doctrine permits attorneys

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<sup>92</sup> Another noteworthy example is described at pp.14-15 in Tool 7 listed in the text. The Workers Defense Project (WDP), based in Austin, Texas has been in an Alliance with OSHA since 2010, focusing on improving health and safety in the construction industry in central Texas.

[https://www.osha.gov/alliances/regional/region6/renewal\\_agreement\\_20220902](https://www.osha.gov/alliances/regional/region6/renewal_agreement_20220902)

WDP identifies workers and collects information that it provides to OSHA, who then initiates an investigation while keeping WDP up-to-date on the case, communicating frequently, copying WDP on letters, and meeting regularly to review their partnership. Among many other things, WDP learned it needed to be judicious in referring only serious violations to avoid draining OSHA’s resources. OSHA found that WDP’s willingness to adapt in light of the resource challenges the agency faces helped alleviate tensions that can arise when agencies and organizations work together. The Alliance’s most recent report lists the activities and accomplishments the partners have achieved, concluding that “[t]he alliance has raised the Agency’s profile with hard to reach immigrant Spanish-speaking workers in the Austin area through a multi-pronged approach.”

[https://www.osha.gov/alliances/regional/region6/alliance-annual-report\\_20190726](https://www.osha.gov/alliances/regional/region6/alliance-annual-report_20190726)

<sup>93</sup> <https://www.osha.gov/alliances/regional/region-state-plans>

representing different parties with similar legal interests to share information without having to share it with others.

The parties' common interest, and their desire to keep the information they share safe from disclosure to other parties, is, as a matter of best practice, memorialized in a Common Interest Agreement (CIA). Federal and state government agencies often enter into CIAs with one another for the purpose of protecting confidential information they share for a common purpose, including enforcement of their respective laws.<sup>94</sup> In the safety and health context, they share a common interest in requiring the subject employer(s) to comply with applicable federal and state laws and regulations protecting workers from harm due to job-related hazards.

Notably, the common interest privilege generally applies where each party has its own attorney since it's effectively a "non-waiver" of other legal privileges claimed by lawyers, specifically attorney-client privilege and the work product doctrine. Recently, though, the U.S. Labor Department has entered into at least one CIA with several related worker centers in the New England Region, to facilitate protected sharing of information in the context of a wage and hour investigation and litigation. In that matter, non-attorney worker center representatives signed the agreement, as did an attorney for the Labor Department.

It's still too early to determine the legal effectiveness of CIAs' protection of the mutual sharing of information between labor agencies and worker advocacy groups. But when privileged or otherwise confidential information is in fact shared, it's always a good idea to consider a common interest agreement. It's also always a safer bet to have an attorney represent the worker center/advocacy group when entering into these potentially very helpful tools, since their legal effectiveness is increased by the involvement of an attorney.

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<sup>94</sup> See, e.g., Common Interest Agreement between the worker protection agencies of the U.S. Department of Labor and the State of Connecticut Department of Labor, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/ct.pdf>, and between the USDOL's Wage and Hour Division and the District of Columbia's Office of Attorney General, <https://www.dol.gov/agencies/whd/about/state-coordination/dc>

- **Designating Employee Representatives/Walkaround Proposed Reg**

As pointed out in other materials in the Strategic Enforcement Toolbox, it's helpful for agencies to enable the designation of worker advocacy organizations as "official" representatives of individual or multiple workers, akin to the representative status attorneys receive. (See [Tool 7](#) at p. 19, for example.<sup>95</sup>) In the safety and health context, the role of the representative is crucial particularly – but not exclusively -- during the agency's inspection of the worksite. In this regard, a recent USDOL regulatory development is quite relevant, and important.

On August 29, 2023, OSHA announced<sup>96</sup> a notice of proposed rulemaking, to revise existing regulations on who can be authorized by employees to act as their representative to accompany safety and health compliance officers during physical workplace inspections. First, the proposed regulation<sup>97</sup> will clarify that the representative of the employees can be an employee of the employer, or a third party. Second, the revised version clarifies that employees' options for third-party representation during OSHA inspections aren't limited to those individuals with skills and knowledge similar to that of the two examples provided in the current regulation, that is, industrial hygienist or safety engineer. The universe of acceptable third-party representatives is expanded to include anyone who "may be reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience."

This revision is particularly significant because it opens the door to community organizations, legal services providers, and other worker advocates, like worker centers, that have the trust of the most vulnerable workers, and the communication and cultural competency skills needed to assist workers in accurately identifying and describing the workplace hazards subject to inspection.

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<sup>95</sup> "For example, the Seattle Office of Labor Standards' Rules of Procedure explicitly allow a party to 'designate an individual over the age of eighteen (18) to be the party's representative.' The regulation expressly states that the representative exercises the rights of the party and that communication with the representative is communication with the party."

<sup>96</sup> <https://www.osha.gov/news/newsreleases/national/08292023>

<sup>97</sup> <https://www.federalregister.gov/documents/2023/08/30/2023-18695/worker-walkaround-representative-designation-process>

The preamble to the proposed regulation explicitly recognizes this type of workplace scenario, and is worth quoting here in full:

“[E]mployees may be reluctant to speak directly or candidly with government officials for a number of reasons. For example, some workers, such as immigrants, refugees, or other vulnerable workers, may be unfamiliar with OSHA and the agency's inspection process, face cultural barriers, or fear that their employer will retaliate against them for speaking to OSHA. In these situations, employees may not feel comfortable participating in OSHA's inspection without a trusted presence, which would negatively affect the CSHO's ability to obtain important information about workplace hazards and conditions. Worker advocacy organizations, labor organization representatives, consultants, or attorneys who are experienced in interacting with government officials or have relevant cultural competencies may be authorized by employees to represent them on walkaround inspections. The CSHO may determine such third-party representatives are reasonably necessary to the conduct of an effective and thorough physical workplace inspection if their presence during the walkaround inspection would enable more open and candid communication with employees who may not otherwise be willing to participate in the inspection.”

As of this writing, employer organizations have lined up in strong opposition to the revised rule. But from a worker protection agency perspective, enabling a worker-selected representative accompany the inspector/compliance officer on the walkaround inspection is, as the preamble asserts, “critically important to ensuring OSHA obtains the necessary information about worksite conditions and hazards.”

### Note to State Plan States

For State Plan states, the notice of proposed rulemaking says: OSHA has preliminarily determined that, within six months of the promulgation of a final rule, State Plans would be required to adopt regulations that are identical or “at least as effective” as this rule, unless they demonstrate that such amendments are not necessary because their existing requirements are already “at least as effective” in protecting workers as the Federal rule.

Indeed, even if the proposed rule is ultimately not promulgated, its reasoning is compelling. From a strategic enforcement perspective, State Plan states can and should exercise their authority to enact something comparable, if not even more effective, to maximize inspection efficacy and impact, especially in high hazard workplaces staffed with workers least likely to complain.

- **Collaborations/MOUs with Other Government Agencies**

Worker safety and health enforcement agencies should also consider strategic collaborations and information-sharing arrangements with other government entities, in support of their mutual common interests.

For example, addressing the then-growing (and continuing) problem of misclassification of employees as independent contractors, a U.S. Labor Department initiative began early in the Obama administration to enter into memoranda of understanding (MOUs) with various governmental units that had a common interest in rooting out misclassification, and the various kinds of violations it creates. The initiative began with information-sharing and cross-referral agreements with the Internal Revenue Service,<sup>98</sup> and quickly extended to MOUs with state labor departments and attorneys general offices around the country.<sup>99</sup>

While this initiative focused initially on wage violations, it's also consequential for state and federal worker safety agencies, because employees misclassified as independent contractors are legally protected by worker safety and health laws, but they may not understand that they are, and their employers unlawfully treat them as if they aren't. Hence, when one agency, like the IRS, discovers a case of misclassification, and makes an inspection referral to the applicable federal or state worker safety agency, workers obtain the protection they're due, and the agency's enforcement mission is bolstered. Indeed, for many agencies, rooting out misclassification is an enforcement priority.

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<sup>98</sup> <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/irs.pdf>

<sup>99</sup> <https://www.proskauer.com/alert/dol-irs-and-11-states-enter-agreement-to-work-together>

Federal OSHA has a long history of MOUs with other federal agencies, both within and outside the Labor Department.<sup>100</sup> Some of these, like a 1979 MOU between OSHA and the Mine Safety and Health Administration, delineate the two USDOL safety agencies' respective jurisdictions.<sup>101</sup> Others, such as a 2014 MOU that OSHA's Region 3 office entered into with EPA's Region 3, was designed to "improve and optimize the combined efforts of the Parties to achieve protection of workers, the public, and/or the environment at facilities" subject to their respective jurisdictions. This would include cross-trainings, cross-referrals, and joint inspections/investigations as warranted.<sup>102</sup>

More recently, in August 2021, OSHA and USDOL's Wage and Hour Division (WHD) signed an MOU establishing a collaborative partnership "to protect the health and well-being of the Nation's workforce, ensuring the effectiveness of a complaint/referral system, and promoting the highest level of compliance with the laws enforced by each Agency." Like the MOU with EPA, this would include cross-referrals, developing and conducting trainings for their respective staffs to ensure valid referrals, and coordinated enforcement activities. **OSHA State Plan states are looped in as well, with federal OSHA committing to encourage them to respond to safety and health referrals from WHD, and to make potential wage violation referrals to WHD. State plans will also be encouraged to participate in any trainings presented under the MOU.**<sup>103</sup>

As a final federal OSHA example, in October 2023, OSHA entered into its latest MOU<sup>104</sup> with the National Labor Relations Board "to facilitate interagency cooperation and coordination" between them "by establishing a process for information sharing and referrals, training, and outreach," with a particular but not exclusive focus on OSHA's anti-retaliation provision (OSH Act section 11(c)). That provision is singled out because many acts of unlawful retaliation under section 11(c) are also unfair labor practices under section 8(a)(3) of the National Labor Relations Act (NLRA). While the remedies available for such violations under the OSH Act are broader than those under the NLRA, workers have only 30 days to report them to OSHA, while the time period under the NLRA is six months. Hence, a victim of retaliation who's missed the reporting

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<sup>100</sup> <https://www.osha.gov/laws-regs/mou/agency>

<sup>101</sup> <https://www.msha.gov/msha-and-osha-memorandum>

<sup>102</sup> [https://www.epa.gov/sites/default/files/2016-12/documents/rr3\\_osha\\_mou.pdf](https://www.epa.gov/sites/default/files/2016-12/documents/rr3_osha_mou.pdf)

<sup>103</sup> <https://www.osha.gov/laws-regs/mou/2021-08-04>

<sup>104</sup> <https://www.osha.gov/laws-regs/mou/2023-10-31>

window under the OSH Act may still be afforded a remedy under NLRA, and OSHA's referral of the worker to the NLRB is an important protocol. **Here again, referrals by State Plans to the NLRB are encouraged, and State Plans are expected to respond to referrals from the NLRB concerning potential violations of state safety and health laws and regulations.**

While federal OSHA has a long history of agreements with other agencies, at least some State Plan OSHAs have followed suit. Oregon OSHA is particularly noteworthy, having entered into agreements<sup>105</sup> with an array of federal and state agencies. These include, for example, one with OSHA Region X delineating responsibilities in the event of a natural disaster or terrorist event;<sup>106</sup> another with the federal Environmental Protection Agency, regarding Oregon OSHA's role in enforcing the worker protection standards of the federal environmental law regulating pesticides;<sup>107</sup> and yet another with the Civil Rights Division of the Bureau of Labor and Industries (BOLI), addressing the handling of worker discrimination complaints.<sup>108</sup>

Especially worthy of attention is Oregon OSHA's interagency agreement with BOLI's Wage and Hour Division<sup>109</sup>, describing the roles and responsibilities of each agency as they relate to agricultural labor housing and employment. Both pledge to report to one another on their respective enforcement activities in this sector, and both agencies agree to refer to one another observed possible violations, as set out in checklists of potentially violative conditions each will provide to the other. These are fine examples, by a State Plan, of interagency agreements designed to enhance multiple agencies' enforcement capacities. Please take note!

## 6. STRATEGIC EVALUATIONS

Ongoing review, and periodic formal evaluation and re-assessment are essential requirements for any mission-driven, strategically-oriented organization. Suggestions for leading, managing, and evaluating worker protection strategic enforcement

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<sup>105</sup> <https://osha.oregon.gov/collaborations/Pages/interagency.aspx>

<sup>106</sup> <https://osha.oregon.gov/collaborations/Documents/G-3.pdf>

<sup>107</sup> <https://osha.oregon.gov/collaborations/Documents/S-9.pdf>

<sup>108</sup> <https://osha.oregon.gov/collaborations/Documents/S-1.pdf>

<sup>109</sup> <https://osha.oregon.gov/collaborations/Documents/S-2.pdf>

initiatives can be found at [Tool 10, “Managing for Strategic Enforcement: a Conceptual Toolkit,”](#) which makes clear:

“[F]rom the strategic enforcement standpoint, ongoing review and assessment of each activity, through the lens of its value and effectiveness in advancing the agency’s strategic objectives, is crucial. An initiative implemented or an investigation begun because of its strategic promise needs to be regularly assessed, with an eye toward whether it continues to merit the resources the agency is devoting to it. Redirecting resources from an activity that was initiated following careful and appropriate consideration, but hasn’t produced the results anticipated – and, on review, is deemed not likely to – is not a failure. It’s an opportunity to learn how to do better with the next strategic initiative, or investigation, or case, selected for agency action.”

Setting standards designed to drive strategic performance by staff is also critically important. If agency employee performance is judged primarily by numbers of closed cases, for example, staff activity will be directed towards meeting or exceeding the expected number, regardless of the strategic value of the cases reported. Because strategic cases are often more complex and require commitment of more staff resources than garden-variety non-strategic cases, any personnel evaluation system needs to devise ways to recognize and appropriately reward such work.

In [Tool 10](#), we briefly reported on how OSHA recognized the need – for performance appraisal and government accountability reporting purposes – to accord greater weight to strategic, impactful, and more resource-intensive enterprise-wide cases than to straightforward single-establishment cases. This led to the development and roll-out of OSHA’s Enforcement Weighting System (EWS) in 2015, a system that weighted certain inspections depending on the time taken to complete them, like complex fatality and enterprise-wide inspections, and also on their impact on workplace safety and health, like priority workplace violence or heat inspections.

That system was revised in 2019 with the creation of a new OSHA weighting system (OWS) during the Trump administration, that included not only inspections but also

enforcement support functions and compliance assistance. Under OWS, criminal and significant (high penalty) cases receive the highest number of “enforcement units” (7 “EUs”), followed by fatality and catastrophe inspections (5 EUs). The four categories of common, usually less complex programmed inspections that are among the leading causes of death – caught-in, electrical, fall, and struck-by hazards – follow, garnering 3 EUs each. Next are programmed inspections focused on priority serious safety and health hazards that include, among others, combustible dust, ergonomics, heat hazards, and workplace violence. Each of these types of inspections receives just 2 EUs. All other inspections not otherwise listed receive 1 EU.<sup>110</sup>

Under the revised OWS system, as reported by OSHA<sup>111</sup> and as noted in the AFL-CIO’s Death on the Job report, the majority of EUs result from inspections related to the fatal four safety hazards noted above, that receive three EUs each. Meanwhile, EUs resulting from labor-intensive inspections addressing ergonomics, heat, non-PEL (permissible exposure limit) overexposures and workplace violence combined only accounted for 242 of 59,868 total EUs in FY 2022. The AFL-CIO’s analysis concludes that “[t]here has been a decline in enforcement activity involving significant and complicated cases that began during the Trump administration.” Its report contends that “this system will continue to mask the significance of health inspections completed and disincentivize inspectors from completing these time-intensive and complex inspections—the opposite intended effect of the original weighting system.”<sup>112</sup> Given the usually much greater complexity of inspections involving such health and safety issues as ergonomics, toxic exposures limits, combustible dust, and workplace violence (all accorded only 2 EUs), this conclusion certainly appears justified.

The bottom line is that any system that “weights” – and therefore recognizes and rewards – certain difficult, time-intensive types of matters that the agency has determined are strategically important, is more likely to result in more of that work getting done than if all inspections – simple or complex – receive the same credit. What those areas of focus should be will depend on the assessment and re-assessment

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<sup>110</sup> <https://www.osha.gov/memos/2019-09-30/revisions-occupational-safety-and-health-administration-osh-weighting-system>

<sup>111</sup> <https://www.osha.gov/enforcement/2022-enforcement-summary>

<sup>112</sup> AFL-CIO 2022 report at pp. 65-66. [https://aflcio.org/sites/default/files/2023-04/2303\\_DOTJ\\_2023\\_final%20%283%29.pdf](https://aflcio.org/sites/default/files/2023-04/2303_DOTJ_2023_final%20%283%29.pdf)

the agency should be making on a regular and recurring basis, consistent with its strategy to most effectively ensure optimal workplace safety and health with the limited resources it has.

## STATE LEGISLATION AND RULEMAKING: OPPORTUNITIES TO BE MORE EFFECTIVE THAN FEDERAL OSHA

Recall that while the OSH Act regulates workplace health and safety nationally, State Plan states are empowered to devise their own regulations and enforcement systems, so long as they're "at least as effective" as federal OSHA's. Moreover, even in states in which federal OSHA is responsible for enforcing worker safety and health requirements applicable to private sector employers, local and state action is only federally preempted when OSHA has adopted an occupational safety and health standard addressing a particular and specific workplace hazard.<sup>113</sup> A number of areas in which states and localities have enacted worker safety and health protections that exceed those provided by federal OSHA follow.

### 1. DURING COVID

The right – and some might say the obligation – of states to act in the absence of federal safety and health regulation was probably never as squarely faced as in the first few years of the COVID-19 pandemic. Within a few months of the initial outbreak, tens of thousands of workers had fallen ill at work and hundreds had died, including workers in hospitals, first response units, nursing homes, meat and poultry plants, grocery stores, warehouses and mass transit. And yet, the Trump administration failed to issue any kind of mandatory requirements aimed at prevention – including by emergency temporary standard – and only suggested rather than required, to the consternation of worker safety and health experts and advocates<sup>114</sup>, that Centers for Disease Control

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<sup>113</sup> The term "occupational safety and health standard" means "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8).

OSHA Standards may be found starting at 29 C.F.R. §1910 and are available at: <https://www.osha.gov/laws-regs/regulations/industry>

<sup>114</sup> <https://thehill.com/opinion/civil-rights/492269-covid-19-we-need-more-osha-not-less/>

(CDC) recommendations be followed.<sup>115</sup> Hence, the primary tool available for federal enforcement was the cumbersome general duty clause, which was ultimately applied in only in a few, particularly egregious cases where large outbreaks had occurred.

This prompted proactive states, and worker advocacy organizations like the National Employment Law Project (NELP), to leap into action. In April, 2020, NELP published a policy and data brief entitled “Protecting Worker Safety and Health in the COVID Crisis: A State and Local Model Policy Response.”<sup>116</sup> It included model language for a variety of COVID-related worker protections that states could cut and paste into draft legislation, that governors could mandate using their emergency public health powers, and that local governments could implement through local ordinances or in some cases through mayoral or health department orders. A companion paper<sup>117</sup> urged the enactment of legislation to create enforceable COVID-19 standards, including:

- Adoption of a COVID-19 specific standard (such as California’s Aerosol Transmissible Disease standard<sup>118</sup>) for health care and emergency response employers;
- Adoption of enforceable COVID-19 specific workplace safety requirements for all other employers, including adoption of the CDC and OSHA COVID-19 guidelines;
- Protection for workers who report or object to unsafe working conditions.

By June, 2022, fourteen states had adopted comprehensive, enforceable COVID-19 worker safety protections. This included Virginia, the first state OSH to issue an emergency temporary standard in July, 2020, followed by Michigan, California, and Oregon (all State Plan states). In other states, executive orders were issued by the governor, including requiring face masks in the workplace in North Carolina (State Plan), and Texas and Massachusetts (both federal OSHA states).

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<sup>115</sup> <https://www.usatoday.com/story/news/nation/2020/04/16/coronavirus-osh-covid-occupational-safety-health/2986364001/>

<sup>116</sup> <https://www.nelp.org/publication/protecting-worker-safety-health-covid-crisis-state-local-model-policy-response/>

<sup>117</sup> <https://www.nelp.org/wp-content/uploads/Harvard-NELP-How-States-Localities-Can-Protect-Workplace-Safety-Health-May-2020.pdf>

<sup>118</sup> <https://www.dir.ca.gov/title8/5199.html>

Another paper, from the Economic Policy Institute written in June 2022<sup>119</sup>, details a number of measures taken by local governments to address the challenges facing workers during the pandemic, including emergency authorities effective for the duration of a local public health emergency order.

“Local governments—most typically by mayoral executive order—have used these emergency authorities to issue stay-at-home orders, as well as masking, testing, quarantine, and vaccination requirements (citations omitted). For example, in December 2021, New York City’s mayor issued an order requiring all workers who perform in-person work or who interact with the public to be vaccinated. These orders were typically enforced by local public health departments which, in some places, have taken complaints from workers and taken enforcement actions to stop workplace spread. Although these local public health measures are not always tied to the workplace, they are crucial to worker health and safety by ensuring that workers can stay home when necessary and reducing the likelihood of unmasked interactions.”<sup>120</sup>

All of these government units took action when federal OSHA’s failure to act had left what was essentially an enforcement vacuum. The COVID-19 pandemic is a striking example of how many states and localities – though certainly not all – can and have stepped up, and implemented protections for workers that are clearer and more readily enforceable than the general duty clause, far better than the “at least as effective” State Plan standard the OSH Act requires. But it’s not the only example.

## 2. HEAT EXPOSURE

Exposure to excessive heat – whether indoors or outdoors – has always been a health and safety hazard capable of causing death or serious bodily harm. In fact, heat is the leading cause of death among all weather-related phenomena, and is becoming more

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<sup>119</sup> <https://www.epi.org/publication/the-role-of-local-government-in-protecting-workers-rights-a-comprehensive-overview-of-the-ways-that-cities-counties-and-other-localities-are-taking-action-on-behalf-of-working-people/>

<sup>120</sup> In another example, the Mayor of New Bedford, Massachusetts and its Board of Health in May, 2020 issued an “Emergency Order to Prevent the Spread of COVID-19 in Industrial Facilities,” mandating temperature checks, social distancing, sanitizing, and other measures. <https://s3.amazonaws.com/newbedford-ma/wp-content/uploads/sites/42/20200506124549/Emergency-Order-to-Prevent-the-Spread-of-COVID-in-industrial-facilities.pdf>

dangerous as nine of the last ten years were among the warmest on record. In October, 2021, federal OSHA finally began the rulemaking process to consider a heat-specific workplace standard.<sup>121</sup> As of this writing, no federal standard has yet been proposed. Currently, federal OSHA's only means of protecting workers from excessive heat is by invoking the law's general duty clause. Some such cases have been brought, but, as has been noted before, a regulation with specified requirements is clearly more protective for workers and more readily enforced. In July 2023, OSHA issued a hazard alert letter regarding heat, but, as the letter expressly states, "[t]his hazard alert is not a standard or regulation, and it creates no new legal obligations." <sup>122</sup>

Here again, states have begun to address this regulatory gap proactively. For example, in May, 2022, Oregon's Occupational Safety and Health Division adopted permanent rules to protect workers laboring in excessive heat.<sup>123</sup> The rules apply to outdoor and indoor work activities when temperatures exceed 80 degrees Fahrenheit, and require employers to provide employees with access to shade, cool drinking water, additional rest breaks when temperatures exceed 90 degrees, and an acclimatization period to gradually help employees adapt. They also require heat illness prevention training.

Other states have stepped up as well. As of July, 2023, Washington State's Department of Labor and Industries implemented updated protections from excessive outdoor heat, first put in place in 2008. California has long had a heat illness prevention rule for outdoor places of employment<sup>124</sup>, and its Department of Industrial Relations is now seeking to enact one for indoor employment. As of November 2023, the bill is wending its way through the notice and comment period.<sup>125</sup> In Colorado, agricultural workers have regulatory protection,<sup>126</sup> and in Minnesota indoor workers are protected against excessive heat and cold, as well as inadequate ventilation.<sup>127</sup>

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<sup>121</sup> <https://www.osha.gov/heat-exposure/rulemaking>

<sup>122</sup> [https://www.osha.gov/sites/default/files/publications/OSHA\\_HA-4279.pdf](https://www.osha.gov/sites/default/files/publications/OSHA_HA-4279.pdf)

<sup>123</sup> <https://osha.oregon.gov/OSHARules/adopted/2022/ao3-2022-text-alh-heat.pdf>

<sup>124</sup> <https://www.dir.ca.gov/title8/3395.html>

<sup>125</sup> <https://www.dir.ca.gov/oshsb/Indoor-Heat.html>

<sup>126</sup> <https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-15%20Agricultural%20Labor%20Conditions%20Rules%20%20-%20Statement%20of%20Basis%20and%20Purpose%20%5BFINAL%5D%201.31.22.pdf>

<sup>127</sup> <https://www.revisor.mn.gov/rules/5205.0110/>

### 3. WILDFIRE SMOKE

Oregon has also taken the lead in promulgating rules<sup>128</sup> requiring protection from wildfire smoke, another burgeoning hazard federal OSHA doesn't regulate through a specific standard. The wildfire smoke rules apply when the Air Quality Index reaches 101, or moderate levels of danger.<sup>129</sup> Employers are to provide N95 face masks or other federally approved face masks for voluntary use. Those masks are mandatory when the AQI reaches 251. The rules also require communicating with employees on wildfire smoke levels, relocating workers indoors, changing work schedules and providing filtered air when air quality is bad.<sup>130</sup> Washington state is seeking to adopt a similar standard; it's currently in the rulemaking process.<sup>131</sup>

### 4. RIGHT TO REFUSE WORK IN CLIMATE EMERGENCY SITUATIONS

In March, 2023, the National Employment Law Project published a policy brief arguing for stronger anti-retaliation rules when workers refuse to work because of the dangers posed by a climate emergency.<sup>132</sup> The brief cites to a couple of examples of governments taking this employer retaliation threat seriously and doing something about it.<sup>133</sup> In California, SB1044, enacted in September, 2022, prohibits an employer, in the event of an emergency condition, from taking or threatening adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe. An "emergency condition" includes a condition of "disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act." The provision doesn't apply to disaster services or emergency services workers, along with a list of other employees

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<sup>128</sup> <https://osha.oregon.gov/OSHAPubs/factsheets/fs92.pdf>

<sup>129</sup> <https://www.airnow.gov/aqi/aqi-basics/>

<sup>130</sup> <https://osha.oregon.gov/OSHArules/adopted/2022/ao4-2022-text-smoke-exposure.pdf>

<sup>131</sup> <https://lni.wa.gov/safety-health/safety-rules/rulemaking-stakeholder-information/wildfire-smoke>

<sup>132</sup> <https://www.nelp.org/wp-content/uploads/Policy-Brief-Right-to-Refuse-Dangerous-Work-3-2023.pdf>

<sup>133</sup> Federal OSHA recognizes a conditional right to refuse dangerous work, expressed on its website as follows: "[I]f the condition clearly presents a risk of death or serious physical harm, there is not sufficient time for OSHA to inspect, and, where possible, you have brought the condition to the attention of your employer, you may have a legal right to refuse to work in a situation in which you would be exposed to the hazard." <https://www.osha.gov/workers/right-to-refuse>

performing various kinds of essential work.<sup>134</sup> An ordinance with similar intent was enacted in 2018 in Miami-Dade County, making it unlawful for an employer to retaliate or threaten to retaliate against a non-essential employee who complies with County evacuation or emergency orders.<sup>135</sup>

## 5. WORKPLACE VIOLENCE

Workplace violence is another all-too-frequently occurring hazard, whose prevention to date has only been addressed by federal OSHA under the general duty clause,<sup>136</sup> and without the benefit of a specific OSHA standard.<sup>137</sup> There were 392 workplace homicides in 2020, and 37,060 nonfatal injuries in the workplace resulting from an intentional injury by another person, according to the U.S. Bureau of Labor Statistics (BLS).<sup>138</sup> Each year, an average of nearly two million U.S. workers report having been a victim of violence at work, OSHA reports. This is a problem clearly worthy of a standard, since effective means of prevention and response are by now well known.<sup>139</sup>

California has been a leader here. In 2017 it passed a regulation mandating that various steps be taken to prevent violence in the workplace, including the requirement to develop and implement a workplace violence prevention plan, and a training and incident reporting system, in a broad array of health care settings.<sup>140</sup> Other states have taken similar steps.<sup>141</sup> Quite recently, in October, 2023, the California legislature passed and Governor Newsom signed a bill that would expand the coverage of the 2017 rule to all employers in the state.<sup>142</sup>

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<sup>134</sup> <https://legiscan.com/CA/text/SB1044/id/2609327>

<sup>135</sup> <http://www.miamidade.gov/govaction/legistarfiles/Matters/Y2018/180148.pdf>

<sup>136</sup> [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-01-058.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-058.pdf)

<sup>137</sup> <https://www.osha.gov/workplace-violence/enforcement>

<sup>138</sup> <https://www.bls.gov/opub/ted/2022/workplace-violence-homicides-and-nonfatal-intentional-injuries-by-another-person-in-2020.htm>

<sup>139</sup> <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/workplace-violence-prevention-and-response.aspx>

<sup>140</sup> <https://www.dir.ca.gov/Title8/3342.html>

<sup>141</sup> These include Oregon, Nevada, Washington state, Minnesota, New York, and Pennsylvania. <https://www.businessinsurance.com/article/20190626/NEWS08/912329252/States-lead-the-way-on-mitigating-workplace-violence-in-health-care-settings>

<sup>142</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB553](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB553)

In the public sector, New York State has enacted legislation that requires public employers (except k-12 schools) to develop and implement workplace violence prevention programs that cover all employees at each of their worksites, a law it asserts is the most comprehensive standard in the country.<sup>143</sup> And in Massachusetts several years ago, an executive order was issued requiring a zero tolerance policy for violence in the public sector workplace.<sup>144</sup>

## 6. ERGONOMIC HAZARDS/EXCESSIVE WORKLOADS

The enormous proliferation of warehouse “fulfillment center” and delivery work, led by Amazon, and the quota and monitoring systems that often accompany that work, have triggered major increases in serious workplace injuries, including especially musculoskeletal, or “ergonomic” injuries. Ergonomic hazards were targeted by federal OSHA in a regulation promulgated in 2000 during the Clinton administration. The rule was promptly rescinded in early 2001 under the Congressional Review Act, very soon after George W. Bush was elected. Hence, ergonomic hazards and the painful and disabling musculoskeletal injuries they can and do cause,<sup>145</sup> are only regulated by federal OSHA under the general duty clause, which, as has been repeated several times here, is far more cumbersome to enforce than a standard with specific requirements.

Though ergonomic hazards (such as lifting, twisting, and repetitive motion hazards) have been a leading cause of workplace injuries for decades, the role of increased amounts of warehouse work in spiking these rates has begun to spur states into action in the absence of a federal standard. Most recently, the state of Washington has joined California in enacting a standard addressing prevention of ergonomically-caused injuries.<sup>146</sup> Signed by Governor Jay Inslee in July, 2023, the law requires employers with high workers’ compensation claim rates involving musculoskeletal injuries to comply with a series of preventative safety requirements. It’s noteworthy that the law repeals a 2003 Washington voter initiative that had prohibited state worker protection agencies from enacting ergonomic regulations. Fortunately, that ban is now history, and

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<sup>143</sup> <https://www.pef.org/wp-content/uploads/2022/07/WVPLaw.pdf>

<sup>144</sup> <https://www.mass.gov/executive-orders/no-442-establishing-a-policy-of-zero-tolerance-for-workplace-violations>

<sup>145</sup> <https://prospect.org/health/deregulation-led-opioid-epidemic/>

<sup>146</sup> <https://www.dir.ca.gov/title8/5110.html>

hopefully other states will also step up to proactively confront and remedy this seriously under-regulated hazard.<sup>147</sup>

## 7. SAFETY AND HEALTH/INJURY AND ILLNESS PREVENTION PROGRAMS

Federal OSHA doesn't, by regulation, require that all employers develop and implement safety and health (aka illness and injury prevention) programs.<sup>148</sup> The agency does, however, highly recommend their universal implementation and use.<sup>149</sup> Several states have opted to require that employers deploy them. A 2016 OSHA report sets out what each State Plan state had required in this regard, as of that date.<sup>150</sup> When the report was issued, California, Minnesota, Montana, Nebraska, and Washington required a safety plan of all employers, for example, and Arkansas, Connecticut, Maine, New Mexico, New York, North Carolina, Texas, and Vermont required "high hazard" employers to have a plan. California's rule, promulgated in 1991, is a worthy example. Here is how OSHA summarizes it:

Cal. Lab. Code §6401.7 (1991), promulgated by the California Department of Industrial Relations, Division of Occupational Safety and Health (Cal/OSHA), established an Injury Illness Prevention Program (IIPP) standard. All employers are required to develop and implement a written IIPP that, at minimum, provide for the following elements:

- Identification of person(s) responsible for implementing the program.

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<sup>147</sup> In addition, in response to ramped-up warehouse work pace standards and electronic monitoring, California, New York, Washington, and Minnesota have enacted new legislation to protect warehouse workers against workloads that interfere with worker health and safety, or that make it hard for workers to take mandated rest and bathroom breaks. These laws will also require employers to disclose information about quotas and protect workers from retaliation. See, e.g., <https://www.npr.org/2021/09/08/1034776936/amazon-warehouse-workers-speed-quotas-california-bill>; <https://revealnews.org/article/new-york-passes-law-to-protect-amazon-warehouse-workers/>

<sup>148</sup> OSHA has requirements for written workplace safety plans that cover a number of specific industries, situations, or activities, including bloodborne pathogen exposure, respiratory protection, permit-required confined spaces, lockout/tagout, process safety management, etc. OSHA also has written plan requirements affecting the construction sector covering, for example, fall protection and construction excavation.

<sup>149</sup> <https://www.osha.gov/safety-management>

<sup>150</sup>

[https://www.osha.gov/sites/default/files/Safety\\_and\\_Health\\_Programs\\_in\\_the\\_States\\_White\\_Paper.pdf](https://www.osha.gov/sites/default/files/Safety_and_Health_Programs_in_the_States_White_Paper.pdf)

- Establishment of a system to identify and evaluate workplace hazards, including scheduled and periodic inspections to identify unsafe conditions and work practices.
- Methods and procedures to correct unsafe or unhealthy conditions and work practices in a timely manner.
- Training program(s) to instruct employees in safe/healthy work practices and the hazards specific to each employee's job assignment.
- System(s) for communicating to employees on workplace safety/health matters, including provisions that encourage employees to report hazards without fear of reprisal.
- System(s) for ensuring employee compliance with safe work practices, which may include disciplinary measures.<sup>151</sup>

All employers, with some exceptions for "small" and "low hazard" employers, are required to keep documentation and records associated with implementing and maintaining the IIPP. The IIPP standard also explicitly permits the use of employer and employee occupational safety and health committees to comply with the communication system requirement. In addition, the IIPP must cover all the employer's employees and "all other workers who the employer controls or directs and directly supervises."

Cal/OSHA requires that every agency workplace inspection include an evaluation of the employer's IIPP. If any of the required program elements are not addressed, employers are considered to be non-compliant.

Here again, states have come forward to create mandatory workplace safety and health practices and procedures that federal OSHA has not, at least to date. These valuable regulatory contributions to worker safety and health prevent injuries and illnesses, and save lives.<sup>152</sup>

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<sup>151</sup> California's Department of Industrial Relations, Division of Occupational Safety and Health, has issued a very helpful guide for employers on how to develop an effective (and mandatory) illness and injury prevention program. [https://www.dir.ca.gov/dosh/dosh\\_publications/iipp.pdf](https://www.dir.ca.gov/dosh/dosh_publications/iipp.pdf)

<sup>152</sup> An OSHA white paper issued in 2012 found, for example, that workplace fatality rates in California, Hawaii, and Washington, all with mandatory injury and illness prevention program requirements, were as much as 31 percent below the national average. <https://www.osha.gov/sites/default/files/OSHAwhite-paper-january2012sm.pdf>

## 8. SAFETY AND HEALTH COMMITTEES

Active participation of workers through safety and health committees – including committees that are workers-only, union-only, and/or labor/management – can be particularly valuable in identifying and addressing workplace safety and health issues. As with injury and illness prevention programs, federal law doesn't mandate safety and health committees, but some states do. These can include mandates that State Plan states have adopted to further their state safety and health program, or they can be legislatively-required actions to support the state workers' compensation systems.

For example, Washington, a State Plan state, requires all employers with 11 or more employees (on the same shift at the same location) to establish a safety committee, with both employer-selected and employee-elected members;<sup>153</sup> the number of employee-elected members must equal or exceed the number of employer-selected members.<sup>154</sup> Required topics to be covered by the safety committee include review of safety and health inspection reports to help correct safety hazards; evaluating accident investigations to determine if the cause(s) of the unsafe condition was/were found and corrected; and evaluating the workplace's accident and illness prevention program and discussing recommendations for improvement.

In Nebraska, all employers subject to that state's Workers' Compensation Act are obligated to establish a safety committee,<sup>155</sup> and that committee is charged with adopting and maintaining an effective written injury prevention program. Here again, if the employer isn't subject to a collective bargaining agreement, the number of

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<sup>153</sup> <https://app.leg.wa.gov/wac/default.aspx?cite=296-800-130>

<sup>154</sup> The mandate that employee members be employee-elected and be in numbers greater than or equal to employer-selected numbers is presumably intended to address concerns regarding the National Labor Relations Act's (NLRA) prohibition on employer-dominated "labor organizations," which the employee component of the safety committee could be construed to be. For a helpful discussion of this important issue, see the OSH Law Project's *Eliminating Workplace Hazards*, pp. 8-12, found at <https://m.usw.org/get-involved/hsande/resources/publications/OSH-Law-Project-Inspection-Toolkit-Printer-Version.pdf>

<sup>155</sup> <https://nebraskalegislature.gov/laws/statutes.php?statute=48-443>

employer- and employee-selected members needs to be equal, with employee members selected under procedures prescribed by the Commissioner of Labor.<sup>156</sup>

## CONCLUSION

Ensuring safe and healthy workplaces for all employees in this country is a noble but elusive goal. And yet, it's one worker protection agencies are duty-bound – and have the honor – to pursue. Comprehensive worker protection laws, and their effective enforcement, are key elements that can help move us toward attainment of that goal.

In this paper, we've examined how, while the federal government under the OSH Act has overall responsibility for safety and health in private sector workplaces, the states – particularly but not exclusively State Plan states – are absolutely key actors in protecting their workers. We've looked at how State Plan OSHAs, along with federal OSHA, must be strategic in their enforcement efforts, and we've examined some tools that can help in that endeavor. We've also looked at how states, in support of their workers, can step into regulatory voids that federal OSHA hasn't filled, and how State Plan states, while they must be “at least as effective” as federal OSHA, can do better than that – as many have.

Hopefully, the strategic tools used and proactive measures taken by both federal and state OSHAs described in these pages will help inspire these agencies to develop new and ever-more effective means to reach the pot of gold at the end of the rainbow: truly safe and healthy workplaces for all.

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<sup>156</sup> In contrast, a comparable Nevada statute requires employers with more than 25 employees to establish a safety committee that must include employee representatives, but its language suggests that only if the workers are represented by a union must they be selected by the employees.

<https://www.leg.state.nv.us/nrs/nrs-618.html> Again, for any state adopting a safety committee requirement, careful consideration of NLRA prohibitions is strongly recommended.