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OCCUPATIONAL SAFETY AND HEALTH REFORM AND
REINVENTION ACT

JUNE 28, 1996.—Ordered to be printed

Mrs. KASSEBAUM, from the Committee on Labor and Human
Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1423]

The Committee on Labor and Human Resources, to which was referred the bill S. 1423 to amend the Occupational Safety and Health Act of 1970 to make modifications to certain provisions, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

CONTENTS

	Page
I. Purpose	1
II. Background and need for the legislation	4
III. Legislative history and committee action	17
IV. Explanation of bill and committee views	22
V. Cost estimate	41
VI. Regulatory impact statement	44
VII. Section-by-section analysis	44
VIII. Additional views	47
IX. Minority views	50
X. Changes in existing law	74

I. PURPOSE

The OSHA Reform and Reinvention Act, S. 1423, will improve workplace safety by updating and retooling our basic Federal work-

place safety law, the Occupational Safety and Health Act of 1970 (OSHA). The bipartisan legislation will provide greater protection for workers, more flexibility for employers, and increased efficiency for the Federal agency designated to oversee and implement our Federal workplace safety policy.

The OSH Act of 1970 imposed a duty on all employers to establish and maintain a safe workplace. Like many programs enacted during the “era of big government,” the legislation created a Federal agency—the Occupational Safety and Health Administration—within the U.S. Department of Labor to write health and safety standards applicable to all workplaces. The Congress then delegated responsibility to the OSH Administration to enforce these standards through random inspections and inspections conducted in response to worker complaints.

Both the Congress and the Clinton administration recognized that OSHA needs improvement. The U.S. Senate Committee on Labor and Human Resources has held hearings on OSHA reform for the past 5 years, and the Clinton administration began a major OSHA reinvention initiative in 1995.

Underlying these efforts was an understanding that OSHA’s basic command and control structure—uniform, one-size-fits-all regulations written at headquarters and enforced through mass inspection—was no longer appropriate. The inflexible system led the agency to become too focused on punishing employers for paperwork violations rather than on the ultimate goal of improved workplace safety. Firms were frustrated that inspectors failed to differentiate between serious hazards and mere technical noncompliance, and from a practical viewpoint, given our limited resources, mass inspection was simply not possible.

The Administration appeared to recognize this reality. In the Labor Department’s OSHA reinvention blueprint, the Administration stated:

Not all workplaces are alike; not all employees are equally responsible. Yet too often, today’s regulatory scheme applies a “one-size-fits-all” approach that treats all workplaces and all hazards equally. In the most significant reform unveiled in this report, OSHA will take steps to treat employers who have aggressive safety and health programs differently from employers who lack such efforts. * * * For firms with strong and effective health and safety programs [OSHA offers] partnership. * * * For firms that do not implement strong and effective health and safety programs [OSHA offers] traditional enforcement.¹

Implementing this “partnership” approach nationally, the Administration stated that “the key to success is encouraging employers to work with their employees in hazard identification and safety awareness, rather than have those workers depend solely on OSHA inspectors.”²

¹“The New OSHA: Reinventing Worker Safety and Health,” National Performance Review, May 1995, p. 3–4 (hereinafter The New OSHA), reprinted in Hearing of the Senate Committee on Labor and Human Resources, “Occupational Safety and Health Reform and Reinvention Act, S. 1423,” 104th Cong., 1st Sess., S. Hrg. 104–353 (November 29, 1995), p. 63 (hereinafter S. Hrg. 104–353).

²“The New OSHA,” cited in S. Hrg. 104–353, p. 64.

The OSHA Reform and Reinvention Act, S. 1423, implements the Administration's reinvention effort and provides OSHA with the tools to respond to a new workplace environment. Recognizing that Federal safety inspectors cannot inspect every workplace, the bill provides positive incentives for employers to address health and safety on their own. Employers with effective safety and health programs, or that utilize certified, third-party consultants for workplace safety audits, would be exempt from random OSHA inspections and would experience lower OSHA fines issued in response to a worker complaint. These positive incentives move OSHA away from the command-and-control, punitive enforcement mode that has plagued the agency since the mid-1970s.

Moreover, the legislation permanently authorizes and codifies two important programs that have heretofore been implemented by regulation and funded through annual appropriations: the onsite consultation program, where safety consultants provide employers with the information they need to comply with the law without fines or penalties, and the Voluntary Protection Program (VPP), where OSHA recognizes work sites for their extraordinary commitment to health and safety. Both of these programs demonstrate a renewed commitment to promoting a cooperative, nonadversarial relationship between OSHA and the employer community.

The legislation also removes significant legal barriers that Federal labor law places in the way of legitimate employee participation in health and safety matters. Workers deal with workplace hazards firsthand every day, yet the National Labor Relations Act prohibits worker-management safety committees in nonunion settings. Senate bill 1423 removes this obstacle to improved workplace safety so workers and managers may address safety issues on their own, without relying on OSHA inspectors.

The committee recognizes that OSHA's enforcement capability must be credible for the agency to remain effective. While positive incentives encourage workers and firms to improve workplace safety without relying on government intervention, OSHA may devote its own scarce resources toward the worst hazards in the most dangerous workplaces. The bill accomplishes this goal in three ways.

First, the OSHA reform bill maintains the agency's "egregious penalty policy," where OSHA multiplies the \$70,000 maximum penalty for a "willful" violation by the number of employees exposed to the hazard, thereby levying multimillion dollar fines on the worst violators. Although some recommended eliminating this policy, the committee did not take this action in order for OSHA to maintain a credible deterrent capability.

Second, the bill changes OSHA's penalty structure for violations of our health and safety laws. The committee expects OSHA inspectors to focus on real hazards rather than on paperwork compliance, yet current law maintains the same maximum fine for both serious and nonserious violations (\$7,000). Senate bill 1423 reduces fines for nonserious hazards from the maximum of \$7,000 to \$100 so our Federal safety laws differentiate between serious and nonserious violations. The reform bill also prohibits fines for first time, non-serious paperwork or posting violations.

Finally, the legislation changes OSHA's complaint process to give inspectors greater discretion to investigate complaints by phone or

fax, rather than conducting onsite inspections for every formal written complaint the agency receives. Last year, OSHA inspectors wasted over 100,000 hours of inspector time responding to complaints where there were no serious hazards. Clearly, given its limited resources, OSHA must deploy its enforcement personnel more efficiently in the future.

In sum, the Nation's Federal workplace safety law needs to be retooled to deal with the changing environment. The committee believes that the OSH Act must recognize and encourage private sector initiatives to improve occupational safety, while at the same time refocusing government resources on the most serious hazards at the most dangerous work sites.

II. BACKGROUND AND NEED FOR THE LEGISLATION

Congress enacted the Occupational Safety and Health Act in 1970. The statute created an agency within the U.S. Department of Labor—the Occupational Safety and Health Administration—to establish and enforce national health and safety standards applicable to all work sites. Under the statute, OSHA inspectors conduct random inspections, respond to complaints, and investigate work sites after accidents occur.

Evidence of OSHA's effectiveness has been mixed. Although some have argued that fatality rates declined over the past 30 years due to enlightened management, higher workers' compensation costs, and a shift away from manufacturing and toward service sector jobs,³ OSHA argued that its health and safety standards, particularly in the area of lead exposure, trench cave-ins and cotton dust, have saved lives.⁴

Despite disagreement over the effectiveness of OSHA, committee members as well as the witnesses testifying before the committee during the two days of oversight hearings on June 21–22, 1995 agreed that our Federal workplace safety policy, including the agency (OSHA) with responsibility for implementing the policy, required reform. OSHA's assistant secretary, Joseph Dear, told the committee:

I want to be very forthright and candid about the need to change the agency's culture. When I came to OSHA, I fully recognized that in the past, the agency had at times lost sight of its mission, focusing too much on procedures that appeared adversarial and nit-picky, and not enough

³ Summarizing the research on OSHA's effectiveness, one author noted:

Indeed, a casual inspection of the data suggests that OSHA's impact on injury and fatality rates has been limited. Figure 1 [chart showing workplace fatalities from 1933–1992, compiled by the National Safety Council, *Accident Facts*, 1993 ed., Itasca, IL] shows that the workplace fatality rate has been declining for years, with little impact from the creation of OSHA. Figure 2 [chart showing workplace injury and illnesses from 1972–1994, compiled by the U.S. Department of Labor, Bureau of Labor Statistics] shows that unlike fatality rates, injury rates do not show a significant decline over time. Rather the pattern of lost workday injuries has closely followed the business cycle since the early 1970s.

Max Lyons, "The Economics of Workplace Safety," Employment Policy Foundation, 1996, p.34.

⁴ See testimony of Joseph Dear before the Senate Committee on Labor and Human Resources, "OSHA Reform," S. Hrg. 104–116, June 21–22, 1995, p. 89–90 (hereinafter S. Hrg. 104–116) and testimony of Linda Chavez-Thompson, AFL–CIO, before the Senate Committee on Labor and Human Resources, S. Hrg. 104–353, p. 37 ("Since the [OSHA] law's passage, the workplace fatality rate has been cut in half; injury rates have decreased. * * *").

on saving lives and preventing injuries. I knew that proceeding with “business as usual” could well put us out of business altogether. But if there is one single message you take away from this hearing today, I hope it is this: that OSHA is changing the way it does business.⁵

Senator Dodd commented that while “OSHA has made a great deal of progress in the quest for injury-free workplaces, [a]ll of its actions have not been perfect * * * [and] there is always room for improvement.”⁶ Joining in agreement, Senator Gregg advocated “mov[ing] down this road of trying to make OSHA work better. Nobody is suggesting that we terminate it; what we are talking about here is how we can make it address the issues of safety in a more constructive way and contribute to the concerns that lead to injuries versus contributing to the concerns that lead to bureaucracy.”⁷

SEPARATE THE GOOD ACTORS FROM THE BAD

Similarly, committee members and witnesses expressed consensus on the changes OSHA needed to make. Mr. Dear testified that OSHA was engaged in a “reinvention” initiative “designed to make major changes in the culture of OSHA’s performance.” Mr. Dear told the committee:

[S]ome employers believe that OSHA’s enforcement approach is too confrontational. To address this concern, OSHA is changing its fundamental operating model from one of command and control to one that provides employers with a real choice between a cooperative partnership and a traditional enforcement relationship. This change is designed to separate good actors from bad actors in the safety and health arena, and to treat them differently.⁸

Emphasizing his commitment to “changing the way OSHA does business,” Mr. Dear summarized his testimony as follows:

At the heart of our effort is a simple principle: develop a broad range of interventions, and treat good actors differently from bad actors. For employers who have made safety and health a priority, and who are looking for a cooperative partnership, offer incentives, compliance assistance, training and education, and recognize their efforts. But for those employers who disregard their workers’ safety and health (and unfortunately some still do), retain a strong traditional enforcement program.⁹

Committee members and witnesses agreed with Mr. Dear that OSHA currently failed to differentiate between companies making a sincere effort to address workplace safety and those that did not. Senator Simon commented that “[a] complaint that I have to believe probably has some legitimacy is that [OSHA] spend[s] a dis-

⁵S. Hrg. 104-116, p. 131.

⁶S. Hrg. 104-116, p. 125.

⁷S. Hrg. 104-116, p. 11.

⁸S. Hrg. 104-116, p. 131.

⁹S. Hrg. 104-116, p. 132.

proportionate amount of time with companies that are doing a good job. * * *¹⁰

Vernon Rose, president of the American Industrial Hygiene Association and a witness invited by the minority, believed “companies that are taking responsibility for themselves and making changes in the workplace could be recognized by OSHA as good faith employers.”¹¹ Similarly, Ray Montaigne, a safety professional testifying for the Associated Builders and Contractors, told the committee: “If OSHA is to be effective, then it needs to be a partner to those companies that make a sincere effort and reserve the policeman tactics for companies that do not make the effort to have a safe workplace.”¹²

Senator Dodd praised the Clinton administration’s reinventing government program that did away with the “one-size-fits-all” view toward regulation. Senator Dodd noted that “OSHA is now offering employers the option of working in partnership with it to create a safe and productive work environment. The agency also now provides incentives for businesses that have good records on complying with safety regulations.”¹³

LIMITED RESOURCES

There also was agreement that Federal Government resources were limited. OSHA’s assistant secretary told the committee that his agency “has a frequency of inspection of once every 23 years for hazardous workplaces.”¹⁴ The AFL–CIO submitted a table to the committee, printed in the hearing record, indicating the range of years—from 18 years in Oregon to 247 years in South Dakota—needed for OSHA to inspect all job sites in the United States.¹⁵

Given its limited resources, witnesses presented numerous suggestions to improve OSHA’s effectiveness. Joseph Kinney, director of the National Safe Workplace Institute, testified that safety awareness and education are probably the most important ways to improve workplace injury records. According to Mr. Kinney:

If you look at safety, there are many different issues that impact it, Government being just one. Others are certainly insurance—litigation, ethics, morality, values and education. In fact, if I had to choose one, I would say that probably education is the one that is going to make the difference because by informing people, we will have a higher value for safety and health.¹⁶

Perhaps for that reason, David Whiston, president of the American Dental Association, advocated reinventing OSHA “to emphasize consultation and training instead of penalties and punitive measures.”¹⁷ Dr. Whiston also believed that the agency’s enforcement personnel should issue warnings in lieu of citations for first-

¹⁰ S. Hrg. 104–116, p. 15–16.

¹¹ S. Hrg. 104–116, p. 28.

¹² S. Hrg. 104–116, p. 6.

¹³ S. Hrg. 104–116, p. 125.

¹⁴ S. Hrg. 104–116, p. 94.

¹⁵ S. Hrg. 104–353, p. 130.

¹⁶ S. Hrg. 104–116, p. 23.

¹⁷ S. Hrg. 104–116, p. 108.

time violations to promote abatement of hazards rather than penalties.

The committee also heard testimony from Duane Guy, acting director of labor management relations in the Kansas Department of Human Resources and director of the onsite consultation program in Kansas. Under that program, small employers receive advice, without fear of citations or fines, on how to improve workplace safety and also to comply with OSHA requirements. The Federal Government pays for 90 percent of the program.

Reminding the committee that OSHA had limited resources for enforcement as well as consultation and education, OSHA Assistant Secretary Joseph Dear informed the committee that his agency's reinvention effort was designed to leverage his resources. According to the OSHA official:

I believe that with a credible enforcement program, we will increase the demand for voluntary assistance and that as we create other ways to develop incentives to encourage employers, like our nationalization of the "Maine 200" concept and the focused inspection concept, that we will find opportunities to leverage resources to get much greater improvement than we could get if we only relied on enforcement.¹⁸

PRIVATE SECTOR, THIRD-PARTY CONSULTANTS

Two years before the Administration published its "New OSHA" reinvention document, Vice President Al Gore's National Performance Review, "From Red Tape to Results: Creating a Government that Works Better and Costs Less," suggested using market mechanisms to improve health and safety. The vice president's report recognized that with limited government resources, there was no way for OSHA inspectors to visit every work site to enforce OSHA standards.

Accordingly, the report stated:

[N]o army of OSHA inspectors need descend upon corporate America. The health and safety of American workers could be vastly improved—without bankrupting the Federal treasury.

The Labor Secretary already is authorized to require employers to conduct certified self-inspections. OSHA should give employers two options with which to do so: *They could hire third parties, such as private inspection companies; or they could authorize non-management employees, after training and certification, to conduct inspections.* In either case, OSHA would set inspection and reporting standards and conduct random reviews, audits, and inspections to ensure quality. (Emphasis added).¹⁹

Mr. Vernon Rose, president of the American Industrial Hygiene Association, testified in support of using third party certification. Specifically, Mr. Rose told the committee:

¹⁸S. Hrg. 104-116, p. 104.

¹⁹Albert Gore, Report of the National Performance Review, 1993, p. 63.

* * * we also believe that OSHA should have a scheme for third-party assistance. * * * There are more than 6 million workplaces in the United States that are under the jurisdiction of OSHA. Currently, there are about 2,400 compliance officers, both State and Federal. It is obvious that all of these workplaces are not going to be visited by compliance officers.

OSHA's goal should be that every employer have an assessment of safety and health in their workplace, conducted by a competent health and safety professional. In view of limited resources, and with due respect to the 7(c)(1) program that Mr. Guy represents, we need to have additional resources made available for these workplace assessments.

The consultants should come from the private sector and from the professional organizations. * * *²⁰

Mr. Joseph Kinney, from the National Safe Workplace Institute, concurred with Mr. Rose on the use of third parties to conduct workplace safety audits. Mr. Kinney told the committee: "I agree with the whole idea of third-party certification."²¹

Synthesizing the Administration's reinvention materials and the testimony of Mr. Dear and other witnesses, the committee concluded that OSHA must be improved and must refocus and leverage its limited resources by differentiating between safe and unsafe workplaces. The agency also must change its emphasis toward education and consultation, particularly with firms that demonstrate a commitment to health and safety, by providing positive incentives for firms to address health and safety. Finally, OSHA must maintain a credible enforcement capability.

POSITIVE INCENTIVES

Several witnesses, including OSHA Assistant Secretary Joseph Dear, provided examples of positive incentives that OSHA could recognize. For instance, OSHA offered firms a choice of "partnership" or "traditional enforcement" depending upon the firms' level of commitment to health and safety, as demonstrated by establishing a health and safety program. Mr. Dear described OSHA's Maine 200 program, which rewarded employers with health and safety programs with inspection exemptions, higher priority for assistance, regulatory relief and penalty reductions.

In its "New OSHA" reinvention document, which described the nationwide expansion of OSHA's Maine 200 program, the Administration stated:

At its core, this new approach [partnership versus traditional enforcement] seeks to encourage the development of work site health and safety programs. In a health and safety program, employers and employees work together to find the best solutions to the particular problems of their workplace. OSHA will be looking for programs with these features: management commitment, meaningful participa-

²⁰S. Hrg. 104-116, p. 24-25.

²¹S. Hrg. 104-116, at p. 29.

tion of employees, a systematic effort to find safety and health hazards whether or not they are covered by existing standards, documentation that the identified hazards are fixed, training for employees and supervisors, and ultimately a reduction in injuries and illnesses.

To spur the spread of these programs, employers will be offered a clear choice:

For firms with strong and effective health and safety programs: partnership. OSHA recognizes that many, if not most, employees are interested in protecting the safety of their workers. Those who choose to work with their employees and with OSHA in reducing injuries and illnesses will find OSHA to be a willing partner. For fully committed employers who are truly exceptional in eliminating hazards and reducing injuries and illnesses, OSHA will provide special recognition including the *lowest priority for enforcement inspections (which, given remaining priorities, means that inspections will be quite rare.)*; and the highest priority for assistance, appropriate regulatory relief, and penalty reductions of up to 100 percent. (Emphasis added.)²²

OSHA's Maine 200 program, described above, provided positive incentives to encourage firms to address health and safety on their own. Those companies were rewarded with inspections that would be "quite rare" and dramatically reduced penalties if a violation were discovered through a complaint or after an accident. According to the Administration "The key to success is encouraging employers to work with their employees in hazard identification and safety awareness, rather than have those workers depend solely on OSHA inspectors."²³

Vernon Rose of the Industrial Hygiene Association concurred that OSHA should adopt positive incentives for firms to establish health and safety programs. Mr. Rose testified that "OSHA's responsibility should be to develop compliance schemes with incentives to encourage the widest possible acceptance and implementation of health and safety programs in the workplace."²⁴

The committee noted that OSHA already offers two programs—the consultation program and the Voluntary Protection Program (VPP)—to encourage firms to establish health and safety programs. OSHA's Safety and Health Achievement Recognition Program (SHARP) part of the consultation service, "provides incentives and support to smaller, high-hazard employers to work with their em-

²²S. Hrg. 104-353, p. 63.

²³"The New OSHA", p. 4, cited in S. Hrg. 104-353, p. 64.

²⁴S. Hrg. 104-116, p. 25. Mr. Rose also testified that firms should be encouraged to audit their workplaces for safety problems. According to Mr. Rose:

Employers should be encouraged to perform self audits or to hire third-party reviewers to analyze company health and safety management systems. Self-inspections and audits are one of the essential tools for employers to maintain effective health and safety programs. This would help achieve the OSHA mission of improving health and safety. To promote the use of audits, some form of legal and regulatory protection for the employer is needed. * * * (S. Hrg. 104-116, p. 46.)

ployees to develop, implement, and continuously improve the effectiveness of their workplace safety and health programs.”²⁵

OSHA described SHARP as a method to provide “public recognition of employers and employees who have worked together successfully to establish exemplary safety and health programs.”²⁶ Firms must have a “lost workday injury rate above the average for their industry or be an industry that is on OSHA’s high-hazard list” to be eligible to enter the program.²⁷

Firms that undergo a review of their work site by a safety consultant, establish a comprehensive health and safety program that includes employee involvement, correct all identified hazards, and lower their lost workday injury rate “to or below the national average for their injury” were removed from OSHA’s general inspection schedule.²⁸

A representative of the VPP program, Mr. James Andrews of DOW Chemical Co., testified that “VPP recognize[s] worksites for achieving and maintaining excellence in worker safety and health protection.”²⁹ Firms in the VPP that establish comprehensive safety programs and meet safety benchmarks also are exempt from regular, programmed OSHA inspections. According to Mr. Andrews, exempting VPP sites from general inspections permits “OSHA [to] concentrate its enforcement efforts where they are needed.
* * *”³⁰

Mr. Joseph Kinney of the National Safe Workplace Institute supported positive incentives for firms to address workplace safety. According to Mr. Kinney, “I think there are incentives that could be used, like third-party certification, that could be tied to an assessment process.”³¹ He also believed “that third-party certification could be something that could be adopted into statute fairly quickly, even by itself, without a major overhaul. I certainly think it would go a long way or be a meaningful step toward encouraging more confidence by business in Government.”³²

STATE INITIATIVES

The committee was also aware of State initiatives to improve safety and health. For instance, Governor Paris Glendening of Maryland formed an Occupational Safety and Health Task Force as part of his Regulatory Review Initiative to improve the delivery of occupational safety services in Maryland, a State-plan State for OSHA purposes. The task force recommended improving the effectiveness of the consultation and training programs, as well as increasing the availability of incentive-based compliance programs.

Significantly, representatives from labor, industry and government served on the task force. Union representatives included the United Food and Commercial Workers (UFCW) Local 27, the Firefighters Association, the Amalgamated Transit Union, International Brotherhood of Electrical Workers Local 24, United Auto

²⁵ OSHA Instruction TED 3.5A, Chapter X, p. 1.

²⁶ Id.

²⁷ Id., p. X-2.

²⁸ Id., p. X-3. See S. Hrg. 104-116, p. 31-32.

²⁹ S. Hrg. 104-116, p. 33.

³⁰ Id., p. 34.

³¹ S. Hrg. 104-116, p. 28.

³² Id., p. 30.

Workers Local 354, and the president and the safety committee chairman of the Maryland State & DC AFL-CIO. Business representatives included Bethlehem Steel, GM Truck and Micro Machining. The Democrat-appointed Commissioner of the Maryland Department of Labor and Industry also served on the task force.

According to the task force's final report:

The Task Force considered a number of Incentive-Based Cooperative Programs designed to serve two complementary purposes. Programs that encourage and reward a commitment to safety and health accomplish the dual goals of increasing safety for workers, while freeing MOSH [Maryland Occupation Safety and Health] staff to concentrate on noncomplying employers. * * * The Task Force recommends that MOSH continue these efforts to reward employers who have superior or effective health and safety programs.³³

One effort to reward firms with health and safety programs was the "Consultation Partnership Program," where employers with a "strong" commitment to occupational safety were "removed from general schedule inspections lists for a period of up to 2 years."³⁴ To qualify, firms must participate in a health and safety consultation, maintain all the core elements of a safety program, and address all hazards identified during the consultation in a timely manner. The Task Force also recommended that this program, including the inspection exemption, be available to smaller employers that lack the resources to participate in the Maryland State-plan equivalent of the VPP program.³⁵

EMPLOYEE INVOLVEMENT

To promote health and safety programs, OSHA Assistant Secretary Joseph Dear and other witnesses testifying on behalf of workplace safety organizations underscored the importance of employee involvement. In its OSHA reinvention initiative, the Administration wrote: "Employer commitment and meaningful employee participation and involvement in safety and health is a key ingredient in effective programs."³⁶

In fact, in order to qualify for the inspection exemption under the Administration's reinvention program (similar to the Maine 200 program), as well as VPP and SHARP, employers must maintain a health and safety program that included employee involvement.

The Administration noted as part of its reinvention program that it would actively promote employee involvement. "OSHA will promote worker participation in efforts to achieve safe and healthful workplaces. * * * Workers possess a keen awareness of hazards to which they are exposed. Many workplaces have tapped into this important resource and achieved successful results with innovative

³³Task Force Report, Nov. 21, 1994, p. 7.

³⁴Task Force Report, p. 9.

³⁵Task Force Report, p. 9.

³⁶"The New OSHA," p. A-1, Appendix A—"OSHA's Principles for Protecting America's Workers," cited in S. Hrg. 104-353, p. 71.

approaches that involve safety and health programs and cooperative efforts between management and workers.”³⁷

In fact, OSHA’s Augusta, ME, Area Office issued a guidance statement, CPL 2.1A, on its Maine 200 Program encouraging employers to establish safety programs that included employee involvement. During the Senate Committee on Labor and Human Resources hearing on OSHA reform, OSHA Assistant Secretary Dear spoke favorably of the Maine 200 initiative.³⁸

In Maine 200, OSHA encouraged the top 200 employers in Maine that experienced the greatest number of serious workplace injuries and illnesses to establish a health and safety program that included employee involvement. OSHA indicated that it would seek to determine whether the health and safety program had “provisions for employee involvement in safety and health matters. An employee safety and health committee is the preferred method, but equivalent systems will be considered by the AAO on an individual basis.”³⁹

ENFORCEMENT

Some witnesses before the Senate Committee on Labor and Human Resources also noted the continuing importance of OSHA’s enforcement program. OSHA Assistant Secretary Dear told the committee that for employers “who disregard their workers’ health and safety,” OSHA needed to maintain a “strong enforcement program.”⁴⁰ Part of that “credible enforcement program” included the egregious penalty policy, where OSHA multiplied the penalty times the number of workers who were exposed to the hazard. The policy permitted OSHA to generate multimillion dollar fines for safety and health violations.

Mr. Ron Hayes, whose son was killed in a corn silo at Showell Farms in Florida, testified that OSHA had inspected Showell Farms 20 times over the last 18 years, yet safety problems in the corn silo at the poultry processor remained.⁴¹ Mr. Hayes was looking for some accountability from OSHA. He wanted OSHA to follow its own procedures in investigating and citing the employer for his son’s death.

And Mr. Hayes asked Senator Gregg what should be done for employers that repeatedly violate Federal safety standards. Senator Gregg replied, “I think you get very aggressive with those companies.”⁴²

Witnesses before the committee were not opposed to OSHA enforcement of legitimate hazards. Instead, William Steinmetz from the National Roofing Contractors Association expressed concern that 12 of the top 20 OSHA citations for 1994 were for paperwork violations.⁴³ In the hearing record, the committee noted that OSHA issued a “serious” citation to a company in Illinois for failing to properly maintain a written Hazard Communication Program for

³⁷“The New OSHA,” p. 5, cited in S. Hrg. 104–353, p. 65.

³⁸S. Hrg. 104–116, p. 91.

³⁹Augusta Area Office Instruction CPL 2.1A, June 25, 1993, p. 7.

⁴⁰S. Hrg. 104–116, p. 92.

⁴¹S. Hrg. 104–116, at p. 3.

⁴²S. Hrg. 104–116, at p. 13.

⁴³S. Hrg. 104–116, at p. 107.

automatic dishwashing detergent.⁴⁴ In addition, Senator Kassebaum noted that a Kansas electrical contractor was fined \$250 for not signing his injury and illness log and another \$250 for not posting his OSHA poster.⁴⁵

OSHA's assistant secretary, Joseph Dear, testified that the current enforcement system had problems. According to Mr. Dear: "The instances that you [Senator Gregg] cite, that the chairman cited [involving the Kansas electrical contractor] of employers being penalized for a poster violation or for not having an injury log signed, those are the kinds of problems that I am trying to correct because they do undermine support for the purpose of the act, which is to save lives."⁴⁶

When Senator Gregg asked Mr. Dear whether he supported creating a "nonserious violation structure" and "warnings in lieu of a citation structure" for paperwork violations, Mr. Dear responded that he could do that without amending the statute. But he also seemed to suggest that he recognized that these paperwork and other nonserious citations were a problem. In Mr. Dear's view, "[T]hat is one of the things we are accomplishing with the initiatives announced by President Clinton."⁴⁷

The committee noted that the State of Maryland, through its Task Force on Occupational Safety and Health, had investigated possible changes to its enforcement program that were similar to the suggestions raised by Senator Gregg. For "other-than-serious" violations, the Task Force recommended that employers with excellent safety and health programs would not be cited or penalized for violations corrected during the course of an inspection. And for "other-than-serious" violations that were corrected within a "reasonable period of time," the citation or penalty would be waived.⁴⁸

Senator Gregg was particularly interested in these enforcement issues. He testified during the committee's OSHA reform hearing in 1995 that one of his constituents in New Hampshire was fined \$975 in the winter of 1993 for having pot holes in the parking lot. Another constituent was fined \$300 because an electrical fan he purchased did not have three-pronged electrical plugs.⁴⁹

Senator Gregg also noted that institutionally, OSHA was not necessarily focused on eliminating workplace hazards. For example, Senator Gregg cited OSHA's fiscal year 1994 goals, titled "Saving Lives, Preventing Injuries, Protecting the Health of American Workers," where OSHA listed among its goals to increase inspections by 5 percent and to increase penalties by 5 percent.⁵⁰

OSHA apparently reversed this "by the numbers" policy in 1995 and 1996. The agency claimed that "in the past, OSHA inspectors were measured not on the basis of safety at the workplace, but on

⁴⁴ S. Hrg. 104-116, at p. 150.

⁴⁵ S. Hrg. 104-116, at pp. 1, 79.

⁴⁶ S. Hrg. 104-116, at p. 94.

⁴⁷ S. Hrg. 104-116, p. 94.

⁴⁸ Task Force Report, p. 10.

⁴⁹ S. Hrg. 104-116, p. 85. During the committee's joint hearing with the Senate Committee on Small Business, Earl Bradley, president of EBAA Iron, Inc. of Texas, related similar frustrating experiences with OSHA. Mr. Bradley testified that his company was cited \$1,000 for sand on the floor of his iron foundry (OSHA alleged the sand was a tripping hazard), \$1,500 for a guardrail that OSHA alleged was too low (even though the lower rail made it easier to pour molten iron into the molds) and \$3,500 for failure to require employees to wear steel-toed shoes even though such shoes can increase the risk of injury to workers. (S. Hrg. 104-316, p. 161.)

⁵⁰ S. Hrg. 104-116, p. 85.

the basis of violations found. Employers were cited not only for genuine safety hazards, but also for minor or paperwork violations.”⁵¹ OSHA Assistant Secretary Joseph Dear informed the committee that OSHA no longer uses the number of inspections, citations, or penalties as a measure of OSHA’s performance.⁵² In other words, OSHA repudiated its “quota” policy.

In addition, recognizing that inspectors focused on paperwork and other mere technical violations of Federal safety law rather than hazards directly related to safety, OSHA announced in its re-invention initiative that citations for paperwork were declining, citations for failure to post the OSHA poster would no longer be issued, and new inspection guidelines would assure that firms would not be cited for failure to maintain a material safety data sheet for common household consumer products.⁵³ OSHA indicated that its “culture” was changing, and inspectors were being “empowered to use judgment and common sense” during the inspection process.⁵⁴

Underscoring its recognition of the problem, OSHA issued a new policy guidance statement, CPL 2.111 (1995), setting forth a new policy on citing employers for paperwork violations. That instruction stated:

[v]iolations of certain standards which require the employer to have a written program * * * or to make written certification * * * are perceived to be “paperwork deficiencies”. * * * OSHA is involved in an effort to redirect limited resources to those activities which most promote its central mission. Unnecessary issuance of citations for minor technical violations of paperwork and written program requirements undermines the agency’s efforts to promote the agency mission.⁵⁵

In addition to warnings in lieu of citations for “minor technical violations of the law and written program requirements,” OSHA also endorsed reduced penalties for paperwork violations. Under CPL 2.111, where an employer failed to maintain injury and illness records, but there were no injuries or illnesses at the work site, “a citation shall not be issued.”⁵⁶ In cases where records were maintained but reference to a specific injury was omitted, a citation for “failure to record” shall be issued, but no penalties would be levied unless the employer received a prior warning.⁵⁷

OSHA also endorsed reduced penalties in exchange for prompt abatement of hazards discovered during the inspection. In its re-invention document, “The New OSHA,” the agency claimed it had “successfully” experimented with its “quick-fix” program. As an incentive to abate hazards immediately and eliminate costly and time-consuming litigation should the employer contest the citation, OSHA inspectors reduced penalties for violations abated during the inspection.⁵⁸ According to OSHA, the quick-fix program was re-

⁵¹ “The New OSHA,” at p. 8, cited in S. Hrg. 104–353, p. 68.

⁵² S. Hrg. 104–353, p. 58.

⁵³ “The New OSHA,” p. 8, cited in S. Hrg. 104–353, p. 68.

⁵⁴ “The New OSHA,” p. 9, cited in S. Hrg. 104–353, p. 69.

⁵⁵ CPL 2.111, p. 2.

⁵⁶ CPL 2.111, p. 3.

⁵⁷ CPL 2.111, p. 4.

⁵⁸ “The New OSHA,” p. 8, cited in S. Hrg. 104–353, p. 69.

sponsible for a 29 percent increase in the immediate abatement of violations.⁵⁹

The committee took note of OSHA's reinvention initiatives and believed they underscored OSHA's own acknowledgment that our workplace safety policies must be reformed. After Assistant Secretary Joseph Dear explained OSHA's new policy of not citing employers for paperwork violations (e.g., citations for posters and failing to sign an injury log), Senator Kassebaum expressed the importance she attached to making these changes permanent. In Senator Kassebaum's view:

[T]here has been a lot of talk back and forth about what we should put into statutory language. I just would be concerned that in the future, another assistant secretary might decide not to do that and to go back. It seems to me we do have to look at some changes that contribute to the change in attitude that you are trying to accomplish. We have to do it in such a way that it will be lasting. Some systemic efforts that really [will] reinforce what I think you are attempting to do to create a different culture, regarding a partnership for health and safety concerns, are necessary. * * *

* * * You are beginning to try to make some changes that certainly seem to me at this point to be important, but I would hope that we can work together to actually put some statutory language together, because it seems to me that that is important.⁶⁰

The committee also took note of OSHA's attempt to streamline its enforcement process and improve its response time to complaints. Dr. David Whiston of the American Dental Association testified in support of OSHA's phone/fax procedure, in lieu of onsite inspections, to investigate routine complaints. Under this procedure, when OSHA received a complaint involving a dental office, it phoned or faxed the dental office to notify the office that a complaint had been filed and to request evidence of abatement within 5 days.⁶¹

OSHA expanded this procedure beyond dental offices. In pilot testing, OSHA stated that it reduced the time to achieve hazard abatement by more than 75 percent.⁶² The phone/fax procedure conserved scarce enforcement resources because OSHA inspectors did not respond with an onsite inspection, and "hazards [were] abated faster" with "better customer service."⁶³

OSHA's reinvention effort included an attempt to focus on the worst hazards in the most dangerous industries. OSHA noted that

⁵⁹"The New OSHA," Appendix B, cited in S. Hrg. 104-353, p. 81.

⁶⁰S. Hrg. 104-116, p. 101.

⁶¹S. Hrg. 104-116, p. 108.

⁶²See Memorandum to Regional Administrators from John Miles, Director of Compliance Programs, May 2, 1995.

⁶³Id. In his budget request for the 1997 fiscal year, OSHA Assistant Secretary Joseph Dear testified before the House Committee on Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies (May 8, 1996) that the phone/fax system reduced the time from complaint to hazard abatement from 32.5 days to 8.5 days in Atlanta, GA, 35 days to 11 days in Columbus, OH, and 39 days to 9 days in Wichita, KS. OSHA apparently plans to expand the phone/fax system to cover formal as well as informal complaints. Daily Labor Report, BNA, May 16, 1996, p. A-4.

it currently treats all employers within an industry alike, regardless of their individual performance. In the future, however, the agency will seek to target its resources more effectively.⁶⁴

The committee noted, however, that attempts to more efficiently deploy OSHA's enforcement resources were hampered by the Department of Labor's interpretation of the OSH Act.⁶⁵ The Department of Labor believes that OSHA inspectors must respond with an onsite inspection when the agency receives a formal (signed, written) complaint alleging a violation,⁶⁶ despite wording of the OSH Act, section 8(f)(1), which states that an inspector must respond with an onsite inspection when the agency has "reasonable grounds" to believe that a hazard or violation exists.

Senator Jeffords noted that OSHA inspectors found serious hazards half the time when they conducted complaint inspections, but the percentage was almost exactly the same when they conducted random inspections. According to Senator Jeffords:

What we are trying to do * * * is to allow you [OSHA] to be more efficient. And one area where we are trying to help you is to say maybe there are better ways and quicker ways to get things done than necessarily an inspection. I think the statistics show that you go out and inspect, and about 50 percent of the time, you find something wrong, and when you get an employee complaint, about 50 percent of the time you find something wrong.

So we are trying to give you the flexibility to enable you to solve the employee complaint other than by an inspection, to allow you to make phone calls or whatever else to make sure that if you go out there, there is really something there. * * *⁶⁷

Witnesses before the committee had other recommendations, too. Dr. David Whiston of the American Dental Association, after endorsing the phone/fax system for dental offices, noted that OSHA should target high-hazard employers while recognizing the special problems that small businesses might have with compliance. Dr. Whiston told the committee: "The American Dental Association believes that reforming OSHA will help to focus the agency's resources and make it better able to carry out its mission."⁶⁸

Later, Dr. Whiston testified:

A small-employer exemption from all random inspections and the OSHA paperwork requirements should be part of any legislation passed by this committee, we believe. The random exemption for dental offices is consistent with current OSHA thinking. The agency has already agreed not to use its limited resources to randomly inspect dental offices. We believe that this exemption should be codified for all small employers, specifically, those employers with

⁶⁴"The New OSHA," p. 9-10, cited in S. Hrg. 104-353, p. 69-70.

⁶⁵The Department of Labor's interpretation of the OSH Act could change in the future, however, because OSHA Assistant Secretary Joseph Dear told the committee: "We have discovered a great deal more flexibility in the [OSH] Act than many people previously thought was there." (S. Hrg. 104-353, p. 29.)

⁶⁶OSHA Assistant Secretary Joseph Dear, S. Hrg. 104-353, p. 18.

⁶⁷S. Hrg. 104-353, p. 28.

⁶⁸S. Hrg. 104-116, p. 108.

good health and safety records. In addition, an exemption from paper requirements, such as the HAZCOM standard, would lift a great burden off small employers without undermining employee health and safety.⁶⁹

The committee noted that since 1978, Congress has exempted small employers (fewer than 11 employees) with better-than-average safety records from random OSHA safety inspections.

In conclusion, the Senate Committee on Labor and Human Resources reviewed Vice President Gore's National Performance Review recommendations on OSHA reform, the Administration's reinventing OSHA report, and various other workplace safety re-invention projects at the State level. The Committee also held hearings on OSHA reform. Based upon the Administration's acknowledgment that our Federal workplace safety program needed reform, OSHA Assistant Secretary Dear's statements that "proceeding with 'business as usual'" was unacceptable⁷⁰ and testimony from witnesses representing workers, health and safety professionals, and firms, the Senate Committee on Labor and Human Resources concluded that OSHA reform was necessary to improve worker health and safety.

The committee concluded that Federal workplace safety laws should have an improved education and consultation program to provide employers with the information they need to comply with the law. In addition, the committee noted that with limited Federal resources, our workplace safety needs would be best met by establishing a series of positive incentives for firms to address safety on their own. Such a program would encourage employers to use private sector auditors and to establish health and safety programs that include management commitment, employee involvement, and hazard identification and abatement.

At the same time, with regard to enforcement, OSHA needed a credible policy that focused on real workplace hazards rather than on paperwork or other technical violations of the law. This policy would refocus OSHA on performance measurements (injury rates) rather than on inspector quotas.

III. LEGISLATIVE HISTORY AND COMMITTEE ACTION

On June 21, 1995, and June 22, 1995, the Senate Committee on Labor and Human Resources held hearings on OSHA reform (S. Hrg. 104-116), and the following individuals provided testimony:

June 21

Ron Hayes of Alabama, whose son was killed in a corn silo.

Ray Montaigne, Capitol Heights, MD, a construction industry safety professional on behalf of the Associated Builders and Contractors.

James C. Andrews of Texas, safety professional from Dow Chemical Co. on behalf of the Voluntary Protection Participants Association of McLean, VA.

Rick Treaster, president of Local 2400, Amalgamated Clothing and Textile Workers Association of Lewistown, PA.

⁶⁹S. Hrg. 104-116, p. 108.

⁷⁰S. Hrg. 104-116, p. 131.

Duane Guy, acting director of Labor Management Relations and Employment Standards Division, Kansas Department of Human Resources, Topeka, KS.

Patrick E. Bush, coordinator for workers' compensation; Western Resources, Topeka, KS.

Joseph A. Kinney, director, National Safe Workplace Institute, Monroe, NC.

Vernon E. Rose, Birmingham, AL, president of the American Industrial Hygiene Association.

Additional statements and letters regarding OSHA reform were also received and placed in the record.

June 22

Joseph Dear, Assistant Secretary, OSHA, U.S. Department of Labor, Washington, DC.

William Steinmetz, South Bend, IN, on behalf of the National Roofing Contractors Association.

David Whiston, Vienna, VA on behalf of the American Dental Association.

Michael Wright, Pittsburgh, PA, on behalf of the United Steel Workers of America, AFL-CIO.

Additional statements and letters regarding OSHA reform were received and placed in the record.

On November 17, 1995, Senators Gregg, Kassebaum, Nunn, Jeffords, and Gorton introduced the Occupational Safety and Health Reform and Reinvention Act, S. 1423.

On November 29, 1995, the Senate Committee on Labor and Human Resources held a third hearing on OSHA reform (S. Hrg. 104-353). The following individuals provided testimony:

Joseph Dear, Assistant Secretary, OSHA, U.S. Department of Labor, Washington, DC.

Dr. Forrest Fisher, cochairman, Government Affairs Committee, American College of Occupational and Environmental Medicine, Camden, NJ.

Katherine Gekker, owner of The Hoffman Press, Alexandria, VA, on behalf of the Printing Industries of America.

David J. Heller, executive director for environmental health and safety, US West, Inglewood, CO, on behalf of the Labor Policy Association, Washington, DC.

Linda Chavez-Thompson, executive vice president, AFL-CIO, Washington, DC.

Additional statements and letters regarding OSHA reform were received and placed in the record.

On December 6, 1995, the Senate Committee on Labor and Human Resources held a fourth hearing on OSHA reform, this time in the form of a joint hearing with the Senate Committee on Small Business. The following individuals provided testimony:

Mark S. Hyner, president of Whyco Chromium Co., Thomason, CT.

Daniel E. Richardson, administrator, Latta Nursing Home A, Latta Road Nursing Homes, Rochester, NY.

Earl Bradley, president, EBAA Iron, Inc., Eastland, TX.

Mike McMichael, president of McMichael Co., Central, SC.

Paul Middendorf, director, OSHA Consultation Program of Georgia, Atlanta, GA.

John Cheffer, chairman, National Government Affairs Committee, American Society of Safety Engineers, Des Plaines, IL.

David Carroll, director of safety, Woodpro Cabinetry, Inc., Cabool, MO.

Robert A. Georgine, president, Building and Construction Trades Department, AFL-CIO, Washington, DC.

Deborah Berkowitz, director, office of occupational safety and health, United Food and Commercial Workers International Union, Washington, DC.

Additional statements and letters regarding OSHA reform were received and placed in the record.

On February 28, 1996, and March 5, 1996, the Senate Committee on Labor and Human Resources met in Executive Session to consider Senate bill 1423, the OSHA Reform and Reinvention Act. The committee voted on the following amendments:

Senators DeWine and Abraham offered an amendment striking the provision that only employees or employee representatives may file formal OSHA complaints. The amendment was agreed to by voice vote.

Senator Dodd offered an amendment establishing an office construction safety within OSHA and mandating that construction sites maintain health and safety programs. The amendment was rejected (7-9).

YEAS	NAYS
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Abraham
	Gorton

Senator Simon offered an amendment debarring Federal contractors with a pattern of OSHA violations. The amendment was initially accepted, but a quorum was lacking. The committee voted (9-7) to reconsider the amendment, and on reconsideration, rejected the amendment (7-9).

Vote to reconsider:

YEAS	NAYS
Kassebaum	Kennedy
Jeffords	Pell
Coats	Dodd
Gregg	Simon
Frist	Harkin
DeWine	Mikulski
Ashcroft	Wellstone
Abraham	
Gorton	

Vote on amendment:

YEAS
Kennedy
Pell
Dodd
Simon
Harkin
Mikulski
Wellstone

NAYS
Kassebaum
Jeffords
Coats
Gregg
Frist
DeWine
Ashcroft
Abraham
Gorton

Senator Kennedy offered an amendment to modify the provisions relating to citations, amending the warnings in lieu of citations provision. The amendment failed on a rollcall vote of 7–9.

YEAS
Kennedy
Pell
Dodd
Simon
Harkin
Mikulski
Wellstone

NAYS
Kassebaum
Jeffords
Coats
Gregg
Frist
DeWine
Ashcroft
Abraham
Gorton

Senator Kennedy offered an amendment to strike the mandatory penalty reductions in S. 1423. The amendment failed on a rollcall vote (7–9).

YEAS
Kennedy
Pell
Dodd
Simon
Harkin
Mikulski
Wellstone

NAYS
Kassebaum
Jeffords
Coats
Gregg
Frist
DeWine
Ashcroft
Abraham
Gorton

Senators Jeffords and Abraham offered an amendment assuring that a complainant's name not be released to the employer. The amendment was adopted by rollcall vote:

YEAS
Kassebaum
Jeffords
Coats
Gregg
Frist
DeWine
Ashcroft
Abraham
Gorton
Kennedy
Pell

NAYS
None

Dodd
 Simon
 Harkin
 Mikulski
 Wellstone

Senator Wellstone offered an amendment to modify the OSHA complaint procedure and to maintain the employee entitlement to an inspection. The amendment failed on a tie (8–8) vote.

YEAS	NAYS
Kassebaum	Jeffords
Kennedy	Coats
Pell	Gregg
Dodd	Frist
Simon	DeWine
Harkin	Ashcroft
Mikulski	Abraham
Wellstone	Gorton

Senator Kennedy offered an amendment related to criminal penalties. The amendment failed (7–9) on a rollcall vote:

YEAS	NAYS
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Abraham
	Gorton

Senator Kennedy offered an amendment by Senator Harkin to strike the provisions related to employee involvement. The amendment failed (7–9) on a rollcall vote:

YEAS	NAYS
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Abraham
	Gorton

Senator Wellstone offered an amendment providing enhanced “whistle blower” protection and remedies to complainants, which failed (7–9) on a rollcall vote:

YEAS	NAYS
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg

Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Abraham
	Gorton

Senator Simon offered an amendment to mandate OSHA coverage for Federal, State, and local public sector workers. The amendment was agreed to (9–7) on a rollcall vote:

YEAS	NAYS
Jeffords	Kassebaum
Abraham	Coats
Kennedy	Gregg
Pell	Frist
Dodd	DeWine
Simon	Ashcroft
Harkin	Gorton
Mikulski	
Wellstone	

The committee then voted (9–7) to report the bill, as amended, on a rollcall vote:

YEAS	NAYS
Kassebaum	Kennedy
Jeffords	Pell
Coats	Dodd
Gregg	Simon
Frist	Harkin
DeWine	Mikulski
Ashcroft	Wellstone
Abraham	
Gorton	

IV. EXPLANATION OF THE BILL AND COMMITTEE VIEWS

Senate bill 1423 will improve workplace safety for workers, assist small employers to comply with Federal safety standards, leverage Federal resources, and refocus OSHA inspectors on the most serious hazards in the most dangerous industries. This effort represents an important step away from the “era of big government” and toward the era of cooperative, responsive, and flexible government.

The bill’s provisions are not new. Instead, the bill simply codifies the Clinton administration’s OSHA reinvention effort. As explained below, notwithstanding the Administration’s claims to the contrary, the bipartisan legislation will not in any way lower safety standards for American workers. Instead, it is a significant improvement to permit the Department of Labor to implement the recommendations set forth in Vice President Gore’s reinventing government report and as presented by OSHA Assistant Secretary Joseph Dear to the committee during his appearances before the committee.

The committee listened carefully to the testimony of the witnesses at the committee’s 4 hearings on OSHA reform, and studied the written material submitted by various interested parties. The committee also carefully reviewed the Administration’s testimony

and its OSHA reinvention material. The committee therefore recommends that the full Senate expeditiously consider the bipartisan legislation and enact it into law.

HEALTH AND SAFETY REINVENTION INITIATIVES

Senate bill 1423 establishes positive incentives for work sites, including both workers and supervisors, to address health and safety without relying on OSHA inspections. Having relied on mass inspection alone in the past, OSHA must now differentiate between work sites based upon their commitment to workplace safety and health, and reward those work sites that have made a commitment toward workplace safety.

OSHA, the business community and safety advocates recognized that OSHA will never have the resources to inspect every work site. Rather than attempting to rely on inspections to discover violations, OSHA must encourage work sites to address health and safety on their own. In the Department of Labor's own words, "The key to success is encouraging employers to work with their employees in hazard identification and safety awareness, rather than have those workers depend solely on OSHA inspectors."⁷¹

Senate bill 1423 encourages employers to address health and safety on their own without relying on OSHA inspections. The positive incentives provide an inspection exemption, which applies only to programmed (not complaint) inspections, and reduced penalties for employers that either establish an effective health and safety program or that utilize certified auditors to review the work site.

HEALTH AND SAFETY PROGRAM

To qualify for the reinvention initiative, an employer must establish a program that includes all the elements that the Department of Labor has recognized as being necessary for a health and safety program, including management commitment, employee involvement, procedures to identify and address hazards, and employee training. Employee involvement must include regular consultation between management and nonsupervisory employees, and nonsupervisory employees must be given an opportunity to make recommendations and receive responses to suggestions for addressing workplace hazards.

To demonstrate that the program is not just a "paper" program but instead actually has been implemented effectively to reduce workplace accidents, the employer also must maintain an exemplary health and safety record. The legislation uses the same definition of the phrase "exemplary health and safety record" that OSHA currently uses for firms that participate in the SHARP program, e.g., firms with no workplace fatalities and a lost workday rate at or below the national average for the firm's particular industry.⁷²

⁷¹ "The New OSHA," p. 4, cited in S. Hrg. 104-353, p. 64.

⁷² See OSHA's compliance directive, OSHA Instruction TED 3.5A, p. X-4, which states that firms with "exemplary programs" qualify for the inspection exemption. Such firms must have "lost workday rates at or below the national average for their industry." Thus, S. 1423 adopts OSHA's definition of an "exemplary" record in that it requires a better than average lost workday rate, and it compares the firm's lost workday rate to other firms in that particular industry rather than all industries.

The committee wants to be clear that employers may not qualify for the inspection exemption without actually implementing a bona fide health and safety program. A “paper” program is not sufficient.

The Department of Labor has found that firms actually will establish and implement health and safety programs when they promise to do so. For instance, in the Maine 200 program, OSHA encouraged companies with the greatest number of workplace injuries—arguably the worst actors—to establish health and safety programs. Those companies that responded positively were removed from OSHA’s primary inspection list. Senate bill 1423 would operate in the same way.

As a further deterrent to fraud, any company that falsely certified that it had a safety and health program would be subject to criminal penalties. Thus, the legislation has serious deterrents to fraud.

THIRD-PARTY CONSULTANTS

In addition, employers that utilize a board-certified health and safety professional to conduct a work site consultation would also be eligible for the programmed inspection exemption and penalty reduction. Consultants must meet the qualifications established by nationally recognized standards organizations and must be certified by the Department of Labor. Such consultants must, at a minimum, be at least as qualified as OSHA inspectors and personnel utilized in the onsite consultation program.⁷³

The committee does not intend the Department of Labor to design and implement its own certification test. Rather, the Federal Government should recognize national certification bodies that perform that function. Thus, just as State bar associations and medical board-certifying organizations establish State standards for the practice of law and medicine, respectively, so should the Department of Labor recognize safety and health certifications established by nationally recognized organizations.

Consultants must be board-certified safety and health professionals. Individuals, such as “certified safety professionals” and “certified industrial hygienists,” will be performing the inspections. These consultants know as much, if not more, about safety and health than OSHA inspectors do.⁷⁴

Certified private sector consultants, under the onsite consultation program, a State workers’ compensation program, or simply by invitation from the employer, must conduct an onsite review of the work site and ensure that any serious hazards identified were cor-

The committee also noted that in the Main 200 program, the Department of Labor granted an inspection exemption to 200 firms with the greatest number of occupational injuries, arguably the “worst actors,” without even requiring them to have better than average lost workday records for their industry.

⁷³ Significantly, OSHA has minimal qualifications for consultants hired by State governments for the federally funded onsite consultation program. According to OSHA, State onsite consultants must have the ability: to identify and abate hazards, to assess employee exposure and risk, and to demonstrate knowledge of OSHA standards and health and safety programs. (S. Hrg. 104–353, p. 91.) Private sector consultants will be more qualified than the onsite consultation consultants who OSHA currently considers to be qualified to review the work site for safety and health hazards.

⁷⁴ In fact, OSHA only requires its safety inspectors to have a bachelors degree with 24 credit hours of basic science or 3 years of general technical experience. In contrast, board-certified safety professionals and safety engineers must have a bachelors degree and pass a comprehensive national examination.

rected. If necessary, the consultant may determine that a follow-up visit is necessary to address the hazards that have been identified.

Those employers that make the effort to address health and safety on their own would be exempt from surprise OSHA inspections. Naturally, if an employee filed a complaint, or an accident or serious injury occurred on the site, then OSHA would, as expected in such a case, respond with an onsite inspection.

The Clinton administration has recognized the value of private sector consultants. In fact, Vice President Gore's original reinventing government report stated "no army of OSHA inspectors need descend upon corporate America. * * * OSHA should give employers two options * * * they could hire third parties, such as private inspection companies [or train nonsupervisory employees to conduct inspections]."

In addition, OSHA's form letter to employers under the phone/fax system notified the employer that a complaint had been filed and that OSHA needed proof of abatement. The agency then informed employers that the State consultation service offered help in "resolving all occupational safety and health issues * * * [but in the event of a backlog] you [the firm] may be able to obtain similar services from your insurance carrier or private consultant in a more timely fashion."⁷⁵ Why would OSHA refer an employer to an insurance carrier or private consultant if OSHA did not believe they could do the job?

The committee carefully considered the issue of third-party certification. Although some concerns were raised about the independence of certified consultants, the committee is confident that licensed, certified consultants will act professionally. As Vice President Gore's reinventing government report recognized, this body of private sector expertise should be harnessed and put to good use.⁷⁶

The committee also noted that any consultant or employer making a false certification to OSHA would be subject to criminal penalties under the OSH Act. This is a powerful disincentive to falsify documentation.

The committee is certain that the Department of Labor has the resources to administer the provisions of S. 1423, including the certification from the third-party consultants and the certification that a firm has established an effective safety and health program. Senate bill 1423 only requires companies to submit a certification, which could be as short as 1 page in length, and that submission would only be required for those companies participating in the program.⁷⁷

The filing may be done electronically to reduce the paperwork. Other Federal agencies have much more lengthy mandatory reporting, such as the Pension and Welfare Benefit Administration and the Pension Benefit Guaranty Corporation for employee benefit

⁷⁵S. Hrg. 104-353, p. 99.

⁷⁶The committee also noted that certified public accountants (CPAs) perform financial audits, and in Virginia, automobile repair facilities and gas stations perform automobile safety inspections. These served as good examples of where the private sector has done the job more efficiently than the public sector.

⁷⁷Ironically, lack of resources has not stopped OSHA from proposing new and burdensome regulations on ergonomics and indoor air quality. The concern about limited resources seems to have been applied selectively, depending upon whether the Department of Labor supports or opposes the legislative proposal.

plans, as well as affirmative action and equal employment opportunity forms that the Federal Government requires firms to file.

OSHA has acknowledged that it cannot inspect every workplace. The agency will be much more efficient if it more fully utilizes private sector resources, with the agency conducting monitoring audits to assure against fraudulent reporting and certification (which carry criminal penalties). Vice President Gore's reinventing government report recommended that approach, and OSHA has used those procedures with the Maine 200 program.

REDUCED PENALTIES

Employers addressing health and safety through the reinvention initiatives would experience reduced OSHA penalties in the event of a citation. The penalty would be reduced at least 25 percent if the employer maintained a health and safety program or maintained an exemplary health and safety record. The reduction would be 50 percent if the employer had both the program and the exemplary record. And the penalty would be reduced at least 75 percent if the employer used a certified health and safety auditor to review the work site and the employer complied with the auditor's recommendations.

The purpose of automatic penalty reductions for companies that implement health and safety programs, have good safety records, or use third-party consultants, is to create an incentive for companies to "do the right thing." The committee wants to reward good behavior through positive incentives, even if the work site falls short of absolute perfection in the eyes of an inspector.⁷⁸

For the positive incentives to be credible, firms require some certainty that the inspection exemption and penalty reduction are real. The only way to do that is to guarantee it in the OSHA statute. OSHA's current plan, to grant a sliding scale of penalty reductions, is not a credible incentive.

The committee noted that OSHA has supported automatic penalty reductions in the past. In its "Reinventing Labor Regulations" report,⁷⁹ the Department of Labor stated that "OSHA will waive penalties for any employer with up to 250 employees who is found to have no significant (willful, repeated, or serious) violations." In response to written questions after a committee hearing, OSHA appeared to distance itself from its own proposal, but there is no dispute that last year, OSHA itself believed this to be good policy. Moreover, OSHA has used a similar approach by offering an inspection exemption and penalty waiver for work sites, in VPP, Maine 200, and SHARP.

INSPECTION EXEMPTION

One of the positive incentives for firms to address health and safety concerns on their own is the inspection exemption. This also allows OSHA to concentrate its efforts on those work sites where supervisors and workers are not committed to addressing health and safety.

⁷⁸The penalty reduction for work sites using a third-party consultant only applied if the violation had not created an imminent danger, caused a fatality or serious incident, or been repeat citation.

⁷⁹June 15, 1995.

Senate bill 1423 is not the first time that OSHA or the Congress granted health and safety inspection exemptions. As described below, small employers under the annual Labor-Health and Human Services appropriations rider and work sites participating in the SHARP, VPP and the Maine 200 program, have been removed from OSHA's general inspection schedule.

In the annual Labor-HHS appropriations rider, Congress exempted small family farms, and small employers with better than average safety records, from regular programmed safety inspections. Congress included this rider in every appropriations bill since 1978.

OSHA also provided an exemption from random inspections for certain companies using the onsite consultation program (usually smaller firms or those in high-hazard industries) under the Safety and Health Achievement Recognition Program (SHARP).⁸⁰ To participate in the program, the State onsite consultation service sends a consultant to the work site for a review of injury and illness logs, written programs, and a walk-through of the plant. Work sites that establish an effective health and safety program and reduce their injury and illness rates to below average for their industry are exempt from programmed inspections.

OSHA also recognized excellence in health and safety for work sites through its VPP program. These companies with a comprehensive health and safety program that underwent a thorough evaluation by OSHA every 3–4 years were exempt from regular, programmed inspections.

Finally OSHA touted the success of its Maine 200 program, where the agency identified the 200 Maine companies with the highest numbers of injuries and gave them a choice: establish a comprehensive health and safety program, demonstrate a reduction in workplace injuries, and be placed on OSHA's secondary inspection list, or face a comprehensive, wall-to-wall inspection. Companies on the secondary inspection list were removed from the primary inspection list and would only be subject to a monitoring audit, where OSHA would verify that the health and safety program was being implemented.

During the committee's hearings, some criticized S. 1423, claiming the bill would exempt 72 percent of employers from OSHA inspections. This criticism was misplaced for several reasons.

First, S. 1423 does not exempt any employers from complaint inspections, so employers are still subject to OSHA regulation, inspections, and citations. Second, the annual appropriations rider alone, which has been enacted into law since 1978, exempts 75 percent of our works sites from safety inspections because OSHA does not conduct random safety inspections of any employer with less than 10 employees. (In the United States, there are a total of 6.4 million work sites, 4.78 million of which have fewer than 10 employees.)

For the remaining larger employers (with more than 10 employees), OSHA targets high-hazard industries. According to CRS, only about 384,000 work sites of the 6.4 million establishments nationwide are subject to random OSHA inspections. So in practice, the

⁸⁰ "Consultation Services for the Employer," U.S. Department of Labor, OSHA 3047, printed in S. Hrg. 104–316, p. 170.

current system for random inspections exempts about 94 percent of work sites from safety inspections. It is astonishing that opponents, particularly the Department of Labor, criticize S. 1423 for granting “a substantial majority” of firms an inspection exemption when OSHA’s current inspection process exempts 94 percent of work sites from safety inspections.

CONSULTATION AND VOLUNTARY PROTECTION PROGRAM (VPP)

In addition to providing positive incentives for employers to establish health and safety programs and to use private sector health and safety consultants, Senate bill 1423 also codifies two very successful programs that enjoy bipartisan support: the onsite consultation program and the Voluntary Protection Program (VPP). Both programs use Federal Government resources to give information to firms so they may identify and abate workplace hazards.

Senate bill 1423 codifies the onsite consultation program, also known as the section 7(c)(1) program. Heretofore, pursuant to regulation, OSHA has offered grants to states to provide health and safety assistance to small, and particularly high-risk firms. Employers request that the consultation agency send a consultant to the work site to review all relevant paperwork, to walk around the work site to observe hazards, to talk with employees about possible hazards, and to conduct a closing conference to review the findings and discuss possible methods to abate hazards. The consultation is conducted without fear of generating an OSHA citation or fine, as long as the firm agrees to address any hazards identified during the consultation.

Similarly, S. 1423 codifies the VPP program, where OSHA recognizes larger work sites for their extraordinary commitment to health and safety. After an extensive work site review, OSHA awards VPP status to work sites with effective health and safety programs and superior lost workday records. Such work sites are removed from OSHA’s programmed inspection list.

By codifying the consultation and VPP, the committee intends to provide stability and permanence to these important programs. Moreover, the committee believes codification reaffirms the Federal commitment to providing the private sector with the occupational safety information firms need to comply with the law.

LIMITED SELF-AUDIT PRIVILEGE

Separate and apart from the consultation, inspection exemption, and penalty reduction program described above, or other audits required by existing OSHA standards, Senate bill 1423 also provides a limited privilege for employer health and safety audits. Under the legislation, records of health and safety inspections, audits, or reviews conducted by employers need not be disclosed to an OSHA inspector, except under certain circumstances.

The purpose of the limited privilege is to encourage employers to examine critically their health and safety procedures, workplace conditions, and possible sources of injuries and accidents. In the past, managers have been deterred from conducting these audits knowing that an OSHA inspector could use the records from such audits as the basis for a willful citation.

Because the privilege is intended to encourage employers to investigate and address workplace hazards, the privilege would not apply unless the employer takes measures to address the hazards that were identified during the audit. In addition, the privilege does not extend to OSHA investigations involving fatalities or serious injuries due to the government's interest in investigating serious accidents.

The committee intends that the privilege would be applied procedurally just as other matters of privilege, such as the attorney-client privilege, are applied. Thus, employers would assert the privilege when the OSHA investigator requests the self-audit information. At a later time, the matter would be litigated before an administrative law judge, the OSHA Review Commission, or a court of competent jurisdiction.

EMPLOYEE INVOLVEMENT

Senate bill 1423 also takes an important step toward promoting employee involvement on health and safety issues. Rather than create a new Federal program, however, the legislation instead simply removes the barriers that Federal labor law places in the way of employee involvement.

The National Labor Relations Board has held that worker-management health and safety committees, where workers discuss health and safety issues with supervisors, violate the National Labor Relations Act.⁸¹ Senate bill 1423 creates a safe-harbor in Federal labor law for employee involvement programs that meet to discuss, in whole or in part, health and safety issues. The legislation also contains an important restriction limiting its scope to non-union settings, so an employer would be prohibited under S. 1423 from trying to bypass its existing union on health and safety issues.

The committee agrees with the U.S. Department of Labor that "employer commitment and meaningful employee participation and involvement in safety and health is a key ingredient in effective programs."⁸² The committee also agrees that "employee participation is vital to a safe working environment."⁸³ The Department of Labor has promoted employee involvement in numerous ways, and the committee applauds those efforts.

For instance, in its reinvention effort, OSHA promises "partnership" rather than "traditional enforcement" for companies with strong health and safety programs that include: management commitment, *employee involvement*, procedures to identify and abate hazards, and employee training. For companies with strong health and safety programs, OSHA offered to make inspections "quite rare." (Emphasis added.)⁸⁴

In fact, when implementing this reinvention program through the Maine 200 program, OSHA gave the 200 Maine employers with the greatest number of worker's compensation claims a choice—establish a strong health and safety program, or face a wall-to-wall

⁸¹ See *Dillon Stores* (NLRB, 1995) (worker suggestions for bakery employees to be given safety goggles while working fryer violated NLRA); *EFCO* (Case No. 17-CA-16911, 1995).

⁸² "The New OSHA," p. A-1, cited in S. Hrg. 104-353, p. 71.

⁸³ Written testimony of OSHA Assistant Secretary Joseph Dear, S. Hrg. 104-353, p. 53.

⁸⁴ "The New OSHA," pp. 3-4, cited in S. Hrg. 104-353, pp. 63-64.

inspection. OSHA told employers that their program must include a “provision for employee involvement in safety and health matters. An employee safety and health committee is the preferred method, but equivalent systems will be considered * * * on an individual basis.”⁸⁵ OSHA even wrote to one employer participating in the Maine 200 program that it was “delighted to see your ‘employee team concept’ used to perform [an] ergonomic job hazard analysis on high risk jobs.”

The performance agreement for 1995 between Labor Secretary Robert Reich and OSHA Assistant Secretary Joseph Dear included a section on employee involvement. That agreement stated:

OSHA will take advantage of opportunities to redefine its relationship with the public. Partnerships with business and labor will be strengthened to foster excellence in worksite safety and health and high performance workplaces through educational, training and outreach programs; grass roots partnerships will be formed as well. *And cooperative labor-management approaches to safety and health excellence will be encouraged by demonstration of the advantages of management commitment, teamwork and employee involvement.* (Emphasis added.)⁸⁶

The committee hopes it will assist OSHA Assistant Secretary Joseph Dear to meet Secretary Reich’s performance criteria by permitting employee involvement on health and safety issues. Senate bill 1423 will facilitate these cooperative efforts between workers and supervisors.

The Department of Labor suggests that current interpretations of Federal labor law permit employee involvement programs with “appropriate protections.”⁸⁷ However, as Senator Gregg pointed out to OSHA Assistant Secretary Dear during an OSHA reform hearing: “The fact is that if an employer sets up an employee participation committee, he can be subject to a labor law violation or the potential for labor law violation. And you can give a lot of verbal support to the concept of having employer-employee relations and joint participation, but unless you get over that threat, you have got a problem.”⁸⁸

The “appropriate protections” most frequently mentioned by opponents of the employee involvement provisions in S. 1423 are secret ballot elections. Ironically, the NLRB has used secret ballot elections to find that the employee teams were “employee representation committees” dominated by management in violation of the law.⁸⁹

Finally, for those who claim that Federal labor law poses no hindrance to worker-management committees or other employee involvement programs, the committee noted that a Democrat-endorsed OSHA reform bill, S. 575 (103d Congress), that mandated

⁸⁵ OSHA Augusta Area Office Instruction CPL 2.1A, June 25, 1993.

⁸⁶ Performance Agreement, p. 2.

⁸⁷ S. Hrg. 104-353, p. 53.

⁸⁸ S. Hrg. 104-116, p. 93.

⁸⁹ *Webcor Packaging, Inc.* 319 NLRB No. 142, fn. 6 (1995) (“Plant Council acted in a representational capacity because its employee-members were elected by respondent’s work force”); *Dillon Stores*, 319 NLRB No. 149 (1995) (employee committee elected by coworkers through secret ballot, where members dealt with safety and other workplace issues, violated Federal labor law).

that all employers with more than 10 employees establish worker-management health and safety committees, amended the National Labor Relations Act to assure that the committees were not inconsistent with Federal labor law. The Clinton administration and the AFL-CIO both endorsed this legislation.

REFORMING OSHA ENFORCEMENT

In addition to providing positive incentives and eliminating the barriers firms face in addressing health and safety on their own, the committee also believed that OSHA's enforcement effort needed to be reformed. Senate bill 1423 amends OSHA's employee complaint process, OSHA's inspector citation policy, and OSHA's penalty structure. These reform efforts refocus OSHA on its basic mission, which is to improve safety and health for workers, particularly at the most dangerous work sites.

One method of improving workplace safety focused on increasing the efficiency of OSHA's inspection process. According to an AP Online report:

Three-quarters of U.S. work sites that suffered serious accidents in 1994 and early 1995 had never been inspected during this decade by the Federal workplace safety agency. * * * Two key reasons OSHA did not make advance visits to these lethal work sites are a shortage of OSHA inspectors and its mandate to follow up on all worker complaints, no matter how routine. More than half the time, complaint inspections find no serious violations. * * * [OSHA Assistant Secretary] Dear says OSHA is trying to address the inspection problems, including experiments to seek out unfounded complaints by fax or telephone. * * *

According to the AP Online analysis, OSHA wasted 106,000 hours in 1994 on complaint inspections that found no violations. Indeed, OSHA found serious hazards in complaint inspections roughly the same percentage of the time as it did with random inspections.⁹¹ In other words, OSHA could have just as well picked work sites out of a hat (a random process) rather than responded to specific complaints, and it would have identified the same number of hazards. The committee found that rather astounding. Clearly, the complaints process required reform.

The OSH Act requires an onsite inspection when an individual files a formal (written and signed) complaint and the Secretary has "reasonable grounds" to believe that a violation or danger exists.⁹² The Department of Labor interpreted the OSH Act to require an onsite inspection after an individual files a formal complaint.⁹³ In other words, when it receive a formal complaint, the Department

⁹⁰ AP Online, September 4, 1995. The report noted that "more than half the OSHA inspections triggered by formal complaints since 1989 failed to find any serious violations, while nearly a third found no violations at all." (Id.) According to the report, "OSHA officials readily acknowledge the problem but say their hands are tied by the 1972 law that created the agency and required that all worker complaints be inspected." (Id.)

⁹¹ See also written testimony of Joseph Dear before the Senate Committee on Labor and Human Resources, Nov. 29, 1995, S. Hrg. 104-353, p. 55 ("In fact, OSHA finds serious hazards at the same rate for complaint-based inspections as it does for targeted inspections.")

⁹² 29 U.S.C. 657(f).

⁹³ See Department of Labor responses to Senator Kassebaum's OSHA questions, S. Hrg. 104-353, p. 84-85.

of Labor thought that it must do an onsite inspection if the signed complaint alleged that a hazard or violation existed. The agency did not believe it could conduct an investigation, through phone, fax or other means, to determine whether there was reasonable cause to believe a violation or hazard existed and then use the results of that investigation as the basis for not conducting the onsite inspection.

In contrast, with an informal complaint, OSHA had discretion whether to conduct an onsite inspection. In the recent past, OSHA has used the phone/fax system to determine whether a hazard existed and whether it had been abated.

Senate bill 1423 amends OSHA's complaint process to give the agency more flexibility to evaluate complaints. After an individual filed a complaint, if the complaint alleged that a hazard or violation existed (where is the "reasonable grounds" that a hazard or violation existed), then OSHA would be authorized "as a method of investigating an alleged violation or danger," to attempt to contact the employer by telephone, facsimile, or other appropriate methods, to determine whether the hazard actually existed and/or whether the employer had taken or was willing to take corrective action.⁹⁴

This provision ends the complainant's "entitlement" to an onsite inspection simply because the individual filed a written complaint. The era of big government is over. With scarce resources, it would be foolish for Congress to mandate that OSHA conduct an onsite inspection even after OSHA determined, through investigation by phone, facsimile or other device, that there was no hazard or violation at the work site.

The legislation also gives OSHA the discretion on whether to conduct an onsite inspection when the Department of Labor determines that the complaint was made for reasons other than the health and safety of workers. For instance, in circumstances where the Department of Labor determines that harassment by a disgruntled former employee or competitor motivated the complainant, and OSHA determines that workers are not at risk, then S. 1423 grants the agency discretion to determine whether to conduct an onsite inspection.

Senate bill 1423 in no way encourages OSHA to ignore complaints alleging hazards or violations. The committee believes strongly that OSHA should err on the side of caution and fully expects OSHA to conduct an onsite inspection if there is any doubt as to the existence of the hazard or violation. However, in instances where OSHA determines through proof offered by phone, facsimile or other means that no hazard or violation exists, then the Department of Labor should have the discretion not to conduct the onsite inspection and to direct its resources toward abatement of real hazards.

In addition, the current OSHA complaint form (OSHA-7) asks the complainant whether he has informed his employer of the hazard or violation.⁹⁵ Senate bill 1423 codifies this inquiry. The committee notes that the complainant need not answer "yes" to this question in order to trigger an inspection. To the contrary, the re-

⁹⁴ Senate bill 1423, Sec. 3(b).

⁹⁵ S. Hrg. 104-353, p. 95.

sponse is simply one piece of information that an OSHA inspector should have at his disposal when the inspector receives the complaint.

Senate bill 1423, states that when OSHA conducts an onsite inspection in response to a complaint, the inspection shall be conducted for the limited purpose of determining whether the violation or danger exists. The purpose of this provision is to preclude OSHA inspectors from engaging in a “fishing expedition” when they enter the work site.

At the same time, the committee does not expect OSHA inspectors to put blinders on during the inspection process. Senate bill 1423 specifically permits the Department of Labor to take “appropriate actions with respect to health and safety violations that are not within the scope of the inspection and that are observed” during the inspection.⁹⁶

For example, in the course of conducting a complaint inspection, an inspector may examine the OSHA 200 log to determine whether the employer recorded the accident, injury, or violation that led to the complaint, and if an inspector found a reasonable basis for expanding the complaint, then such an expansion would not be precluded by section 8(f)(1)(E)I. Similarly, if an inspector noted another hazard or violation in plain view in the course of investigating a complaint, then nothing in the above noted section would preclude the inspector from citing the employer for those violations.

Senate bill 1423, as introduced, stated that the complainant’s name would not appear in the copy of the complaint provided to the employer, “except that the Secretary [of Labor] may disclose this information during prehearing discovery in a contested case.” The sponsors did not intend that the complainant’s name be released on a routine basis.⁹⁷ Instead, they intended to provide the Secretary with flexibility to balance the complainant’s need for anonymity against the firm’s need to defend itself against the charge and to release the complainant’s name only in rare instances when the firm could meet its extraordinary burden of demonstrating the need for the information.

To avoid any misconstruction of this provision, however, the committee adopted the Jeffords/Abraham amendment during the executive session to eliminate the Department of Labor’s discretion in releasing the complainant’s name. Senate bill 1423, as reported, therefore, does not permit the name of any complainant to be released to the employer.

In addition, Senate bill 1423, as introduced, stated that an inspection may only be requested by an employee or an employee representative. During the committee hearings, concerns were raised, particularly by Robert Georgine of the Building and Construction Trades Department, AFL–CIO, that bystanders, hospital emergency room personnel, spouses, and other individuals would be precluded from filing OSHA complaints on behalf of workers. Although the sponsors of S. 1423 had not intended this result,⁹⁸ they

⁹⁶ S. 1423, section 3(b).

⁹⁷ If the sponsors had intended this, they would have said that the Secretary “shall” disclose the complainant’s name to the employer.

⁹⁸ The OSH Act stated that “employee or employee representatives” may file a complaint requesting a special inspection under Section 8(f)(1). See also S. Hrg. 104–353, p. 90.

recognized the legitimate concerns that were raised at the hearings and, when the committee met in executive session, supported the DeWine amendment, which removed the restriction on who could file a complaint.

To further reform OSHA's enforcement process, the committee believed that OSHA should focus its resources on the most hazardous work sites, while at the same time recognizing the unique problems that smaller employers have had in complying with burdensome paperwork requirements. The committee noted OSHA Assistant Secretary Dear's testimony before the House appropriations subcommittee: "* * * the agency will soon announce a revised penalty system, which will substantially increase penalty discounts for small employers. * * * In the near future, we intend to establish a small business advocacy office within OSHA, to ensure that small employers have a voice in our enforcement practices and regulatory policy making."⁹⁹

Senate bill 1423 provides immediate relief to small employers, while focusing OSHA inspection resources on the most hazardous work sites. Consistent with Dr. David Whiston's testimony before the committee, the legislation codifies the long-standing (since 1978) rider in the Labor-Health and Human Services (Labor-HHS) appropriations bill that exempts small employers (employers with fewer than 11 employees) in industries with better than average lost workday records from random OSHA inspections. The provision does not exempt small employers from complying with OSHA safety and health standards, and small employers remain subject to post-accident and complaint inspections.

In written testimony, the Department of Labor conceded that "as a general matter, OSHA recognizes that small businesses face unique challenges and are deserving of special treatment from OSHA."¹⁰⁰ Nevertheless, OSHA believed that "compliance assistance and penalty reductions," not "across the board exemptions" were more appropriate.¹⁰¹ The Department of Labor's testimony failed to note that its fiscal year 1996 Labor/HHS appropriations request included the small employer random inspection exemption,¹⁰² and that the department's current selection system for conducting targeted inspections excludes employers with fewer than 10 employees from random safety inspections.¹⁰³

The committee strongly believed that OSHA must focus on safety and health performance, rather than bureaucratic activity, to measure the agency's success. OSHA's assistant secretary testified before the House appropriations subcommittee that his agency "eliminated performance measures based on inspections, fines and citations, and is developing a new performance system tied to real improvements in safety and health."¹⁰⁴ In written testimony,

⁹⁹ Statement of Joseph Dear before the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, May 8, 1996.

¹⁰⁰ S. Hrg. 104-353, p. 53.

¹⁰¹ Id.

¹⁰² To the extent that the "lost workday case rate" in the small employer exemption provision only reflects safety as opposed to health records, the committee would endorse a technical amendment to assure that "illness" as well as "injury" rates were considered.

¹⁰³ According to the Congressional Research Service, "OSHA's practice is to exempt from programmed inspections all employers of fewer than 10 employees in all industries." CRS Memorandum, "Workplaces Subject to OSHA Programmed Inspections," February 23, 1996.

¹⁰⁴ Statement of Joseph Dear before the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, May 8, 1996.

OSHA's director stated that these quotas "have contributed to OSHA's reputation as a nit-picky, overzealous enforcement agency."¹⁰⁵

To facilitate the assistant secretary's efforts, S. 1423 eliminates OSHA inspector quotas. The legislation prohibits the Secretary of Labor from establishing any numerical quota with respect to the number of inspections conducted, the number of citations issued, or the amount of penalties collected. Inspectors must not face institutional pressure to issue citations or collect fines. Success for OSHA must depend upon whether the Nation's work force is safer and healthier, and not upon meeting or surpassing numerical goals for inspections, citations, or penalties.

ALTERNATIVE METHODS DEFENSE

Senate bill 1423 contains other important methods to focus OSHA on performance rather than bureaucratic activities. The legislation requires OSHA to recognize alternative methods of compliance that offer equivalent or greater protection to workers.

As a defense to a citation under the OSH Act, section 5 of S. 1423 requires the Department of Labor to vacate any citation if the employer demonstrates that its employees were protected by alternative methods "equally or more protective of the employee's safety and health than those required by OSHA." This provision forces OSHA to abandon its "one-size-fits-all" approach to occupational safety and health.

This defense goes to the heart of OSHA reform. OSHA must recognize that it does not have all the answers. The regulators at OSHA cannot possibly account for the variety of problems that individual supervisors and workers encounter and the solutions which they devise.

The Department of Labor must begin to recognize that all solutions to workplace hazards do not originate in OSHA's workplace standards division. The ultimate test of "performance" is whether workers are protected, not whether firms follow a "one-size-fits-all" set of prescriptive rules established by those who write the regulations in OSHA's Washington, DC, headquarters. Senate bill 1423 requires OSHA to recognize alternative methods of worker protection.¹⁰⁶

Regrettably, the Department of Labor opposed this provision. In written testimony presented to the committee, OSHA's assistant secretary stated that this provision "could seriously undermine OSHA standards. * * *"¹⁰⁷ Apparently, OSHA failed to appreciate its mission, which is to protect workers not its standards.

The agency also claimed the alternative methods provision would increase "costly and time consuming" litigation as employers contest citations. OSHA noted that under current rules, "the contest

¹⁰⁵ S. Hrg. 104-353, p.58.

¹⁰⁶ Federal courts have recognized that a citation may be inappropriate (although a de minimus notice was sustained) when there was no significant difference between the protection provided by the employer and that which would be afforded by technical compliance with the standard. *Phoenix Roofing v. Dole*, 874 F.2d 1027 (5th Cir. 1989).

¹⁰⁷ S. Hrg. 104-353, p. 58.

rate has remained relatively low; under 10 percent of all citations are contested.”¹⁰⁸

The Department of Labor’s argument is specious. The department appears to suggest that administrative convenience overrides workplace safety and health. It suggests that success for the agency is measured by how many citations it successfully prosecutes, rather than whether workers are actually protected from occupational hazards. If the contest rate were zero, would workers be safer? The committee does not believe that to be the case.

EMPLOYEE ACCOUNTABILITY

The legislation, under section 5, also codifies the employee accountability defense. Under the provision, no citation shall issue if the employer can demonstrate that: (1) its employees were trained properly and provided with the appropriate equipment to prevent the violation; (2) work rules to prevent the violation were established, communicated to employees, and enforced through appropriate discipline; (3) the failure of the employees to follow the work rules led to the violation; and (4) the firm took reasonable steps to discover the violation.

The defense is designed to assure that firms are held accountable for implementing safety and health standards, while at the same time assuring that firms are not unnecessarily punished should their employees fail to follow appropriate safety and health procedures. The Department of Labor indicated that it had no objection to the provision.¹⁰⁹

CITATION AND PENALTY POLICY

Senate bill 1423 further reforms OSHA’s enforcement policy by revising the health and safety agency’s citation and penalty system. The legislation permits OSHA inspectors to issue warnings in lieu of citations in appropriate situations and reduces penalties for nonserious violations of health and safety standards.

The committee believes that OSHA inspectors should focus on serious hazards and agrees with the Department of Labor that “unnecessary issuance of citations for minor technical violations of paperwork and written program requirements undermines the agency’s efforts to promote the agency mission.”¹¹⁰ The current OSH Act does not give inspectors the flexibility they need to use “judgment and common sense to protect workers.”¹¹¹ Instead, the OSH Act, by its terms, mandates that inspectors issue citations for all offenses, regardless of the severity of the offense.¹¹²

Senate bill 1423 grants inspectors discretion whether to issue a citation after observing a violation. Under the legislation, inspectors “may” issue a citation. Such discretion is intended to be used with care. The committee does not intend inspectors to ignore hazards or violations that pose a danger to workers. On the other

¹⁰⁸ Id.

¹⁰⁹ S. Hrg. 104–353, p. 58.

¹¹⁰ OSHA Instruction CPL 2.111, “Citation Policy for Paperwork and Written Program Requirement Violations.”

¹¹¹ “The New OSHA,” p. 9, cited in S. Hrg. 104–353, p. 69.

¹¹² Section 9 of the OSH Act, 29 U.S.C. 658, states that if an inspector believes that an employer has violated an OSHA standard or the general duty clause, then the inspector “shall with reasonable promptness issue a citation to the employer.”

hand, the committee wishes to give inspectors the explicit authority to decide against issuing a citation if circumstances warrant.

For instance, where workers have not been placed at risk or where an inspector observes that a firm remains in substantial compliance with OSHA standards yet has fallen just short of the mark, then the inspector may decide not to issue a citation.¹¹³ There is no mechanical formula for making this decision. It requires inspectors to use judgment. Without this authority, however, inspectors will be under institutional pressure to cite firms for all violations observed, and the Department of Labor will face uncertainty in designing programs like Maine 200 and VPP.¹¹⁴

The bill's language amending section 9(a)(1) of the OSH Act is intended to complement section 9(a)(3), which grants inspectors the explicit authority to provide technical or compliance assistance to an employer in correcting a hazard discovered during an inspection or an investigation. The committee believes that inspectors should have this discretion to improve workplace safety without relying solely on citations.

Senate bill 1423 also provides two specific examples where the inspector may issue a warning in lieu of a citation. First, the legislation states that inspectors may issue a warning with respect to a violation that has no significant relationship to employee safety or health.¹¹⁵ Second, the legislation permits inspectors to issue a warning in lieu of a citation when an employer acts in good faith promptly to abate a violation, as long as the violation is not a willful or repeated violation.¹¹⁶

These two instances call upon OSHA inspectors to use sound judgment. The committee specifically grants inspectors the discretion to issue a warning where workers are not placed at risk by the violation, or where the employer demonstrates good faith to address the hazard promptly. If the inspectors believes that a warning would further the purposes of the act then the inspector need not issue the citation.

These changes are consistent with the Department of Labor's published policy statement. In its reinvention document, OSHA claimed that "citation for violations of paperwork requirements are declining" and "OSHA inspectors no longer penalize employers who have not put up the required OSHA poster.* * *" ¹¹⁷ Similarly,

¹¹³ See testimony of Mark Hyner, president of Whyco Chromium, Inc. regarding recommendations of White House Conference on Small Business, S. Hrg. 104-316, p. 9-11.

¹¹⁴ For instance, the Department of Labor's written testimony on OSHA reform noted that "Federal case law demonstrates that OSHA possesses a greater degree of prosecutorial discretion than was recognized in the early years of the agency." (S. Hrg. 104-353, p. 58.) Similarly, OSHA's assistant secretary testified that "we have discovered a great deal more flexibility in the Act than many people previously thought was there. The Main [sic 'Maine'] program, the Focused Construction program and others are essentially departures from perceived policy that if any serious violation exists, OSHA is compelled to issue a citation to note the violation." (S. Hrg. 104-353, p. 29.)

¹¹⁵ Although the Department of Labor did not support this provision, OSHA Assistant Secretary Joseph Dear testified as follows in response to Senator Gregg's question regarding a "non-serious violation structure" and "warnings in lieu of a citation structure:"

I believe we can do that without amending the statute. * * * Clearly, in the case of violations that have no direct relationship with any threat to workers' health or safety, the opportunity exists for OSHA not to issue a citation or to issue a citation and not have a penalty." (S. Hrg. 104-116, p. 93-94.)

¹¹⁶ S. 1423, section 7 "Warnings in Lieu of Citations," amending section 9(a)(2) of the OSH Act.

¹¹⁷ "The New OSHA", p. 8, cited in S. Hrg. 104-353, p. 68.

OSHA's "Citation Policy for Paperwork," CPL 2.111, indicated that in certain circumstances where paperwork deficiencies pose no risk to workers, OSHA inspectors should not issue citations.

The Department of Labor did not support providing OSHA with discretion on whether to issue citations for violations. On the one hand, the department recognized that a strict reading of the OSH Act would require an inspector to issue a citation after observing a violation. On the other hand, the department recognized that its own policies and reinvention initiatives depend upon a more liberal reading of the OSH Act, because the Main 200 VPP expansion and "no citation for failure to post the OSHA poster" policies all depend upon OSHA exercising discretion in not citing firms for every violation that inspectors encounter.

The department must therefore conclude that it has discretion on whether to issue citations. But it opposes codifying the very discretion that it exercises because to do so would "undermine both the preventive purpose as well as the deterrent effect of OSHA's enforcement program."¹¹⁸ The department apparently believes that such changes to the OSH Act would "signal employers that they need not take preventive steps to protect their workers" and could wait until an OSHA inspector arrives before addressing workplace hazards.¹¹⁹

This argument is meritless for at least two reasons. First, the employer will not know whether the inspector will issue a warning or a citation. Granting the inspector discretion to issue a warning in no way provides immunity to bad actors. Since the employer cannot rely upon a warning, the firm has no choice but to attempt to comply with OSHA standards. Accordingly, OSHA's "preventive" and "deterrent" effects are not undermined.

Second, if OSHA believed that providing such discretion to inspectors really undermined the agency's effectiveness, then it should not have adopted and publicized its reinvention initiatives that rely upon that discretion. By doing so, OSHA appears to have undermined its own argument.¹²⁰

Senate bill 1423 further reforms OSHA's enforcement process by amending the penalty schedule for violations of OSHA standards. The legislation reduces penalties for nonserious violations and posting or paperwork infractions. By these changes the committee reaffirms the importance of OSHA standards that directly affect worker safety and health and underscores the need to focus on these standards rather than the paperwork, posting and other compliance burdens that do not directly improve worker protection.

Under S. 1423, section 8, the maximum penalty for "serious" violations remains unchanged at \$7,000 per violation.¹²¹ On the other hand, the bill reduces the maximum penalty for other-than-serious,

¹¹⁸S.Hrg. 104-353, p. 58.

¹¹⁹Id.

¹²⁰By the department opposing these provisions granting OSHA inspectors discretion, the committee is left to wonder whether the department believes its inspectors should issue citations for every citation that inspectors encounter. Further, the committee is left to wonder whether the Department believes citations (rather than warnings) should issue for all violations that have no significant relationship to safety or health and in situations where the employer in good faith promptly abates first time, nonwillful violations.

¹²¹Similarly, the legislation does not lower the maximum fine for "willful" or "repeat" violations, and it does not in any way affect the department's ability to use the "egregious" penalty policy to pursue particularly flagrant OSHA violators.

also termed “nonserious,” violations from a maximum of \$7,000 per violation to a maximum of \$100 per violation. By lowering this amount, the committee intends to refocus OSHA inspectors on serious hazards and away from nonserious, technical violations of law.

POSTING AND PAPERWORK

In addition, the legislation eliminates penalties for posting or paperwork requirements. This provision is designed to encourage OSHA inspectors to focus on violations that place workers at risk, rather than nonserious paperwork violations. The committee noted that in 1995, OSHA inspectors issued the most citations (over 3,000 citations) to employers for failure to properly maintain a written program under the hazard communication standard. In fact, record keeping, the written program and information/training under the hazard communication standard (generally industry and construction), and container labeling were among the most frequently cited standards by OSHA inspectors.¹²²

The committee intends for the term “paperwork and posting requirement” to be interpreted consistent with the definitions the Department of Labor adopted in its “posting and paperwork” regulation, CPL 2.111. That regulation applied to “record keeping, posting of the OSHA notice, written program requirements in standards such as lockout-tagout, permit-required confined spaces, blood borne pathogens, hazard communication, personal protective equipment, and other essentially similar requirements found in OSHA standards.”¹²³

To its credit, the Department of Labor conceded that “in the past * * * OSHA cited employers not for genuine safety hazards, but also for minor or paperwork violations.”¹²⁴ However, in an attempt to inject some “common sense” into the enforcement system, “citations for violations of paperwork requirements are declining. * * * OSHA inspectors no longer penalize employers who have not put up the required OSHA poster if the employer agrees to post it right away. * * * [and] OSHA has issued new inspection guidelines that will better assure that employers are not fined for failure to have a material safety data sheet for a common consumer product. * * *”¹²⁵ OSHA recognized that citations for “minor technical violations of paperwork and written program requirements undermine the agency’s efforts to promote the agency’s mission.”¹²⁶

Consistent with the Department of Labor’s reinvention efforts, Senate bill 1423 assures that firms will not be fined for nonwillful, nonserious posting and paperwork violations. The committee reaffirms the importance of identifying and eliminating serious hazards and intends OSHA inspectors to focus on those violations, rather than nit-picky, paperwork violations. Although OSHA has made progress in reducing citations for posting the OSHA notice and failure to properly maintain material safety data sheets, the committee believes legislation is necessary to institutionalize the advances that have been made.

¹²² U.S. Department of Labor (Oct. 30, 1995).

¹²³ OSHA Instruction CPL 2.111, p.2.

¹²⁴ “The New OSHA”, p. 8, cited in S. Hrg. 104-353, p. 68.

¹²⁵ *Id.*, at p. 68.

¹²⁶ OSHA Instruction CPL 2.111, p.2.

CRITERIA TO ASSESS PENALTIES

Senate bill 1423 expands the criteria that the OSHA Review Commission utilizes to assess civil penalties. The current OSH Act authorizes the Commission to consider the following factors: the size of the firm being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.¹²⁷

The OSHA reform legislation includes the following criteria; the size of the employer, the number of employees exposed to the violation, the likely severity of any injuries directly resulting from the violation, the probability that the violation could result in injury or illness, the employer's good faith in correcting the violation after it was discovered, the extent to which employee misconduct was responsible for the violation, the effect of the penalty on the employer's ability to stay in business, the history of previous violations, and whether the violation is the sole result of the failure to comply with posting the OSHA notice or maintaining records or paperwork.¹²⁸

Both current law and the reform legislation authorize the OSHA Review Commission to consider the size of the firm, and current law's "gravity of the violation" is roughly equivalent to the "number of employees exposed," "the likely severity" of injury, and the "probability that the violation could result in injury or illness." In addition, both current law and the reform legislation refer to the good faith of the employer and the history of previous violations.

Accordingly, S. 1423 simply expands the criteria by authorizing the Review Commission to consider the extent to which employee misconduct was responsible for the violation, the effect of the penalty on the employer's ability to stay in business, and whether the violation is the sole result of posting or paperwork deficiencies. The committee intends the Review Commission to consider these criteria as mitigating factors.

CONCLUSION

In sum, the committee places a high priority on OSHA reform. As Mark Hyner, president of Whyco Chromium Co. of Thomaston, CT, testified: "OSHA reform is not merely a wish or a hope; it is an absolute necessity which is long, long overdue. * * * We need change, and we need it now."¹²⁹

The committee believes that the OSHA Reform and Reinvention Act, S. 1423, will improve worker safety and health, increase employee involvement, provide greater flexibility and efficiency to OSHA, and reduce unnecessary paperwork burdens on workers and supervisors. Private sector resources will be more fully utilized, and OSHA, leveraging scarce resources, will better focus its resources on the most dangerous hazards at the most perilous work sites.

OSHA can no longer afford to treat all employers alike. In our "post-big government era," the Federal Government must distinguish between safe work sites and unsafe work sites, and concentrate its resources where they are most needed. The agency also

¹²⁷ OSH Act, section 17(j), 29 U.S.C. 666 (j).

¹²⁸ S. 1423, section 8.

¹²⁹ S. Hrg. 104-316, p. 9-10.

must distinguish between serious hazards and mere technical violations of the law.

Senate bill 1423 provides the Department of Labor with the tools it needs to address our Nation's health and safety needs. The committee encourages the Senate to enact this important legislation.

V. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 27, 1996.

Hon. NANCY LANDON KASSEBAUM,
Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.

DEAR MADAM CHAIRMAN: The Congressional Budget Office has prepared a cost estimate for S. 1423, the Occupational Safety and Health Reform and Reinvention Act, as ordered reported by the Committee on Labor and Human Resources on March 5, 1996. Because enactment of S. 1423 would affect receipts, pay-as-you-go procedures would apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 1423.
 2. Bill title: Occupational Safety and Health Reform and Reinvention Act.
 3. Bill status: As ordered reported by the Senate Committee on Labor and Human Resources on March 5, 1996.
 4. Bill purpose: To amend the Occupational Safety and Health Act of 1970 to make modifications to certain provisions, and for other purposes.
 5. Estimated cost to the Federal Government: S. 1423 would affect the Occupational Safety and Health Administration's (OSHA's) need for budgetary resources in several ways, some of which would increase costs and some of which would reduce them. The provisions of the bill that would narrow the scope of OSHA's regulatory domain—either directly by exempting certain employers from inspection or indirectly by permitting employers to apply for exemptions—would decrease OSHA's costs. The provisions of the bill that would require review of application for exemptions and would extend OSHA's jurisdiction to cover the federal government and state and local governments would increase its costs. In addition, federal agencies may incur additional costs to comply with OSHA standards. CBO does not have sufficient information to estimate the net effect of these provisions on the federal budget.
- With one exception, the costs or savings associated with S. 1423 would involve discretionary spending. The bill would, however, result in the loss of about \$1 million a year in federal receipts from civil penalties.
6. Basis of estimate: Section 3 of S. 1423 would prohibit the Secretary of Labor from conducting routine inspections of or enforcing

any OSHA regulation on certain farming operations with 10 or fewer employees and on employers with above-average safety records and 10 or fewer employees. Although this exemption has been included in legislation providing for OSHA's appropriations in recent years, S. 1423 would represent a change in permanent law. Thus, by permanently reducing the scope of OSHA's jurisdiction, this provision would reduce potential federal costs. Reliable data on the number of employers who would be eligible for this exemption are not available, but the savings to OSHA—relative to future costs under current law—could be in the range of \$30 million to \$45 million annually.

Section 4 of the bill would exempt employers who meet certain qualifications from all safety and health inspections, other than those arising from the death or severe injury to an employee. In a given year, employers could meet these qualifications in two ways. First, they could qualify if they had been reviewed under an approved workplace safety and health consultation program provided by a state or local government or by any other business entity or qualified person certified by the Secretary during the preceding year. Second, they could qualify if they had not had a work-related employee death during the preceding year, had an above-average safety and health record, and maintained an employee safety and health program meeting specified standards. The Secretary could conduct random audits to verify that employers were in compliance.

The effects of this provision on the federal budget would depend critically on how many employers chose to apply for certification and the percentage of certifications that were audited. Even a cursory review of applications would require one full-time equivalent employee for every 1,000 applications. CBO cannot estimate how many employers would apply for certification, but if 100,000 applications were received annually, federal costs would be over \$5 million. Costs would be higher if applications were reviewed more intensively. Auditing 1 percent of these applications—a percentage similar to the audit rate of the Internal Revenue Service but higher than the current percentage of establishments subject to OSHA inspection—would add further costs of about \$5 million. Further, an increase in the number of employers choosing to use consultation services provided through state agencies (but largely paid for with federal funds) could require an increase in spending of \$10 million. These certification, auditing, and consultation costs would be offset somewhat because OSHA would no longer need to conduct inspections of certified employers.

Section 5 of S. 1423 would provide additional grounds on which employers could contest citations for noncompliance issued by OSHA. Citations would be vacated if employers could demonstrate that employees were protected by methods at least as stringent as the OSHA regulation being violated. This provision could increase OSHA's litigation costs by increasing the incentive for employers to contest citations.

Sections 7 and 8 of the bill would reduce civil monetary penalties for certain violations in some circumstances. For violations not considered serious, penalties of up to \$7,000 under current law would be reduced to not more than \$100. Civil penalties for violations of

posting and paperwork requirements would be eliminated for violations that were not serious, were not repeated, and which occurred before time to correct them had expired. In addition, penalties would be reduced by 25 percent in cases where an employer maintained a qualified safety and health program or had an exemplary safety record and by 50 percent for employers meeting both criteria. Penalties would be reduced by 75 percent if, within one year of the date of the citation, the employer was reviewed by an approved consultant and complied with any resulting recommendations. This latter reduction would not apply if the violation had been cited previously, created imminent danger, or caused death or a serious accident.

Several of the penalty provisions in the bill would formalize what are for the most part current OSHA policies. However, in some instances these provisions would reduce penalties below the current level of collections. CBO estimates that enacting Section 8 of the bill would reduce governmental receipts by about \$1 million annually.

Section 11 would include the federal government and state and local governments as employers subject to the jurisdiction of OSHA. Currently, the federal government is required to maintain an occupational safety and health program and to comply with OSHA standards. However, OSHA may only issue a “failure to abate” to agencies not in compliance, and has no authority to levy fines. This amendment would enable inspectors to levy fines for safety and health violations. Federal costs would rise because agencies would be under greater pressure to comply; however, CBO cannot estimate how large this increase would be.

Twenty-three states elect to administer OSHA standards. These states are already required to include public employees in their programs. Based on their cost of administering OSHA standards, CBO estimates that making the remaining states subject to these standards would cost OSHA about \$20 million annually.

7. Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. The bill would have the following pay-as-you-go impact:

[By fiscal years, in millions of dollars]

	1996	1997	1998
Changes in outlays	(1) ¹	(1) ¹	(1) ¹
Changes in revenues	0	-1	-1

¹ Not applicable.

8. Estimated cost to State, local, and tribal governments: S. 1423 contains an intergovernmental mandate as defined in Public Law 104-4. Specifically, the bill would require state and local governments to apply federal workplace health and safety laws to public workplaces. Currently, the Occupational Safety and Health (OSH) Act excludes states and their political subdivisions from the definition of employer and covers public employees only when a state voluntarily assumes the responsibility for administering the federal program. Currently 23 states and two territories are voluntarily administering the program to some extent. If S. 1423 is enacted, OSH Act provisions would apply in 31 jurisdictions (27 states, the

District of Columbia, and three territories) that currently do not apply such laws to public workplaces. CBO estimates that approximately 54,500 governmental units (including states, counties, cities, towns, and other special purpose governments such as school districts) and eight million public employees would be affected.

At this time, CBO cannot precisely estimate the net costs of applying federal workplace health and safety laws to state and local government workplaces although we believe that they are likely to exceed the \$50 million annual threshold established in Public Law 104–4. These costs would be incurred in the first few years after enactment as governments bring their workplaces into compliance. State and local governments would face additional costs for such activities as modifying facilities and machinery, training employees, recordkeeping, purchasing safety equipment, and posting safety procedures. CBO is in the process of preparing a more complete estimate of the impact of S. 1423 on state and local governments.

9. Estimated impact on the private sector: This bill does not include any private-sector mandates as defined in Public Law 104–4.

10. Previous estimate: None.

11. Estimate prepared by: Federal Cost Estimate: Cyndi Dudzinski; State and Local Cost Estimate: Marc Nicole; Federal Revenue Estimate: Stephanie Weiner.

12. Estimate approved by: Robert A. Sunshine (for Paul N. Van de Water, Assistant Director for Budget Analysis).

VI. REGULATORY IMPACT STATEMENT

The committee has determined that there will be no increase in the regulatory burden imposed by this bill.

VII. SECTION-BY-SECTION ANALYSIS

Sec. 1. Short Title.—The bill may be referred to as the “Occupational Safety and Health Reform and Reinvention Act.”

Sec. 2. Employee Participation.—The legislation permits workers and supervisors to address health and safety matters through employee involvement programs by amending Federal labor law. The section also contains an important limitation to clarify that this labor law provision does not permit an employer to bypass its union (if applicable) and in no way alters an employer’s duty to bargain with its union (if applicable) over health and safety issues.

Sec. 3(a). Inspections.—The legislation codifies the annual small employer (10 or fewer employees) appropriations rider by exempting from safety inspections small farms, and small employers with better than average lost workday rates. The bill expands this exemption to health inspections as well.

Sec. 3(b). Inspection Based on Employee Complaints.—Employees or employee representatives must contact OSHA in writing when filing a complaint (same as current OSH Act).

The bill codifies the phone/fax system OSHA uses to investigate informal (nonwritten) complaints and expands it for use with formal (written, signed) complaints. After receiving the complaint, the Secretary may use the telephone, facsimile, or other appropriate methods to determine whether an onsite inspection is necessary. A

copy of the complaint must be provided to the employer no later than at the time of inspection, but the name of those who filed the complaint may be withheld by the Secretary upon request.

Sec. 4. Work Site-Based Initiatives.—The Secretary shall establish a program to encourage voluntary efforts to improve workplace safety and health. The program provides a 1-year exemption from regular programmed inspections and reduced OSHA penalties for work sites that have been reviewed by a certified, third-party health and safety expert, or whose places of employment have established a comprehensive health and safety program (that includes employer commitment, employee involvement, hazard identification and abatement, and worker training) and have an exemplary safety and health record.

Records of employer self-audits and self-inspections to identify hazards (not conducted pursuant to the inspection exemption described above) shall be privileged from disclosure to the Secretary, as long as the employer has taken measures to address any serious hazards identified during the self-audit and the Secretary's investigation does not involve a serious accident.

Sec. 5. Employer Defenses.—The legislation codifies the employee accountability defense, which provides a defense to an OSHA citation when an employee disregards an established health and safety work rule that is the subject of the citation, where the employer enforces the work rule and provides appropriate training to the employee. In addition, the section provides a defense to a citation if an employer can demonstrate that it has provided an alternative means to protect workers that is equally or more protective than the safeguards required by the act.

Sec. 6. Inspection Quotas.—OSHA may not evaluate inspectors based on the number of inspections that they conduct, violations that they cite, or penalties that they collect.

Sec. 7. Warnings in Lieu of Citations.—The Secretary has discretion to issue a warning in lieu of citation if a violation has no significant relationship to employee safety or health, or if the employer acts in good faith promptly to abate a hazard. The Secretary also may provide technical and compliance assistance to address a violation discovered during the course of an inspection.

Sec. 8. Reduced Penalties for Nonserious Violations and Mitigating Circumstances.—The legislation reduces penalties from up to \$7,000 to no more than \$100 for other-than-serious (nonserious) violations. This section also provides for reduced penalties if the employer has been inspected by a certified third-party safety and health consultant or has an effective health and safety program.

Sec. 9. Consultation Services.—The legislation codifies OSHA's consultation program, where OSHA provides funding to the States to provide compliance assistance to small businesses. The consultants provide advice in identifying and addressing workplace hazards without citing the employer for violations, as long as the firm promises to abate serious hazards identified during the consultation.

Sec. 10. Voluntary Protection Program.—The legislation codifies the Voluntary Protection Program (VPP), where OSHA recognizes those work sites that have demonstrated a strong commitment to workplace safety and health. The section also codifies OSHA's cur-

rent practice of granting a programmed inspection exemption to VPP work sites.

Sec. 11. Coverage for Public Sector.—The legislation extends OSHA coverage to public sector workers, including workers at the Federal, State and local levels.

VIII. ADDITIONAL VIEWS OF SENATOR ABRAHAM

During the Labor Committee's consideration of S. 1423, I was unable to comment on several amendments that were offered, so I wanted to take this opportunity to make my views clear.

First, while I supported the underlying legislation, I cosponsored two amendments that I believe improve the bill. The first, offered by Senator Jeffords, clarifies that the name of an employee who complains to OSHA may not be released to the employer at any time during OSHA's response. As I understand the underlying bill, its intent was to permit the complaining employees' written statement to be released for good cause after they had testified in a contested case. Testimony before the committee, however, raised questions whether potential release of the name would unnecessarily deter employees from filing complaints.

The other amendment, sponsored by Senator DeWine, strikes the sentence "The Secretary may only make an inspection under this section if such an inspection is requested by an employee or representative of employees." The amendment clarifies that non-employees—such as doctors and family members—may file written complaints. While I understand the intent of the bill was to prevent disgruntled former employees from filing OSHA complaints, witnesses before the committee suggested that independent observers sometimes are important sources of information regarding workplace hazards. This amendment ensures that they have access to OSHA.

A third amendment I supported was the Simon amendment to extend OSHA coverage to local, State and Federal employees. While some groups view this amendment as an unwarranted expansion for OSHA's current jurisdiction, I supported it for the following reasons.

First, Congress recently passed legislation which applies Federal labor and safety laws—including OSHA—to the House and Senate. The argument for this legislation is that Congress should not exempt itself from the laws and mandates it applies to other employers. I believe this same argument applies to the coverage of public employees under OSHA.

Second, every argument raised against this amendment—that it will cost too much, that it means retraining employees, and that it will affect low-risk workplaces—applies to private employers and their workplaces as well. In other words, those who oppose this amendment wish to maintain a two-tier system where private employers are subject to OSHA scrutiny and costs while public employers, including the Federal Government, are not. I believe this distinction is unjustified.

While the preceding three amendments were accepted, the committee also rejected numerous amendments offered by Democratic members. I want to comment on two of those amendments.

One amendment was the criminal penalty amendment offered by Senator Kennedy. I support imposing tough penalties upon those employers who recklessly and knowingly endanger the lives of their employees. At the same time, I believe Senator Kennedy failed to demonstrate why it is necessary for Federal penalties of this magnitude to be imposed when state laws already address these crimes. All fifty States already have laws to cover negligent homicide. Before this amendment is adopted, the case needs to be made that there is a gap in the legal fabric between State and Federal laws addressing negligent homicide. Senator Kennedy failed to address this issue.

In addition, the size of the penalties Senator Kennedy wished to impose appear to be out of proportion to existing State penalties for similar crimes. The Kennedy amendment would punish employers up to 20 years for willfully violating a standard that leads to the death of an employee. At the same time, someone convicted of willfully killing someone could anticipate a sentence of just a fraction that long. In other words, the Kennedy amendment would elevate the punishment for willfully violating a standard above the typical punishment for willfully killing a person. While there may be some level of increased Federal criminal penalty that is appropriate for violating OSHA standards, I found those prescribed by the Kennedy amendment to be excessive compared to existing State penalties.

Another amendment I opposed was the Simon amendment to allow the debarment of Federal contractors with a pattern and practice of serious OSHA violations. As with the Kennedy amendment, I have several concerns with the approach Senator Simon takes.

First, the amendment fails to outline under what procedures debarment proceedings would take place. It is my understanding that similar debarment provisions under other laws provide specific and well-defined processes by which a contractor is debarred, yet the Simon amendment fails to either set up its own procedures, or refer to those already established under the Administrative Procedures Act. Because of this oversight, I am concerned that this provision could be abused for political purposes.

Second, in my opinion, the amendment fails to adequately define what a "pattern and practice" is. Although Senator Simon modified his amendment to change "serious" to read "substantial probability of death or serious physical harm to employees," this modification does not ensure that this provision would only be used against so-called "bad actor" employers who truly disregard the health and safety of their employees.

The final amendment upon which I would like to comment is the Wellstone amendment. His amendment would have extended the current whistleblower complaint period from 30 days to 180 days and allowed awards of back-pay, compensatory damages, and attorney's fees. During debate, Chairman Kassebaum indicated that, while she sympathized with Senator Wellstone's intent, she preferred to offer a more moderate approach when this legislation is debated on the floor. As Chairman Kassebaum made clear, protecting whistleblowers from retaliation is something that should be ad-

dressed by this legislation and I intend to support her efforts to bring this matter up when S. 1423 is considered by the full Senate.

In conclusion, I supported S. 1423 because I believe this is an issue which the full Senate should have a chance to debate. As someone who cares very much about worker safety and health, I am encouraged that many of the reforms included in this legislation have either been endorsed or implemented administratively by the Clinton administration. While there are several remaining areas of the bill which I believe can be improved upon, I am confident that, under Chairman Kassebaum's leadership, these concerns can be addressed on the floor in a bipartisan manner.

IX. MINORITY VIEWS OF SENATORS KENNEDY, DODD, HARKIN, WELLSTONE, PELL, SIMON, AND MIKULSKI

The committee's majority has voted for a collection of amendments to the Occupational Safety and Health Act with one unifying theme: to weaken enforcement of workplace safety and health standards. The amendments would (1) allow all but a few employers to exempt themselves from surprise inspection, (2) make it more dangerous for employees to complain about hazards, (3) take away the right of workers to an on site inspection when OSHA finds reasonable grounds to believe there are serious hazards, (4) give the agency the authority not to cite employers for serious violations, even if they had caused the death of an employee, (5) automatically reduce penalties by a minimum of 50% for many employers with serious safety violations, even if they have long histories of safety violations, their violations are willful and repeat, and the violations have led to the death or disability of workers through occupational disease or illness.

For these and other reasons detailed below, we oppose enactment of S. 1423 and applaud the Administration's pledge to veto this bill if it reaches the President's desk.

OVERVIEW

Chairman Kassebaum and the committee's majority have repeatedly declared their support for the OSHA reinvention initiatives the Clinton administration has undertaken. They claim that S. 1423 "simply codifies" those initiatives. In reality, S. 1423's "reforms" are vastly different from OSHA's reinvention initiatives, and conflict with them in fundamental ways. The Administration's strong opposition to S. 1423 is proof that the bill's sponsors are hiding behind the wrong skirts.

The first and greatest conflict between the Clinton program and S. 1423 involves their differing approaches to enforcement. In summary, OSHA reinvention is premised on strong enforcement of the law, while S. 1423 undermines or negates enforcement of safety and health standards in numerous ways.

OSHA is changing its fundamental operating model from one of command and control to one that provides employers with a real choice between a cooperative partnership and a traditional enforcement relationship. For example, OSHA's "Maine 200" program, one of the 1995 winners of the Ford Foundation Innovations in American Government Award, offers employers a choice of working in partnership with OSHA or facing stepped-up enforcement. All of these reinvention activities are premised on a strong enforcement program. In fact, as many of the participants in these reinvention initiatives have recognized, without a strong enforcement program many of these companies would not participate.

In contrast, S. 1423 consists of a series of inspection exemptions, means of avoiding citations, defenses to citations, penalty reductions and other enforcement relief. Taken together, these provisions would seriously undermine OSHA's enforcement program. In addition, the bill would give OSHA the authority to dismantle its enforcement program altogether, frustrating the preventive and deterrent purposes of the original OSH Act.

S. 1423 represents one piece of a larger deregulatory trend in the 104th Congress. Notably, the current deregulatory climate has already affected employer efforts to protect workers. In a recent survey of over 1,000 safety and health professionals by Industrial Safety and Hygiene News, about one-third expected greater budget and staff cuts and thought it would be harder to sell management on major safety investments. As one management representative said, "if regulatory enforcement or requirements are unlikely, it's human nature to make these areas less of a priority."¹

Second, OSHA has developed its reinvention initiatives through a careful, ongoing process of pilot programs, stakeholder input, and simple trial and error. For example, the principle of the Maine 200 Program—leveraging OSHA's limited resources by offering employers a choice between a cooperative partnership and traditional enforcement—is a young one. But two years after beginning the program OSHA is still defining the appropriate parameters for similar programs.

Many of S. 1423's provisions, on the other hand, would impose new statutory changes without adequate consideration, testing or dialogue with stakeholders. Once enacted, these reforms would be very difficult to refine or otherwise modify even if serious problems arose during their implementation.

OSHA's experience during the early 1980's confirms the dangers of precipitous change. The agency exempted employers from targeted inspections based solely on the number of injuries and illnesses recorded on their logs. Some in Congress even wanted to enact this records-check exemption into law. OSHA soon discovered, however, that a sizable number of employers were under-reporting injuries and illnesses at their work establishments and that many dangerous workplaces were not inspected as a result. In some cases OSHA found that workers had been seriously injured or killed at workplaces that the agency visited but failed to inspect. The agency subsequently eliminated the records-check exemption. If this policy had been enacted into law, it would have been much more difficult to change.

Third, OSHA's reinvention initiatives and existing programs permit limited inspection exemptions and penalty reductions for employers who demonstrate continued commitment to worker safety and health. In contrast, S. 1423 requires substantially less from employers to qualify for enforcement relief, and rewards such employers with substantially greater relief.

Thus, for example, OSHA's Voluntary Protection Program exempts employers who undergo a wall-to-wall inspection and follow-up inspections, and demonstrate superior safety and health per-

¹Industrial Safety and Hygiene News, 12th Annual White Paper Report on U.S. Industry Safety and Health Practices, November 1995.

formance. Only a few hundred worksites have qualified for a VPP exemption. Yet OSHA estimates that roughly 94 percent of U.S. firms would be eligible for an inspection exemption under S. 1423's various provisions.

Fourth, as the Clinton administration recognized in its testimony, any effort to improve Federal oversight of workplace safety and health must improve worker protection. After all, the very purpose of the original act was "to assure, so far as possible, every working man and woman in the Nation safe and healthful working conditions." Thus, for example, OSHA has improved efficiency significantly through the use of telephone and facsimile to investigate informal complaints, while simultaneously protecting the fundamental worker right to a government inspection where serious hazards are present.

Unfortunately, however, rather than improving worker protection, the bill's focus is on granting employers inspection exemptions, means of avoiding citations, defense against citations, penalty reductions, and other relief from enforcement. With the exception of Senator Simon's amendment to extend OSH Act coverage to public sector workers, S. 1423 as reported does not contain a single provision that strengthens worker rights or protections. Instead, it would repeal the worker right to an inspection, one of the original OSH Act's core principles. In this regard, S. 1423 is seriously unbalanced and represents an extremely one-sided approach.

Fifth, in the regulatory arena OSHA has sought to strengthen its standard-setting process to ensure the development of common sense protective standards. This strategy has included early and continuous stakeholder involvement, the use of negotiated rule-making and non-regulatory approaches where feasible, an emphasis on performance-based standards, and an effort to rewrite existing rules in plain English.

By comparison, S. 1423 would weaken every one of OSHA's protective standards by relieving employers from OSHA enforcement activities, and by allowing employers to challenge those standards in every enforcement proceeding. If S. 1423 were enacted into law, employers would be free to ignore OSHA standards.

SECTION-BY-SECTION ANALYSIS

Section 2. Employee participation

Section 8(a)(2) of the National Labor Relations Act protects workers against employer-dominated company or sham unions. This does not mean, as the majority baldly claims, that the NLRA "prohibits worker-management safety committees in nonunion settings." But it does mean that employers cannot set up phony employee organizations, dominate and control them, and use them to prevent employees from joining together to let the employer know their real concerns about workplace safety and health.

Section 2 of the S. 1423 would exempt from the statutory protection of the NLRA any employee participation mechanism—no matter how one-sided, coercive, unfair, and employer-dominated—which deals at least in part with worker safety and health conditions and which does not involve the negotiation of a collective bargaining agreement. This provision would overthrow 61 years of

labor law protecting the right of employees to be represented only by representatives of their own choosing and would permit the spread of sham unions dealing with issues far outside the scope of a safety and health committee.

Employee participation is vital to a safe work environment, and current interpretations of the NLRA allow the creation of employee involvement programs—in both union and nonunion settings—with appropriate protections to ensure a genuine voice for employees. However, this provision of S. 1423 would jeopardize the workers' right to choose a representative independent of their employer's influence.

Indeed, the bill would make it legal for employers to dominate, interfere with, or otherwise control any employee organization, provided that no collective bargaining agreement is negotiated. Employers could take advantage of this broad exception to NLRA section 8(a)(2) to appoint employee "representatives" who in fact represent only the views of the employer. Employers could legally exert undue influence on workers to deprive them of their statutory right to an independent representative. If a safety committee or other employee organization actually acted in the interests of the employees but against the wishes of the employer, the bill would give the employer the right to terminate the employee organization at will.

The majority tries to find support for its effective repeal of National Labor Relations Act section 8(a)(2) in the fact that S. 575, a bill sponsored by Senator Kennedy in the 103rd Congress, mandated independent, democratic, joint safety and health committees and exempted them from the definition of a "labor organization" under section 2(5) of the NLRA. They should look somewhere else for support.

The Committee Report on S. 575 made clear that section 8(a)(2) was not amended or repealed:

Although the committee believes that committees established under Title II would not pose a problem under section 8(a)(2) of the National Labor Relations Act, to ensure there will be no conflict between the OSH Act and the NLRA the substitute provides that a safety and health committee established under and operating in conformity with the OSH Act does not constitute a labor organization. * * * This section does not, however, limit or modify the NLRA's prohibition on company-dominated unions. Thus, if an employer usurps the authority vested in the committee under Title II, the employer's activities may still constitute a violation of the NLRA.²

Section 3. Inspections

Small business exemption

Section 3 would exempt from inspection farms with fewer than 11 employees and establishments of fewer than 11 employees with in industries that have injury or lost workday case rates below the

²Report of the Senate Committee on Labor and Human Resources on the Comprehensive Occupational Safety and Health Reform Act, 103rd Cong., 2nd Sess., S. Rpt. 102-453, page 27 (1992).

national average. While small businesses face unique challenges, and are deserving of special treatment from OSHA, that should come in the form of compliance assistance and penalty reductions, where appropriate, not in the form of across-the-board exemptions from inspections.

Although a similar exemption has been added to OSHA's appropriations bill for a number of years, workers at smaller establishments should be entitled to the same rights and protections as workers at larger establishments. As the American Society of Safety Engineers testified: "All Americans have a fundamental right to a safe and healthful working environment regardless of the size of the firm in which they are employed. * * * [section 3(a)] could be interpreted by small business that providing a safe and healthful workplace is not a priority."³

In fact, workers at small establishments are already in increased danger; businesses with fewer than 11 workers account for 33 percent of all fatalities even though they account for less than 20 percent of all employees. Moreover, even small employers with terrible safety and health records could qualify for the exemption if their industry has a low injury rate overall. Workers at these establishments need and deserve the protections of OSHA's targeted inspection program.

Even worse, S. 1423 would expand the current exemptions to ban targeted health inspections for the first time, without regard for the employer's occupational illness record. The majority pretends to codify the small business appropriations rider, but they do not. In enacting the small business rider in past years, Congress has repeatedly recognized the importance of health inspections by excluding them from the scope of the rider. Indeed, health inspections protect workers from latent hazards that many small employers may not even recognize. No new justification or evidence has been offered which would warrant depriving millions of workers at small establishments of this critical protection against health hazards.

Finally, the data S. 1423 would use to determine eligibility for the exemption may be suspect. As one witness testified before the Committee, "many observers believe that the BLS annual survey is marred by serious and pervasive underreporting, especially among the smaller employers." Codifying the small business exemption would permanently rely on these questionable data.

Employee complaints

Section 3 would amend section 8(f)(1) of the OSH Act to require employees submitting written complaints to state (1) whether the alleged violation has been brought to the employer's attention, and (2) whether the employer has refused to remove the hazard. This provision will discourage workers from filing complaints about unsafe work practices.

While in current practice OSHA's complaint form asks employees whether they have alerted employers about the hazard in question, the agency does not require workers to respond. Many workers are afraid of retaliation by their employers, and OSHA's experience

³Statement of American Society of Safety Engineers, "Small Business and OSHA Reform," Joint Hearing of the Committee on Labor and Human Resources and the Committee on Small Business, S. Hrg. 104-316, page 99 (December 6, 1995) ("Statement of ASSE").

with antidiscrimination complaints suggests that in many cases their fears are well-founded. Establishing the above statutory requirements—including a requirement that the worker indicate “whether the employer has refused to take any action” to correct the hazard—could easily be misunderstood as requiring workers to identify themselves to their employers as a prerequisite to filing a complaint.

As such, this provision may cause a chilling effect on the filing of worker complaints, and a consequent reduction of worker protections. Alternatively, if workers were unaware of these provisions, employers would file procedural challenges to complaints which failed to provide the required responses, and OSHA might be precluded from conducting an inspection even when workers were facing substantial risks.

The Voluntary Protection Programs Participants’ Association, a group of employer participants in OSHA’s VPP excellence recognition programs, opposes this provision of S. 1423 for similar reasons:

[W]e believe employees should not be required to state whether or not they informed their employer of the safety complaint. While the VPPPA encourages employees to bring safety concerns to the attention of management before contacting OSHA, we realize that this may not always be possible. Employees must have direct access to OSHA, and they must feel free to report safety or health concerns without fear of retaliation. While we recognize that the current OSH Act contains specific remedies for employer retaliation, many times employees do not know these rights or are not willing to risk losing their jobs.⁴

A worker’s right to an OSHA inspection

In enacting the OSH Act in 1970, Congress established two important principles: first, that employers have an obligation to provide a safe workplace, and second, that workers have a right to an OSHA inspection where dangerous hazards are present. Section 3 of S. 1423 would repeal this second principle.

Currently, section 8(f)(1) of the OSH Act provides that OSHA “shall” conduct an inspection in response to a complaint when the agency determines that there are “reasonable grounds” to believe that “a violation of a safety or health standard exists that threatens physical harm.” S. 1423 would change “shall” to “may”, giving OSHA the discretion to decline to inspect even where it concludes that there are clear dangers to workers.

Workers have had the right to an OSHA inspection for 25 years, and no evidence has been offered to warrant the repeal of that right. Proponents of S. 1423 have questioned whether protecting this right represents the best use of OSHA’s limited resources. In fact, as is discussed below, OSHA has substantially improved efficiency through reforms in complaint handling procedures, while simultaneously protecting this fundamental right. With these improvements, a significantly higher rate of complaint-based inspec-

⁴Statement of Lee Ann Elliot, Executive Director, VPPPA, “Small Business and OSHA Reform,” Joint Hearing of the Committee on Labor and Human Resources and the Committee on Small Business, S. Hrg. 104–316, page 125 (December 6, 1995) (“Statement of VPPPA”).

tions have led to findings of serious hazards than was the case in the past.

In many cases, only an OSHA inspection will ensure that workers are adequately protected. In 1992, for example, workers at the Lundy packinghouse in North Carolina suffered an outbreak of brucellosis, a hog-transmitted disease. North Carolina's health agency investigated, and recommended that the company purchase only brucellosis-free herds. The company also underwent a state consultation visit; the consultant recommended employee training and personal protective equipment. The employer followed neither recommendation, resulting in an epidemic of brucellosis cases that accounted for half of the cases reported nationwide.

The following year, an employee filed a complaint with OSHA. In response, the agency conducted an inspection, issuing citations and fines totalling \$13,000. Only then did the employer address the hazard by changing its hog purchasing policies, and by providing workers with medical surveillance, treatment, education and training.

In sum, workers' longstanding statutory right to an inspection represents a sound public policy that should not be overturned. As the American Industrial Hygiene Association testified before the House Economic and Educational Opportunities Committee, "whatever change occurs in our federal health and safety law, a worker's right to ask for help in preventing injuries and illnesses should be a mainstay of any legislative action."

Limiting the scope of inspections

Section 3 of S. 1423 would also prohibit OSHA from expanding a complaint inspection beyond the hazards identified in the complaint. The only exception would be for violations "observed" during the inspection. This would exclude worksite areas not covered by the complaint, as well as many hazards (such as airborne toxins) which cannot be observed. Thus, if a compliance officer, responding to a complaint, encountered an employer who blatantly disregarded worker safety, or discovered a pattern of serious injuries by reviewing the employer's injury log, the compliance officer would be precluded from expanding the inspection to assure protection of all workers at the facility.

This provision would substantially impede OSHA's ability to protect workers. For example, last January, OSHA responded to a complaint at Glacier Vandervill, a manufacturer of fluid film bearings located near Columbus, OH. The complaint alleged that employees exposed to lead were not receiving blood lead level evaluations as required by the standard. When OSHA entered the plant and examined the injury/illness logs, the compliance officer discovered large numbers of lead exposure violations—but also found that workers had suffered amputations and crushing injuries from mechanical power presses. In response, OSHA then expanded the investigation to include the entire facility. The agency eventually cited the company for overexposure to lead, failure to establish a hearing conservation program, deficiencies in power press guarding and safety controls, violations of the standard on confined spaces, fall protection violations, as well as an inadequate lockout-tagout program. Under S. 1423, however, OSHA's inspection would have

been limited to checking for blood lead problems and the agency would have been precluded from protecting workers from other substantial hazards.

Similarly, when OSHA expanded a complaint-based inspection at Eastern Prestressed Concrete in Hatfield, PA, the agency found serious hazards such as unsafe industrial trucks, improper use of cranes, unguarded floor openings, and unguarded conveyor belts, saws and grinders. The OSHA Area Director commented that "with 30 years" experience inspecting heavy equipment I have never observed equipment that was operated in such a hazardous condition." Many of these hazards were not raised in the initial complaint. As a result, under S. 1423, OSHA would have been precluded from identifying many of these hazards and protecting workers from them.

The use of telephone and facsimile machines

S. 1423 would allow OSHA to investigate both formal and informal complaints by telephone, facsimile or other appropriate methods instead of conducting an inspection. While OSHA has itself found these investigation methods desirable for informal complaints, they should not be used at the expense of the fundamental worker right to an inspection.

Under current law, OSHA handles worker complaints by distinguishing between formal and informal complaints. If a worker files a written, signed, formal complaint, and OSHA has reasonable cause to believe that a hazard or violation exists, OSHA is required by section 8(f) of the OSH Act to conduct an inspection. In contrast, if OSHA receives an informal complaint (such as a telephone call or an unsigned writing), the agency has discretion under section 8(a) of the OSH Act to conduct an inspection or to opt for an alternative method of investigation. Traditionally, due to resource constraints, OSHA has responded to most informal complaints by writing a letter to the employer inquiring about the alleged hazards, and awaiting a response by letter, a process that often takes several weeks.

More recently, the agency has conducted pilot programs in which it used telephone calls and facsimile transmissions instead of letters to resolve informal complaints. Workers are offered a choice between this expedited informal complaint process and the traditional formal complaint process (with an inspection if the complaint gives OSHA reasonable cause to believe that workers are exposed to hazards). In this manner, these programs have protected workers' statutory right to a government inspection where they are exposed to serious danger. OSHA is now expanding these pilot programs nationwide.

Proponents of S. 1423 contend that roughly half of OSHA's complaint-based inspections turn up no serious hazards, and that S. 1423's proposed change (to allow the use of telephone, facsimile and other investigative tools for both informal and formal complaints) is necessary to address this problem. This change, however, would effectively repeal workers' statutory right to file a formal complaint and obtain an inspection.

In addition, employers could routinely be notified in advance of the likelihood of an OSHA inspection. The element of surprise is

critical to the success of the agency's enforcement program; that is why giving advance notice of an inspection to an employer constitutes a criminal offense under section 17(f) of the OSH Act. S. 1423 encourages OSHA to give notice to employers before every inspection, which would in turn encourage employers to ignore hazards until OSHA calls. Such a change in the law would substantially undermine the OSH Act's preventive and deterrent purposes.

Moreover, it is simply wrong to assume that the agency is wasting its resources every time a complaint inspection results in a finding of no violations. Workers exposed to toxic, airborne substances such as lead may be unable to determine the extent of their exposures without an OSHA inspector's help. An inspection conducted to make such a determination would not be a waste of agency resources even if the exposure levels turn out to be within safe margins. Similarly, when OSHA finds a serious hazard that is not covered by the Act's standards or general duty clause, it is not a waste of resources for the agency to inspect and recommend appropriate abatement actions to the employer, even though there is no violation of the act.

Finally, rather than improving efficiency, this provision of S. 1423 could well increase the time between the filing of a formal complaint and abatement of the hazard. In cases in which OSHA chose to conduct an inspection, the inspection would be delayed several days to allow for the exercise of telephone and facsimile procedures.

In fact, OSHA has substantially improved the efficiency of its complaint handling procedures without sacrificing the fundamental worker right to an inspection. The agency's pilot programs dramatically reduced the time period from the filing of an informal complaint to abatement of the hazard. In addition, with the promise of speedy abatement, more workers chose to file informal complaints. Workers filed formal complaints only where they believed them to be absolutely necessary, such as when the worker had already raised his or her concern with the employer to no avail. As a consequence, preliminary data indicate that OSHA found serious hazards in a much higher percentage of cases (an early estimate of 67 percent as opposed to roughly 54 percent before the pilots).

OSHA is now in the process of expanding the use of telephone and facsimile transmissions for the investigation of informal complaints to all offices. Significantly, workers are still entitled to an inspection if they choose to file a formal, signed, written complaint that gives the agency reasonable cause to believe that a hazard exists. The alternative investigative methods of telephone and facsimile transmissions are not acceptable where a worker seeks to exercise his or her statutory right to file a formal complaint and obtain an inspection.

Determining the complainant's motivation

Section 3 of S. 1423 would allow OSHA to forego a complaint inspection if it determines that the complaint was made for reasons other than safety and health—even where the workers in question are at substantial risk. The agency's determination as to whether to inspect following a complaint should be based on the likelihood that workers are at risk—not on the motivation of the complainant.

Where workers face substantial hazards, OSHA should act—and should be compelled by statute to act—to protect them.

Moreover, it would be very difficult for OSHA to determine the complainant's motivation. This exercise would consume scarce agency resources and delay inspections. Ultimately, the agency should continue to inspect where it has reasonable cause to believe that workers are at risk.

No evidence was ever presented to the committee in support of this provision. And even the hypothetical examples the majority puts forward to support the provision fail to provide any support. A “disgruntled former employee or competitor” is not an employee with a right to an OSHA inspection under current law. OSHA already has discretion to refuse to inspect in response to an otherwise valid written complaint.

Section 4. Worksite-based initiatives

Section 4 of S. 1423 would authorize exemptions from scheduled inspections if an employer (1) had been inspected under a consultation program or independent audit by a certified auditor during the preceding year, or (2) has an “exemplary” safety and health record and maintains a safety and health program. This provision poses a number of significant problems.

The use of broad-based exemptions

This provision—like many of OSHA's own reinvention initiatives—seeks to leverage the agency's limited resources, encourage employer/employee cooperation, and reduce the adversarial nature of the relationship between OSHA and employers. Nevertheless, the broad exemption described above does not represent the best balancing of these goals with OSHA's statutory mission to protect workers.

Currently, OSHA allows an exemption from scheduled inspections only under limited circumstances, when an employer demonstrates a superior commitment to worker safety and health. Under the VPP program, for example, participants must meet stringent criteria that demonstrate continued excellence in safety and health as a prerequisite to an exemption. Moreover, VPP sites receive a comprehensive on-site inspection by OSHA representatives and are subject to periodic monitoring inspections as a condition of continuing VPP approval. Only a few hundred worksites have qualified for a VPP exemption.

By contrast, section 4 of S. 1423 would grant a broad exemption from targeted inspections. In fact, OSHA estimates that roughly 94 percent of U.S. firms would be eligible for an exemption under S. 1423's various provisions.

Under section 4, for example, an employer could qualify for an exemption just by undergoing even a very limited consultative visit. Unfortunately, all too often such visits do not reflect employer commitment to protect workers. For example, MIT Tank Wash of Garden City, GA, received a state consultation visit in 1990, and was told to purchase a retrieval system to rescue workers cleaning tanks. The employer purchased the equipment, but returned it three months later. Subsequently an employee cleaning a chemical tank was overcome by toxic fumes and died. The employer was sen-

tenced to 6 months in prison and fined \$190,000. MIT Tank Wash could have qualified for a inspection exemption under S. 1423.

On the introduction of S. 1423, Chairman Kassebaum recognized that “[t]o be effective, OSHA must use its resources efficiently.” The proponents of S. 1423 contend that section 4’s exemption program would further this goal, by allowing OSHA to focus its limited resource on the most dangerous workplaces. In fact, the opposite is true: this provision would require the agency to shift substantial resources away from targeted inspections, to the processing of exemption certification paperwork submitted by employers.

OSHA estimates that 6.4 million employers would be eligible for section 4’s exemption program. Assuming that only 10 percent of these eligible employers actually applied for the exemption, OSHA estimates that the administrative costs of processing 640,000 applications would involve several hundred agency employees, at a cost of up to \$30 million. (Notably, BLS spends roughly \$20 million annually to process 280,000 annual survey forms.)

While section 4 appears to exclude monitoring inspections, OSHA believes that such inspections would be necessary to ensure that the employers that apply for exemptions actually protect their workers. If OSHA chose to audit just 10 percent of these applications to ensure such protection, the agency estimates that these 64,000 audits would involve even more agency employees, at a cost of up to \$45 million. Together, these processing and auditing costs could consume more than a quarter of OSHA’s current appropriation. As a result, OSHA would be forced to curtail targeted inspections or cease conducting them altogether.

The majority argues that resource constraints are not really a problem for OSHA, and offers as proof that OSHA has proposed “new and burdensome regulations on ergonomics.” In fact, OSHA has never issued a proposed rule and which has been banned for two consecutive fiscal years from doing so.

Third-party certification

In addition, there are many unresolved issues surrounding third-party certification. The Vice President’s National Performance Review recommended that OSHA consider the use of employer self-audits as a leveraging device, with the audits being performed by employees or by third parties.

In 1994, however, at an OSHA stakeholder meeting, representatives of industry and labor expressed serious reservations about the use of third-party certification in the area of occupational safety and health. Similarly, in a 1995 poll conducted by the National Safety Council Safety and Health Journal, respondents rejected third-party certification as desirable reform by nearly a two-to-one ratio (42 percent to 23 percent). Participants at the 1994 stakeholders’ meeting raised questions such as: Who would certify the third parties? What would the certification criteria be? Should OSHA divert its limited resources to facilitate a costly certification process? What is the legal liability of private sector experts certifying a workplace which later suffers a serious accident? Would third-party auditors be agents of OSHA, employees or the employer? Who would pay for the audit? If the employer pays, would it create a conflict of interest?

Conflicts of interest would be almost unavoidable under the scheme the bill would create. Since the third party auditor would be hired by the employer and would depend on the employer's repeat business and good will for his livelihood, there would be enormous incentives to overlook problems and to certify employers despite the existence of serious hazards to the employees.

VPPPA employers warned the committee that "because the third-parties would be selected and paid for by the facility, the possibility exists that the auditors may tell facility managers what they want to hear."⁵ These employers have also pointed out that "employees are more likely to trust OSHA with their safety and health issues" than third-party auditors who are paid by their employer.

Some stakeholders urged OSHA to restrict third party audits to the employer's safety and health program rather than to the entire workplace. Others encouraged OSHA to evaluate the effectiveness of existing audit programs in the context of corporate-wide settlements and existing safety and health committees before embarking on the untested waters of third-party certification.

The resource issues are particularly troubling. Again, this provision would require OSHA to reallocate substantial resources away from inspecting the most dangerous worksites, towards certifying thousands of safety and health consultants. As one witness observed, "OSHA would become an agency that reviewed employer paperwork and certified consultants, not one that investigated workplace hazards."

Requiring OSHA to certify individuals to provide a worksite evaluation leading to exemption from inspection would place an enormous burden on the agency, both in the pre-certification process and in quality control. Certification is a costly, time-consuming process, as OSHA has seen when it accredits testing laboratories under existing statutory authority; each such certification costs roughly \$40,000.

At the same time, reliance on the private sector for such certifications would leave third-party consultants with little accountability, except to the employers that hired them. Similarly, exempting the employer's worksite from the possibility of on-site inspections would minimize employer accountability for safety and health audits and for maintaining a safe workplace.

Congress would never be so foolish as to grant audit exemptions to employers who hire CPAs to certify to the IRS that their tax returns are accurate and in compliance with the law. We know that such a system would be systematically abused. Why would we be less protective of worker health and safety than we are of the government's tax revenues?

Ultimately, although we are skeptical, the concept of third-party certification may have some utility as a means of leveraging scarce resources. But is simply far too early to tell if the concept is workable in the context of worker safety and health, let alone so reliable that it deserves codification in the OSH Act. Rather than enacting a broad-scale statutory scheme, OSHA should be allowed to continue to explore this concept further through pilot programs. The results of this and other similar initiatives should be reviewed and

⁵Statement of VPPPA at 126.

the necessary monitoring and quality control mechanisms must be in place before decisions are made as to whether third-party certification should be used on a broader scale.

“Exemplary” safety and health records

Section 4 also allows exemptions for employers who have an “exemplary” safety and health record (fewer lost workdays than the applicable industry average) and a safety and health program (including procedures for assessing and correcting hazards, employee participation, and employee training). While we are glad to see that the committee’s majority recognizes the importance and effectiveness of safety and health programs, a broad-scale inspection exemption is not warranted in these circumstances. Instead, we would prefer to see such programs mandated for all employers and a health and safety standard should be promoted through penalty reductions, incentive programs such as Maine 200 and Focused Inspections in Construction, and the development of a Safety and Health Program Standard.

Firms with unexceptional safety records would be deemed “exemplary” under the bill, even though many of them might be quite dangerous. For example, according to the North Carolina Occupational Safety and Health Program, the Imperial Foods processing plant where 25 workers were killed in a fire in 1991 had a lower than average lost workday injury rate and would have been considered an exemplary employer under S. 1423.

The bill’s exemption criteria pose a particular problem in high-hazard industries where injury rates are excessive across the board. For example, in meatpacking, the average injury rate is 36 per 100 workers, and the average lost time injury rate is 19 per 100 workers. Yet firms with this record of injuries would be considered exemplary employers and eligible for exemption even though their injury rates are five times higher than the national average for all injuries.

In fact, the use of an employer’s injury data as a primary or exclusive basis for enforcement relief poses problems in and of itself. First, the bill allows OSHA to conduct random audits, but would only allow the agency to audit an employer’s records, not actual working conditions. Thus, unsafe employers who declare themselves eligible for an exemption would not be held accountable for their failure to protect workers. As the American Society of Safety Engineers testified “the legislation should require an actual physical assessment of the facility.”⁶ The VPPPA employer association concurred that precluding OSHA from conducting monitoring inspections would “reduc[e] the credibility of these [third-party] inspections.”⁷ OSHA learned first-hand in the 1980’s that enforcement exemptions based solely on employer-provided data will encourage some employers to falsify their records.

Second, the unpredictability of small employer injury and illness rates further demonstrates the difficulties posed by section 4. In general, such rates have no predictive value: a small employer may have no reportable incidents one year, and then have an extremely

⁶ Statement of ASSE at 100.

⁷ Statement of VPPPS at 126.

high rate the next year based on just one or two incidents. Thus, for example, workers' compensation insurers give small employers a pooled or capped experience rating because of the high year-to-year volatility of claims and injuries.

Third, section 4 ignores hazards that pose long-term health risks to workers. While an employer's injury data are relevant to assessing the need for an OSHA inspection, it would be unwise to use them as the sole or primary basis for an inspection exemption.

Finally, the bill's measure of an "exemplary" record is the raw number of lost workdays; the measure is not defined as a rate, such as lost workdays per 1,000 employees. This radically skews the measure in favor of smaller companies. A dangerously unsafe company with a 100 percent injury and illness rate among its 20 employees would be far more likely to have a below average number of lost workdays than a company with 1,000 employees whose injury rate was only 3 percent.

We object to the majority's misuse of the fact that labor union officials participated in a Maryland state occupational safety and health task force to imply that they support the inspection exemptions in S. 1423. In fact, the Maryland AFL-CIO strongly dissented from the Maryland task force report that the majority cites and opposes "any measures toward self-inspection or self audit."⁸

OSHA access to employer self-audit records

In her opening statement at the Committee's November 29, 1996 hearing, Chairman Kassebaum declared that S. 1423 "encourages the agency to focus on the most serious hazards and the most dangerous worksites." Yet that objective is seriously undermined by section 4 of the bill, which bars OSHA from reviewing certain records of safety and health inspections, audits or reviews unless a worker was killed or injured on the job. Prohibiting OSHA's access to these records will impede the agency's effort to target its limited resources at the worst worksites. (The bill includes another exception—allowing OSHA access when the employer has not corrected the hazards identified in the self-audit—but it would be impossible for OSHA to know whether this was the case without first having access to the records.)

This provision does not represent an appropriate balance between an employer's desire for confidentiality and OSHA's need to determine whether employers were aware of serious hazards prior to an inspection. Moreover, this provision could be read to deny OSHA access to a host of records required by the agency's own standards and regulations, including exposure monitoring, process hazard evaluation reports, hearing conservation tests, and other similar records.

Reasonable access to employer self-audit records is essential to OSHA's efforts to protect American workers. In some cases, this information will be critical to OSHA for enforcement purposes. More significantly, at a time when promising initiatives are underway at OSHA to evaluate and reward efforts by employers to improve employee health and safety, OSHA would be completely unable to as-

⁸Letter from Edward A. Mohler, President, Maryland State and D.C. AFL-CIO to Edward M. Ranier, Esquire, Chairman, MOSH Task Force (December 5, 1995).

sess the effectiveness or good faith of employer-initiated safety programs without access to underlying documentation. Finally, allowing employers to refuse to disclose their health and safety records will, for some employers, remove the incentive to take prompt and effective action to eliminate any hazards disclosed by these in-house reports.

In practice, an employer's self-audit records are not used against employers who have made good faith efforts to protect their workers. As a result, this provision would only protect employers who have identified hazards and consciously failed to correct them.

Section 5. Employer defenses

Employer knowledge

Current law prevents OSHA from issuing citations for serious violations unless the employer knew or "could" have known of the violation. Section 5 of S. 1423 would prevent OSHA from issuing a citation for any violation unless the employer "knew, or with reasonable diligence would have known" of the violation.

Although the impact of these changes is not altogether clear, they appear to be intended to increase the agency's burden of proving violations of the Act or OSHA standards. The agency's ability to protect workers could well be compromised as a result.

No testimony was offered to justify this change in the law.

Employee misconduct defense

Section 5 also attempts to codify the so-called "employee misconduct" defense. In its testimony on S. 1423, OSHA supported the codification of this longstanding employer defense, to the extent that its requirements track existing OSHA case law. This provision would require the employer to prove this affirmative defense, as is now the case.

The "alternative methods" defense

Section 5 would also create an entirely new statutory defense to an OSHA citation, based on an employer's demonstration that employees were protected by alternate methods equally or more protective than those required by the standard the employer violated. This provision could seriously undermine OSHA's standards, and in turn every enforcement action into a costly and time-consuming variance proceeding.

The OSH Review Commission and the courts have held repeatedly that when OSHA's standards require employers to adopt specific precautions for protecting employees, employers must comply in the manner specified. Under current law, employers have the right to select alternative means of compliance only when literal compliance is impossible or would pose a greater hazard to employees. In "greater hazard" cases the Commission requires an employer to show that a variance has either been sought or would be inappropriate.

Under these rules, the contest rate has remained relatively low: under 10 percent of all citations are contested currently. Under this provision of S. 1423, however, virtually every employer cited for violations of the OSH Act or OSHA standards could claim that an

alternative means of compliance was as effective as the standard in question. As the VPPPA employer association recognized, this provision “might create a loophole by allowing employers to circumvent OSHA standards * * * as well as create additional litigation.” In effect, standards would no longer be mandatory, but would be subject to challenge—and potential waiver) in every individual contested case.

As a consequence, judges with little or no safety and health expertise would make determinations as to the adequacy of worker protections, rather than trained safety and health professionals. This provision could have a substantial impact on agency research, and greatly increase litigation burdens on OSHA, the OSH Review Commission, and the Federal courts.

The provision does not require that the employer take any action to request a variance or to obtain an independent opinion about the appropriateness of its alternative compliance. It encourages employer to ignore accepted practices and take chances with their employees’ safety.

Section 6. Inspection quotas

Section 6 of the bill would prohibit OSHA from establishing “quotas” for inspections, citations or penalties. For many years, Congress used inspections, citations and penalties as measures of OSHA’s performance. As a result, the agency used them as performance measures as well. In all likelihood, these performance measures encouraged OSHA compliance officers to improve their personnel evaluations by maximizing the number of violations cited and the penalties assessed. By doing so, they contributed to OSHA’s reputation as a nitpicky, overzealous enforcement agency.

To address this problem, OSHA eliminated these performance measures last year. OSHA is currently in the process of developing a performance measurement system that is more closely tied to improvements in worker safety and health. We support this section of S. 1423.

Section 7. Warnings in lieu of citations

Currently, the OSH Act provides that OSHA “shall” issue a citation for each violation it discovers during an inspection. Section 7 of S. 1423 would change this rule to “may.” Although federal case law demonstrates that OSHA possesses a greater degree of prosecutorial discretion than was recognized in the early years of the agency, this provision would remove any limits to such discretion.

Section 7 has generated much confusion, even among its authors. For example, in introducing S. 1423 Senator Gregg described the bill as including “warnings in lieu of citations for nonserious violations.” In fact, the bill would allow OSHA to issue warnings instead of citations for all violations, including willful, repeat, failure to abate, and serious violations.

Similarly, in her opening statement at the committee’s November 29, 1996 hearing, Chairman Kassebaum stated that S. 1423 “encourages employers voluntarily to improve workplace safety.” Yet that objective is seriously undermined by section 7 of the bill, which would allow OSHA to issue warnings instead of citations whenever an employer acts promptly to abate a violation. Such a

policy would encourage employers not to take voluntary steps, but to wait until an OSHA inspector arrived to conduct an inspection. By eliminating both the preventive and deterrent functions of OSHA's enforcement program, section 7 would turn that program on its head.

Witnesses at the hearings on S. 1423 also demonstrated confusion about the impact of section 7. For example, the Labor Policy Association testified that it was "pleased that S. 1423 gives discretion to OSHA to issue warning notices in lieu of citations in cases where an alleged violation poses no threat to employees." In fact, that is OSHA's current policy, known as the *de minimis* rule. S. 1423 would go much farther, allowing the agency to issue warnings instead of citations even where workers are killed, seriously injured, or permanently disabled by occupational disease.

In addition, the changes proposed in this section might be misunderstood by some employers as a limitation on OSHA's authority to issue citations. For example, paragraph 2(B) allows the issuance of a "warning in lieu of a citation" for violations that the employer "acts promptly to abate." Even though it does not require OSHA to issue a warning in such circumstances, we agree with Assistant Secretary Dear that this provision may signal employers that they need not take preventive steps to protect their workers prior to an OSHA inspection. Such a signal would undermine both the preventive purpose as well as the deterrent effect of OSHA's enforcement program.

Ultimately, prompt abatement of hazards should be encouraged, but it should be encouraged through penalty reductions, not by eliminating any citations whatsoever for the violations. Otherwise, employers who made good faith efforts to protect workers before an OSHA inspector arrived at their door would be treated the same as neglectful employers that ignored their workers' safety until the inspection.

Charles Jeffress, Director of North Carolina's State OSHA Program, made a similar point in testifying before the House Committee on Economic and Educational Opportunities:

Warning tickets will encourage employers to gamble with their employees' lives and health, knowing they have to take no precautions until OSHA arrives. There are employers who are willing to take big risks with safety in the mistaken belief that it will reduce costs or provide some competitive advantage. To say to these employers, "there will be no penalty for violating safety and health rules as long as you fix things after OSHA has found you" is to convey the wrong message. I urge you not to send them this message.

Section 8. Penalty reductions

Section 8 of the bill would make several major changes in OSHA's penalty policies, reducing penalties for nonserious violations, limiting penalties for recordkeeping or "paperwork" violations, revising the factors to be considered in assessing a penalty, and providing for substantial penalty reductions in specific situations. These provisions would seriously undercut the preventive and deterrent goals of OSHA's penalty policies. For example, while

OSHA's penalty reduction policies generally reward employers for protecting workers before OSHA arrives at the doorstep, many of these changes would reward employers who did little until OSHA arrived.

\$100 penalty limit for non-serious violations

Section 8 would reduce the maximum penalty for non-serious violations from \$7,000 to \$100. As a general matter, OSHA typically does not assess penalties against employers for non-serious violations: in FY 1995, for example, employers were not penalized for 92 percent of all non-serious violations. However, the average penalty for the other 8 percent of these violations was \$739. These violations included such hazards as inadequate fire exits and failure to monitor excessive noise levels. OSHA needs to retain the authority to levy significant penalties for violations which may threaten workers even if they do not technically meet all of the criteria to be classified as serious.

Posting and paperwork violations

As part of its reinvention effort, OSHA has taken steps to limit citations and penalties for paperwork violations unrelated to safety and health. For example, citations for the most common paperwork violations declined 35 percent between 1991 and 1994. OSHA's compliance officers no longer cite for minor paperwork requirements; they advise and educate the employer instead. To illustrate, for years OSHA issued thousands of violations annually for failing to put up the required OSHA poster. Last year, OSHA decided just to give employers a poster and ask them to put it up. The number of poster violations has dropped from several thousand a year to near zero. Similarly, if there are no injuries or illnesses to record, OSHA no longer cites an employer for failing to complete the agency's recordkeeping requirements.

At the same time, the agency needs to retain the discretion to penalize employers who under-report injuries and illnesses. Without accurate data, OSHA would be unable to accurately determine the nature of workplace problems, would not know where to target inspections, and would be unable to evaluate the effectiveness of its interventions. Furthermore, the bill fails to recognize that there are many other important "paperwork" requirements that significantly and directly protect workers from serious injury or illness. Penalties for OSHA violations concerning written lockout/tagout programs, process hazard analysis at chemical plants, hearing conservation and toxics exposure monitoring records all would be reduced by the bill.

According to the majority report, "the legislation eliminates penalties for posting or paperwork requirements." This is thoughtless overkill. OSHA will not be able to enforce effectively the requirement to keep injury and illness logs, which occupational safety and health professions consider one of the most valuable tools available. OSHA will be unable to enforce effectively the requirement to have material safety data sheets for extremely hazardous substances including carcinogens and neurotoxins. For these reasons, the VPPPA employer association did not support this provision of S. 1423, stat-

ing instead that it “support[s] OSHA’s authority to issue first instance citations for *all* violations.” (Emphasis added.)⁹

Consideration of mitigating factors

S. 1423 would expand the statutory list of factors to be considered in the assessment of penalties, adding such factors as whether the employer abated the hazard after the inspection, whether the violations involved paperwork requirements, whether employee misconduct contributed to the violation, and whether the penalty might affect the employer’s ability to remain in business.

None of the four proposed factors would improve the act, but only the last, which would require the agency to consider the effect of the penalty on the employer’s ability to stay in business, poses serious problems. In practice, many of the most negligent companies are those operating on the margins; they are looking for any means of cutting costs to gain a competitive advantage, and worker protections are often sacrificed. For example, Imperial Foods of Hamlet, North Carolina cut costs by not installing a sprinkler system and by not maintaining its fryer fuel lines. The company saved money, but twenty-five workers paid with their lives when a flash fire started on the fryer line. Under S. 1423, OSHA might be precluded from assessing significant penalties against similar employers operating on the margins by endangering their workers.

The Occupational Safety and Health Act provides OSHA great discretion in assessing proposed penalties and has not resulted in excessive penalties. Indeed, the current average federal OSHA penalty for a serious violation (where there is a substantial probability that death or serious harm could result) is only \$753, though the law permits of a maximum penalty of \$7,000. There is no need for changes in the law that would further reduce penalty assessments and the incentive they provide for compliance.

Minimum penalty reductions (25 percent to 75 percent)

The existing OSH Act sets maximum penalties, and one minimum penalty for willful violations, and requires OSHA to consider an employer’s size, good faith, and history, and the gravity of the violations, in assessing penalties. This statutory scheme allows the agency to establish particular penalty policies administratively and implement such policies on a case-by-case basis. In contrast, section 8 of S. 1423 would establish mandatory minimum penalty reductions, limiting OSHA’s discretion to set policies, modify them as experience dictates, and apply them on a case-by-case basis, considering all relevant facts and circumstances. Notably, the VPPPA employer association concluded that penalty reductions should be developed administratively by OSHA: “This will allow OSHA to develop the most efficient method of rewarding these good faith employers while maintaining its ability to amend the program when necessary.”

S. 1423 would reduce penalties by a minimum of 25 percent if the worksite has either an “exemplary” safety record or a safety and health program (a minimum of 50 percent if it has both). The definition of “exemplary” would include hundreds of thousands of

⁹Statement of VPPPA at 128.

employers whose records are not exemplary at all. These employers could qualify for major penalty reductions even where they have ignored serious, widespread hazards; even where the employer has committed willful, repeat and failure to abate violations, and even where workers have been killed, seriously injured, or permanently disabled by occupational disease.

In addition, stating penalty reductions in terms of an automatic “minimum” reduction leaves the agency without enough discretion to weigh countervailing factors. An employer with a truly effective safety and health program should receive a penalty reduction, and under current practice, OSHA would grant one. But what about an employer that merely, as section 8 provides, “maintains a safety and health program”? Nothing in section 8 requires the program to be effective in order to entitle the employer to the minimum penalty reduction of 25 percent. An employer with a written safety and health program could have 15 or 20 willful and repeat violations that resulted in the death of employees, but this provision would require OSHA to reduce the penalty. S. 1423 denies the agency discretion and guarantees absurd and unjust results.

Another provision would reduce penalties by a minimum of 75 percent if the worksite has received a consultation visit or third-party audit within the preceding year and the employer has abated any identified hazards within a reasonable period of time. In addition to the concerns about minimum penalty reductions we mentioned above, and our concern regarding third-party certification, this provision would grant a substantial penalty reduction even for consultation visits with very limited scope. Thus, the 75 percent reduction would still apply to willful violations that fell outside the scope of a consultation visit, third-party audit or self audit.

In addition, the bill would allow a 75 percent reduction even where the employer has a substantial history of safety and health violations and workplace injuries. Employers would also remain eligible for these reductions even if the hazards in question arose after the consultation visit or audit, and even if they allowed safety and health conditions to deteriorate after initially complying with a consultant’s recommendations.

Section 9. Consultation programs

Section 9 would codify the consultation services currently funded by OSHA under section 7(c)(1) of the OSH Act. As a general matter, OSHA supports the codification of current consultation programs.

The requirement for at least 15 percent of total OSHA appropriations to be spent on education, consultation, and outreach efforts would probably not require any adjustments in OSHA programs. Nevertheless, it may be unwise to tie the agency’s consultation efforts to a specific percentage of appropriations. In future years, OSHA’s appropriation may increase or decrease, and the appropriate mix of consultation and enforcement might shift as well.

Section 10. VPP programs

Section 10 would codify the existing Voluntary Protection Program. Notably, OSHA testified in support of the codification of this current excellence recognition program.

OSHA's VPP program has traditionally been reserved for employers that have demonstrated the highest commitment to worker safety and health. Unfortunately, this provision of S. 1423 does not define this primary characteristic of VPP. Nor would the bill require VPP participants to provide meaningful employee involvement in safety and health. Ideally, any codification of this program should limit participation to employers that have truly superior safety and health records, but should allow OSHA the flexibility to define (and modify as necessary) the specific criteria for participation in the program.

This section would also authorize OSHA to charge an annual fee to VPP participants; the fees would not be available to support administration of the VPP, but would be deposited in the general treasury of the United States. If fees are to be charged for participation, they should be applied to support the program. They should not be treated as a tax.

Section 10 would also require OSHA to establish cooperative agreements to encourage the establishment of comprehensive safety and health management systems. A substantial body of evidence has established that such systems can dramatically reduce injury and illness rates. For example, VPP participants are required to establish comprehensive safety and health programs and such participants have injury and illness rates 60 percent below their industry averages.

Although the VPP program will undoubtedly retain the enthusiastic support of Congress even without codification, we support an amendment that would authorize the program statutorily and that would accurately codify the program's current requirements.

DEMOCRATIC AMENDMENTS

SIMON AMENDMENT EXTENDING OSHA COVERAGE TO FEDERAL, STATE AND LOCAL EMPLOYEES

By a vote of 9-7, the committee accepted Senator Simon's amendment extending OSHA coverage to Federal, State and local government employees. This change in the OSH Act is long overdue. Over 1,700 public employees die each year on the job, and almost half a million more suffer disability.

Federal employees in particular lack protection from unsafe work environments. Federal employees are excluded from coverage by OSHA, and, although Executive Order 12196 requires OSHA to conduct annual inspections of Federal workplaces, OSHA has no authority to issue citations or impose penalties upon non-complying agencies. As a result, the protection of approximately 3.2 million Federal employees remains at the discretion of their employers.

Altogether, approximately 7.3 million public employees in 27 States have no health and safety protection from Federal law. These employees have no whistleblower protection, or right to request an OSHA inspection. On the other hand, only 23 States have enacted their own safety and health plans as suggested by the OSH Act.

A study conducted by Ruttenberg and Associates found that providing public sector workers with OSHA coverage could save the nation between \$600 million and \$2.1 billion a year. The study

found that Philadelphia alone could save \$7.6 million from the reduction of workdays lost to injuries; \$2.9 million in service-related disability costs; and \$480,000 in medical costs payable by the city.

By voting to apply OSHA to public employees, the committee took an important step towards ensuring that all Americans receive adequate protection against workplace injury and disease.

FEDERAL CONTRACT DEBARMENT AMENDMENT

During its February 28, 1996 Executive Session, the committee voted to accept Senator Simon's amendment providing for Federal contract debarment for repeat OSHA violators. When the Executive Session continued on March 5, 1996, the Chairman moved for reconsideration, and the Simon Amendment was rejected on a party-line vote. The amendment would have allowed the Secretary of Labor to debar from Federal contracts firms that showed a clear pattern or practice of serious OSHA violations.

The Federal government already enforces a number of statutes and executive orders that hold Federal contractors to high standards. For example, the Davis-Bacon Act requires Federal construction contractors to pay their workers the "prevailing wage" in their locality, and Executive Order 11246 requires Federal contractors to establish affirmative action policies in their workplaces. Yet there is no statute or executive order in place to require that Federal contractors serve as a model for other employers in assuring their employees a safe and healthful workplace.

On the other hand, a number of studies have shown that the Federal Government is currently paying millions of contract dollars per year to companies that have demonstrated a clear pattern and practice of exposing their employees to hazardous and even life-threatening working conditions.

Senator Simon's amendment, the Federal Contractor Safety and Health Enforcement Act of 1996, was designed to address this problem. It would have given the Secretary of Labor the discretion to debar firms that show a "clear pattern and practice" of OSHA violations creating a "substantial probability of death or serious physical harm" from receiving Federal contracts or extensions or modifications of Federal contracts for three years.

The Simon Amendment would also have given the Secretary discretion to reduce or remove a debarment order for a firm that demonstrates that it has complied with the rules that were found to have been violated, that there has been a bona fide change of ownership, or that there has been fraud or misrepresentation by a charging party.

Under the amendment, the Secretary would have been allowed to define "pattern and practice" through the administrative rule-making process. The Amendment would also have left to the Secretary rulemaking discretion to determine the circumstances under which a parent company should be debarred because of the actions of a subsidiary.

The Simon Amendment would have helped to ensure that employers who repeatedly disregard the health and safety of their workers face serious economic consequences for their failure to abide by the law. It also would have promoted efficient and economical Federal procurement by removing Federal support for

firms that unfairly underbid their competitors by skimping on health and safety for their workers.

CONSTRUCTION SAFETY

Although the Occupational Safety and Health Act originally made a pledge to protect America's workers, S. 1423 fails to adequately safeguard our workers and, in fact, weakens OSHA. It most specifically fails the construction industry, which has one of the most disturbing injury records. According to the most recent figures available to the Occupational Safety and Health Administration, there were 127,000 deaths in the construction industry during 1994. Although construction workers comprise only 6 percent of the workforce, they account for 16 percent of all workplace fatalities. The injury rate for construction workers is also higher than the national average, resulting in more lost work days for construction workers than workers in any other industry.

In past Congresses, the committee, led by Senator Dodd, has looked closely into this issue. The committee held hearings on one of the worst workplace accidents in OSHA's history—the collapse of the L'Ambiance Plaza construction project which killed 28 workers in 1987. It became clear that the construction industry presented unique challenges to providing a safe workplace. Specifically, construction is characterized by changing conditions and multiple employers working on one site with uncoordinated or non-existent safety plans. OSHA, with its focus on single employers, is simply unable to fully address these unique problems.

In an effort to deal with this problem, Senator Dodd offered an amendment to S. 1423 which provided specific protections for construction workers by requiring internal cooperation between contractors on each site to assure safer working conditions and by establishing an Office of Construction Safety and Health within the Occupational Safety and Health Administration. Specifically, the amendment required every construction project to create a coordinated safety and health plan. To assure a safer worksite, plans would include a hazard analysis, an appropriate construction process protocol, and a method to respond to a request for an inspection of a potentially imminent danger.

These provisions would have significantly improved the safety conditions on construction sites. The internal coordination of safety plans within a work site would have enabled OSHA to spend more time preventing accidents. By rejecting this amendment, without offering any alternative of their own, the majority members of the Committee have indicated that they place no special priority on the safety of our nation's construction workers.

CONCLUSION

S. 1423 would be a major step backward in the nation's long struggle to improve workplace safety and health. The bill's fundamental premise—that we can improve the performance of employers by making it less likely that they will be punished for violating the law and endangering their employees—is wrong. It is hard to imagine that the majority would support this kind of approach with respect to any other activity that endangers human

life. The recent experience with ValuJet Airlines, for example, would lead no one to conclude that airline safety would be improved if we lessened the penalties for unsafe airplane maintenance. No one seriously suggests that we would improve drug safety by reducing the penalties for companies caught producing unsafe drugs. Yet the majority's prescription for workplace safety seems to boil down to the following: "Reduce the likelihood of catching companies that violate the law, and when you do catch them, let them off with a slap on the wrist."

No matter how much the majority tries, it cannot make this ill-conceived approach to "reform" resemble the Clinton Administration's OSHA Reinvention initiative. The Administration can speak for itself, and its veto message on S. 1423 speaks eloquently.

But someone must speak for the victims of unsafe workplaces, and no one does that better than Mr. Ron Hayes, who testified before the committee about the death of his son, Patrick, who was killed by a grossly negligent employer. In the section of this report headlined "Enforcement," the majority quotes Mr. Hayes, perhaps to create the impression that Mr. Hayes supports this misguided legislation. In fact, Mr. Hayes is an ardent opponent of S. 1423. In a letter to Chairman Kassebaum, dated February 15, 1996, Mr. Hayes wrote:

I know you truly believe what you are proposing will help deregulate some of our government's grip on us, but in reality, in this instance, I think we will be hurt more.

I think you know, I have had many problems with OSHA and I will be the first to say, we need changes within the agency, but I can't let the changes devastate the millions of workers that need strong enforcement from this agency. I do believe that accountability and some hard changes would make this agency better, but to completely tie the hands of this already weak agency is not the answer.

Like Mr. Hayes, we oppose S. 1423 and urge our colleagues to take a different approach to OSHA reform. Every day, 17 Americans die from work injuries and 137 die from occupational lung diseases, occupational cancers, and other work-related illnesses. Every week, 67,000 workers are disabled by work injuries and illnesses. Most of these injuries and illnesses are preventable.

We should support legislation only if it enhances the safety and protection of the millions of men and women who get up and go to work every day. S. 1423 does not.

EDWARD M. KENNEDY.
CHRISTOPHER J. DODD.
TOM HARKIN.
PAUL WELLSTONE.
CLAIBORNE PELL.
PAUL SIMON.
BARBARA A. MIKULSKI.

X. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the Statute or the part of section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

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OCCUPATIONAL SAFETY AND HEALTH REFORM AND REINVENTION ACT

* * * * *

TITLE 29, UNITED STATES CODE

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SEC. 653. (c) *In order to carry out the purpose of this Act to encourage employers and employees in their efforts to reduce the number of occupational safety and health hazards, an employee participation program—*

- (1) in which employees participate;*
- (2) which exists for the purpose, in whole or in part, of dealing with employees concerning safe and healthful working conditions; and*
- (3) which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, shall not constitute a "labor organization" for purposes of section 8(a)(2) of the National Labor Relations Act (29 U.S.C. 158(a)(2)) or a representative for purposes of sections 1 and 2 of the Railway Labor Act (45 U.S.C. 151 and 151a). Nothing in this section shall be construed to affect employer obligations under section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5) to deal with a certified or recognized employee representative with respect to health and safety matters to the extent otherwise required by law.*

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SEC. 657. **[(g)]** (h) * * *

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(g)(1) Except as provided in paragraph (2), the Secretary shall not conduct routine inspections of, or enforce any standard, rule, regulation, or order under this Act with respect to—

(A) any person who is engaged in a farming operation that does not maintain a temporary labor camp and that employs 10 or fewer employees; or

(B) any employer of not more than 10 employees if such employer is included within a category of employers having an occupational injury or a lost workday case rate (determined under the Standard Industrial Classification Code for which such data are published) that is less than the national average rate as most recently published by the Secretary acting through the Bureau of Labor Statistics under section 24.

(2) In the case of persons who are not engaged in farming operations, paragraph (1) shall not be construed to prevent the Secretary from—

(A) providing consultations, technical assistance, and educational and training services and conducting surveys and studies under this Act;

(B) conducting inspections or investigations in response to complaints of employees, issuing citations for violations of this Act found during such inspections, and assessing a penalty for violations that are not corrected within a reasonable abatement period;

(C) taking any action authorized by this Act with respect to imminent dangers;

(D) taking any action authorized by this Act with respect to a report of an employment accident that is fatal to at least one employee or that results in the hospitalization of at least three employees, and taking any action pursuant to an investigation conducted with respect to such report; and

(E) taking any action authorized by this Act with respect to complaints of discrimination against employees for exercising their rights under this Act.

* * * * *

[(f) Request for inspection by employees or representative of employees; grounds; procedure; determination of request; notification of Secretary or representative prior to or during any inspection of violations; procedure for review of refusal by representative of Secretary to issue citation for alleged violations.

[(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provi-

sions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

[(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representatives of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.]

(f)(1)(A) An employee or representative of an employee who believes that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by providing notice of the violation or danger to the Secretary or an authorized representative of the Secretary.

(B) Notice under subparagraph (A) shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall state whether the alleged violation or danger has been brought to the attention of the employer and if so, whether the employer has refused to take any action to correct the alleged violation or danger.

(C)(i) The notice under subparagraph (A) shall be signed by the employees or representative of employees and a copy shall be provided to the employer or the agent of the employer not later than the time of arrival of an occupational safety and health agency inspector to conduct the inspection.

(ii) Upon the request of the person providing the notice under subparagraph (A), the name of the person and the names of individual employees referred to in the notice shall not appear in the copy of the notice or on any record published, released, or made available pursuant to subsection (i), except that the Secretary may disclose this information during prehearing discovery in a contested case.

(D) The secretary may only make an inspection under this section if such an inspection is requested by an employee or a representative of employees.

(E)(i) If, upon receipt of the notice under subparagraph (A), the Secretary determines that there are reasonable grounds to believe the violation or danger exists, the Secretary may conduct a special inspection in accordance with this section as soon as practicable. Except as provided in clause (ii), the special inspection shall be conducted for the limited purpose of determining whether the violation or danger exists.

(ii) During a special inspection described in clause (i), the Secretary may take appropriate actions with respect to health and safety violations that are not within the scope of the inspection and that are observed by the Secretary or an authorized representative of the Secretary during the inspection.

(2) If the Secretary determines either before, or as a result of, an inspection that there are not reasonable grounds to believe a violation or danger exists, the secretary shall notify the complaining employee or employee representative of the determination and, upon request by the employee or employee representative, shall provide a written statement of the reasons for the Secretary's final disposition of the case.

(3) The Secretary or an authorized representative of the Secretary may, as a method of instigating an alleged violation or danger under this section, attempt, if feasible, to contact an employer by telephone, facsimile, or other appropriate methods to determine whether—

(A) the employer has taken corrective actions with respect to the alleged violation or danger; or

(B) there are reasonable grounds to believe that a hazard exists.

(4) The Secretary is not required to conduct a special inspection under this subsection if the Secretary determines that a request for a special inspection was made for reasons other than the safety and health of the employees of an employer or that the employees of an employer are not at risk.

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SEC. 8A. HEALTH AND SAFETY REINVENTION INITIATIVES.

(a) **IN GENERAL.**—The Secretary shall establish a program to encourage voluntary employer and employee efforts to provide safe and healthful working conditions.

(b) **EXEMPTION.**—In establishing a program under subsection (a), the Secretary shall, in accordance with subsection (c), provide an exemption from all safety and health inspections and investigations for a place of employment maintained by an employer participating in such program, except that this subsection shall not apply to inspections and investigations conducted for the purpose of—

(1) determining the cause of a workplace accident that resulted in the death of one or more employees or the hospitalization of three or more employees; or

(2) responding to a request for an inspection pursuant to section 8(f)(1).

(c) **EXEMPTION REQUIREMENTS.**—To qualify for an exemption under subsection (b), an employer shall provide to the Secretary evidence that, with respect to the employer—

(1) during the preceding year, the place of employment or conditions of employment have been reviewed or inspected under—

(A) a consultation program provided by recipients of grants under section 7(c)(1) or 23(g);

(B) a certification or consultation program provided by an insurance carrier or other private business entity pursuant to a State program, law, or regulation if the person conducting the review or inspection meets standards established by, and is certified by, the Secretary; or

(C) a workplace consultation program provided by a qualified person certified by the Secretary for purposes of providing such consultations,

that includes a means of ensuring that serious hazards identified in the consultation are corrected within an appropriate time and that, where applicable, permits an employee (of the employer) who is a representative of a health and safety employee participation program to accompany a consultant during a workplace inspection; or

(2) the place of employment has an exemplary safety and health record and the employer maintains a safety and health program for the workplace that includes—

(A) procedures for assessing hazards to the employer's employees that are inherent to the employer's operations or business;

(B) procedures for correcting or controlling such hazards in a timely manner based upon the severity of the hazard; and

(C) an employee participation program that, at a minimum—

(i) includes regular consultation between the employer and nonsupervisory employees regarding safety and health issues;

(ii) includes the opportunity for nonsupervisory employees to make recommendations regarding hazards in the workplace and to receive responses or to implement improvements in response to such recommendations; and

(iii) ensures that participating nonsupervisory employees have training or expertise on safety and health issues consistent with the responsibilities of such employees.

(d) **MODEL PROGRAM.**—The Secretary shall publish and make available to employers a model safety and health program that if completed by the employer shall be considered to meet the requirements for an exemption under this section.

(e) **CERTIFICATION.**—The Secretary may require that, to claim the exemption under subsection (b), an employer provide certification to the Secretary and notice to the employer's employees of such eligibility. The Secretary may conduct random audits of the records of employers to ensure against falsification of the records by the employers.

(f) **RECORDS.**—Records of a safety and health inspection, audit, or review that is conducted by an employer and that is not conducted under a program described in subsection (a) shall not be required to be disclosed to the Secretary unless—

(1) the Secretary is conducting an investigation involving a fatality or a serious injury of an employee of such employer; or

(2) such employer has not taken measures to address serious hazards in the workplace of the employer identified during such inspection, audit, or review.

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SEC. 652. * * *

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(15) The term "exemplary safety and health record" means such record as the Secretary shall annually determine for each industry. Such record shall include employers that have had, in

the most recent reporting period, no employee death caused by occupational injury and fewer lost workdays due to occupational injury and illness than the average for the industry of which the employer is a part.

* * * * *

SEC. 658. (d) No citation may be issued under subsection (a) to an employer unless the employer knew, or with the exercise of reasonable diligence would have known, of the presence of the alleged violation. No citation shall be issued under subsection (a) to an employer for an alleged violation of section 5, any standard, rule, or order promulgated pursuant to section 6, any other regulation promulgated under this Act, or any other occupational safety and health standard, if such employer demonstrates that—

(1) employees of such employer have been provided with the proper training and equipment to prevent such a violation;

(2) work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and the employer has taken reasonable measures to discipline employees when violations of such work rules have been discovered;

(3) the failure of employees to observe work rules led to the violation; and

(4) reasonable steps have been taken by such employer to discover any such violation.

(e) A citation issued under subsection (a) to an employer who violates the requirements of section 5, of any standard, rule, or order promulgated pursuant to section 6, or any other regulation promulgated under this Act shall be vacated if such employer demonstrates that employees of such employer were protected by alternative methods equally or more protective of the employee's safety and health than those required by such standard, rule, order, or regulation in the factual circumstances underlying the citation.

(f) Subsections (d) and (e) shall not be construed to eliminate or modify other defenses that may exist to any citation.

(g) The Secretary shall not establish any quota for any subordinate within the Occupational Safety and Health Administration (including any regional director, area director, supervisor, or inspector) with respect to the number of inspections conducted, citations issued, or penalties collected.

* * * * *

SEC. 658. [(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations.

[If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a

notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.】

(a)(1) Except as provided in paragraph (2), if, upon inspection or investigation, the Secretary or an authorized representative of the Secretary believes that an employer has violated a requirement of section 5, of any regulation, rule, or order promulgated pursuant to section 6, or of any regulations prescribed pursuant to this Act, the Secretary may with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, regulation, rule, or order alleged to have been violated. The citation shall fix a reasonable time for the abatement of the violation.

(2) The Secretary or the authorized representative of the Secretary—

(A) may issue a warning in lieu of a citation with respect to a violation that has no significant relationship to employee safety or health and

(B) may issue a warning in lieu of a citation in cases in which an employer in good faith acts promptly to abate a violation if the violation is not a willful or repeat violation.

(3) Nothing in this Act shall be construed as prohibiting the Secretary or the authorized representative of the Secretary from providing technical or compliance assistance to an employer in correcting a violation discovered during an inspection or investigation under this Act without issuing a citation.

* * * * *

SEC. 666(c) Citation for violation determined not serious. Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty [up to \$7,000] *not more than \$100* for each such violation.

* * * * *

【(h)(i) Violation of posting requirement. Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act shall be assessed a civil penalty of up to \$7,000 for each violation.】

【(i)(j) Authority of Commission to assess civil penalties. The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.】

(i) Any employer who violates any of the posting or paperwork requirements other than serious or fraudulent reporting requirement deficiencies, prescribed under this Act shall not be assessed a civil penalty for such violation unless it is determined that the employer has violated subsection (a) or (d) with respect to such posting or paperwork requirements.

(j)(1) *The Commission shall have authority to assess all civil penalties under this section. In assessing a penalty under this section, the Commission shall give due consideration to the appropriateness of the penalty with respect to—*

- (A) *the size of the employer;*
- (B) *the number of employees exposed to the violation;*
- (C) *the likely severity of any injuries directly resulting from such violation;*
- (D) *the probability that the violation could result in injury or illness;*
- (E) *the employer's good faith in correcting the violation after the violation has been identified;*
- (F) *the extent to which employee misconduct was responsible for the violation;*
- (G) *the effect of the penalty on the employer's ability to stay in business;*
- (H) *the history of previous violations; and*
- (I) *whether the violation is the sole result of the failure to meet a requirement, under this Act or prescribed by regulation, with respect to the posting of notices, the preparation or maintenance of occupational safety and health records, or the preparation, maintenance, or submission of any written information.*

(2)(A) *A penalty assessed under this section shall be reduced by at least 25 percent in any case in which the employer—*

- (i) *maintains a safety and health program described in section 8A(a) of the worksite at which the violation (for which the penalty was assessed) took place; or*
- (ii) *demonstrates that the worksite at which the violation (for which the penalty was assessed) took place has an exemplary safety record.*

If the employer maintains a program described in clause (i) and has the record described in clause (ii), the penalty shall be reduced by at least 50 percent.

(B) *A penalty assessed against an employer for a violation other than a violation that—*

- (i) *has been previously cited by the Secretary;*
- (ii) *creates an imminent danger;*
- (iii) *has caused death; or*
- (iv) *has caused a serious incident,*

shall be reduced by at least 75 percent if the worksite at which such violation occurred has been reviewed or inspected under a program described in section 8A(c)(1) during the 1-year period before the date of the citation for such violation, and such employer has complied with recommendations to bring such employer into compliance within a reasonable period of time.

* * * * *

SEC. 670 [(c) The] (c)1 *The Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall [(1) provide] (A) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this Act, and [(2) consult] (B) consult with and advise employers and employees, and organi-*

zations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

(2)(A) *The Secretary shall, through the authority granted under section 7(c) and paragraph (1), enter into cooperative agreements with States for the provision of consultation services by such States to employers concerning the provision of safe and healthful working conditions. A State that has a plan approved under section 18 shall be eligible to enter into a cooperative agreement under this paragraph only if such plan does not include provisions for federally funded consultation to employers.*

(B)(i) *Except as provided in clause (ii), the Secretary shall reimburse a State that enters into a cooperative agreement under subparagraph (A) in an amount that equals 90 percent of the costs incurred by the State under such agreement.*

(ii) *A State shall be fully reimbursed by the Secretary for—*
 (I) *training approved by the Secretary for State staff operating under a cooperative agreement; and*
 (II) *specified out-of-State travel expenses incurred by such staff.*

(iii) *A reimbursement paid to a State under this subparagraph shall be limited to costs incurred by such State for the provision of consultation services under this paragraph and the costs described in the clause (ii).*

(C) *Notwithstanding any other provision of law, at least 15 percent of the total amount of funds appropriated for the Occupational Safety and Health Administration for a fiscal year shall be used for education, consultation, and outreach efforts.*

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