# THE STATE OF WORKERS' SAFETY AND HEALTH

This 2009 edition of "Death on the Job: The Toll of Neglect" marks the 18th year the AFL-CIO has produced a report on the state of safety and health protections for America's workers. The report includes state-by-state profiles of workers' safety and health and features state and national information on workplace fatalities, injuries, illnesses, the number and frequency of workplace inspections, penalties, funding, staffing and public-employee coverage under the Occupational Safety and Health Act (OSHAct). It also includes information on the state of mine safety and health.

Since 1970, when the OSHAct was passed, workplace safety and health conditions have improved. Unfortunately, as demonstrated by recent job safety disasters, such as the Sago mine explosion, the Imperial Sugar Refinery dust explosion and construction crane collapses in New York and Miami, which claimed dozens and dozens of lives, too many workers remain at risk and face death, injury or disease as a result of their jobs.

In 2007, the most recent year for which job fatality data is available, 5,657 workers lost their lives on the job as a result of traumatic injuries. While this is a decline in worker deaths from 2006, when 5,840 fatal injuries were reported, on average 15 workers die every day because of job injuries. In 2007, more than 4 million work-related injuries and illnesses were reported by employers, but due to limitations in the injury reporting system and underreporting of workplace injuries, this number understates the problem. The true toll is estimated to be two to three times greater or 8 to 12 million injuries and illnesses a year.

The cost of these injuries and illnesses is enormous—estimated at $145 billion to $290 billion a year for direct and indirect costs of disabling injuries. But these estimates are based upon only injuries that are disabling and that are reported by employers, and understate the full extent of occupational injuries and illnesses and their associated costs.

For eight years, the Bush administration failed to take action to address major safety and health problems. Many OSHA and MSHA rules were withdrawn or blocked. The rules that were issued were largely in response to court challenges, congressional mandates or tragedies. New and emerging hazards were not actively addressed. Voluntary efforts were favored over strong enforcement.

OSHA's enforcement has remained relatively weak. The dollar amounts of both federal and state OSHA penalties are woefully inadequate, even in cases of workplace fatalities. The OSHAct's criminal penalty provisions are also very weak and rarely utilized. OSHA funding and staffing has not kept pace with the growth in the nation's workforce. As a result, OSHA's ability to provide oversight has diminished with the average frequency of federal OSHA inspections now more than once every 137 years for covered workplaces.

Congressional oversight and legislative action on job safety and health have increased significantly with the election of Democratic majorities in the House and the Senate, and are expected to remain strong with the prospects for enactment of legislative improvements now greatly enhanced.

The safety and health challenges faced by the new administration are daunting. Years of inaction and neglect have created a huge backlog of problems that need to be addressed, which has been made all the more difficult by the deep economic crisis the nation is now facing. The Obama administration has started to chart a new course to return OSHA and MSHA to their mission to protect workers. With strong leadership from the administration and a renewed commitment by the nation as a whole, there is a real opportunity to move forward toward achieving the goal of safe jobs for all.

## JOB FATALITIES, INJURIES AND ILLNESSES

More than 389,000 workers now can say their lives have been saved since the passage of the OSHAct in 1970.[1] Unfortunately, too many workers remain at risk. On average, 15 workers were fatally injured and more than 10,959 workers were injured or made ill each day of 2007. These statistics do not include deaths from occupational diseases, which claim the lives of an estimated 50,000 to 60,000 workers each year.

### Job Fatalities

According to the BLS, there were 5,657 workplace deaths due to traumatic injuries in 2007, a decrease of 183 deaths from the 5,840 deaths reported in 2006. The rate of fatal injuries in 2007 was 3.8 per 100,000 workers, down from 4.0 per 100,000 workers in 2006.

Wyoming led the country with the highest fatality rate (17.1 per 100,000), followed by Montana (11.0), Alaska (9.2), West Virginia (7.8) and Mississippi (7.5). The lowest state fatality rate (0.9 per 100,000) was reported in Rhode Island, followed by New Hampshire (1.9), Connecticut (2.1), Massachusetts (2.3) and Delaware (2.3).[2] Twenty-one states saw an increase in either the rate or number of fatalities between 2006 and 2007.

In 2007, a number of states experienced large increases in fatality rates from their 2006 rates. Nevada led the way with a 41 percent increase, followed by Wyoming (31 percent), Utah and Iowa (28 percent) and South Carolina (25 percent).

The construction sector had the largest number of fatal work injuries (1,204) in 2007, followed by transportation and warehousing (890) and agriculture, forestry, fishing and hunting (585). Industry sectors with the highest fatality rates were agriculture, forestry, fishing and hunting (27.9 per 100,000), mining (25.1 per 100,000) and transportation and warehousing (16.9 per

[1] Calculated based on change in annual fatality rates and employment since 1970. Fatality rate data for 1970-1991 from National Safety Council Accident Facts, 1994. Fatality rate data for 1992-2007 is from Bureau of Labor Statistics, Census of Fatal Occupational Injuries. Annual employment data is from the Bureau of Labor Statistics Current Population Survey.

[2] State fatality rates have not yet been calculated by BLS. The AFL-CIO calculated 2007 state fatality rates per 100,000 workers using the numbers of deaths reported by BLS for 2007 and the preliminary data on the employment status of the civilian non-institutional population 2007 annual averages from the BLS Current Population Survey (CPS).

100,000).

The number of deaths in construction decreased to 1,204 deaths in 2007 compared to 1,239 in 2006, and there was a slight decrease in the fatality rate. In manufacturing the number of fatalities also decreased, with 400 deaths reported, compared to 456 deaths in 2006. The fatality rate in manufacturing also decreased in 2007.

The mining industry saw a decrease in fatalities, from 192 deaths reported in 2006 to 183 deaths reported in 2007. Within the mining industry, in 2007 there were 34 deaths in coal mining, 33 deaths in metal and non-metal mining, and 122 deaths in oil and gas extraction and support activities.

Transportation incidents, in particular highway crashes, continue to be the leading cause of workplace deaths, responsible for 2,351 or 42 percent of all fatalities in 2007, although this number was down from 2006. Highway crashes continue to account for one-fourth of the fatal work injury total (1,414).

Fatalities from falls increased to an all-time high with 847 fatal falls reported in 2007 compared to 827 fatal falls in 2006. Since 1992, when BLS began the fatality census and reported 600 fatal falls, the number of fatal falls has increased by 41 percent.

From 2006 to 2007, there were also increases in the number of workplace deaths caused by assaults and violent acts (from 788 to 864).

In 2007, the number of workplace homicides increased substantially from 540 in 2006 (an all-time low) to 628 in 2007.

Transportation and material moving occupations had the highest number of fatalities with 1,503 deaths, followed by construction and extraction occupations with 1,172 fatal injuries. The occupations at greatest risk of work-related fatalities were fishers and related fishing workers (111.8 per 100,000), logging workers (86.4 per100,000) and aircraft pilots and flight engineers (70.7 per 100,000).

Fatal injuries to Hispanic or Latino workers continue to be a serious problem with 937 fatal injuries among Hispanic workers in 2007. This compares to 990 fatalities among Hispanic workers in 2006. Since 1992, when BLS started the fatality census, the number of fatalities among Hispanic workers has increased by 76 percent, from 533 fatalities in 1992 to 937 in 2007. At the same time, the overall number of workplace fatalities dropped from 6,217 in 1992 to 5,657 in 2007.

In 2007, more than two-thirds of the fatalities (634 deaths) among Hispanic or Latino workers were among workers born outside of the United States. The states with the highest number of Hispanic worker fatalities were Texas (211), California (179), and Florida (111).

The rate of fatal injuries to Hispanic or Latino workers decreased from 5.0 per 100,000 workers in 2006 to 4.6 per 100,000 workers in 2007. The fatality rate among Hispanic or Latino workers

in 2007 was 21 percent higher than the fatal injury rate for all U.S. workers.

Fatalities among foreign-born or immigrant workers also continue to be a serious problem. In 2007, there were 1,009 workplace deaths reported among immigrant workers compared to 1,046 deaths in 2006. Since 1992, fatalities among foreign-born workers have increased by 59 percent, from 635 deaths to 1,009 deaths in 2007.

Texas, California, and Florida had the greatest number of foreign-born worker fatalities in 2007, with 153, 182 and 121 deaths, respectively. Of the foreign-born workers who were fatally injured at work in 2007, 63 percent were Hispanic or Latino. Sixteen percent were white, 14 percent were Asian, native Hawaiian or Pacific Islander and 5 percent were black or African American. Of the foreign-born workers who were injured fatally at work in 2007, 44 percent were from Mexico. Twenty-eight percent of the foreign-born fatalities resulted from transportation incidents, 24 percent resulted from assaults and violent acts, 17 percent were a result of contact with objects and equipment and 19 percent resulted from falls.

The number of fatalities among black or African American workers increased to 609 in 2007, up from 565 deaths in 2006. The number of fatalities among blacks in 2007 was the highest since 1999.

## Job Injuries and Illnesses

In 2007, 4.0 million injuries and illnesses were reported in private-sector workplaces, a decrease from 4.1 million in 2006. An additional 541,000 injuries and illnesses occurred among state and local employees in the 30 states and territories in which these data were collected. The national injury and illness rate (private sector only) in 2007 was 4.2 per 100 workers.

Manufacturing accounted for 18.8 percent of the nonfatal workplace injuries and illnesses in 2007. The health care and social assistance industry accounted for 16.6 percent of injuries and illnesses followed by the retail trade industry at 15.0 percent. Construction experienced 9.8 percent of all private-sector injuries and illnesses in 2007.

The industries with the highest rates of nonfatal workplace injuries and illnesses were skiing facilities (16.5 per 100), sports teams and clubs (16.2 per 100), beet sugar manufacturing (13.8 per 100), steel foundries (13.8 per 100) and iron foundries (13.6 per 100).

Thirty-one percent of all cases of injuries and illnesses involving days away from work, job transfer or restriction occurred in the trade, transportation and utilities industry, followed by manufacturing at 21 percent, education and health services at 16 percent and construction at 10 percent. Occupations with highest number of injuries involving days away from work were laborers and materials movers, heavy and tractor-trailer truck drivers, nurses' aides and orderlies, construction laborers, and light or delivery service truck drivers.

The median number of days away from work for lost time injury cases was seven days in 2007, with 26 percent of all days away from work cases resulting in 31 or more days away from work.

### *Musculoskeletal Disorders*

For 2007, BLS reported 333,760 musculoskeletal disorder (MSD) cases resulting in days away from work. MSDs account for 29 percent of all injuries and illnesses involving days away from work and remain the biggest category of injury and illness.

The occupations reporting the highest number of MSDs involving days away from work in 2007 were laborers and freight, stock, and material movers, handlers (27,030); nursing aides, orderlies and attendants (24,340); and truck drivers, heavy and tractor-trailer (16,430). The median number of days away from work for MSDs in 2007 was nine days.

It is important to recognize that the numbers and rates of MSDs reported by BLS represent only a part of the total MSD problem. The BLS MSD data are limited to cases involving one or more days away from work, the cases for which BLS collects detailed reports. Similar detailed reports are not collected for injuries and illnesses that do not involve lost work time or those that result in job transfer or restriction but not in time lost from work. Based on the percentage of days away from work cases involving MSDs (29 percent) in 2007, there were an estimated 252,634 MSDs that resulted in restricted activity or job transfer, 586,368 MSD cases that resulted in days away from work, restricted activity or job transfer, and a total of 1,152,778 MSDs reported by private-sector employers.

Moreover, these figures do not include injuries suffered by public-sector workers or postal workers, nor do they reflect the underreporting of MSDs by employers. Based on studies and experience, OSHA has estimated that MSDs are understated by at least a factor of two—that is, for every MSD reported there is another work-related MSD that is not recorded or reported.[3] However, a recent study that examined undercounting of injuries and illnesses found that underreporting is even greater, with two additional injuries occurring for every injury that is reported.[4]

### *Reported Cases Understate Problem*

While government statistics show that occupational injury and illness are declining, numerous studies have shown that government counts of occupational injury and illness are underestimated by as much as 69 percent.[5] A study published in the April 2006 *Journal of Occupational and Environmental Medicine* that examined injury and illness reporting in Michigan has made similar findings.[6] The study compared injuries and illnesses reported in five different data bases – the BLS Annual Survey, the OSHA Annual Survey, the Michigan Bureau of Workers' Compensation, the Michigan Occupational Disease reports and the OSHA Integrated Management Information System. It found that during the years 1999, 2000 and 2001, the BLS

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[3] 64 F.R. 65981 and 65 F.R. 68758.

[4] Rosenman, K.D., Kalush, A., Reilly, M.J., Gardiner, J.C., Reeves, M., and Luo, Z., "How Much Work-Related Injury and Illness is Missed by the Current National Surveillance System?" *Journal of Occupational and Environmental Medicine*, Vol. 48, No. 4, pp 357-367, April 2006.

[5] Leigh, J. Paul, James P. Marcin, J., and Miller, T.R., "An Estimate of the U.S. Government's Undercount of Nonfatal Occupational Injuries," *Journal of Occupational and Environmental Medicine,* Vol. 46, No. 1, January 2004.

[6] Rosenman, op. cit.

Annual Survey, which is based upon employers' OSHA logs, captured approximately 33 percent of injuries and 31 percent of illnesses, reported in the various data bases in the state of Michigan.

A similar study published in 2008 comparing the injuries reported to state workers' compensation systems with those reported to the Bureau of Labor Statistics Annual Survey in six states for the years 1998-2001 found similar results.[7] The study, which examined reporting in Minnesota, New Mexico, Oregon, Washington, West Virginia and Wisconsin found that the BLS survey captured 50 to 75 percent of the injuries and illnesses that occurred, missing half to a quarter of the injuries and illnesses that occurred in these states. As with the Michigan study, more injuries and illnesses were reported to the state workers' compensation systems than to the BLS survey.

The BLS data underestimates the extent of workplace injuries and illnesses in the United States for a variety of reasons. First, the data exclude many categories of workers (self-employed individuals; farms with fewer than 11 employees; employers regulated by other federal safety and health laws; federal, state and local government agencies; and private household workers). This results in the exclusion of more than one in five workers from the BLS Annual Survey. In addition to the built-in exclusions, which BLS is candid about, there also is underreporting for other reasons.[8] There are a number of factors—mostly economic—that help explain underreporting:

- Workers' compensation systems create incentives for employers to underreport by increasing costs for companies that show an increase in injuries.
- Firms seeking government contracts may fear being denied a contract if their injury rate is too high.
- OSHA's reliance on injury rates in targeting inspections and measuring performance creates a clear incentive for employers not to record injuries.

There also are many reasons why workers may not report an injury or illness to their employer:

- Economic incentives can influence workers. Employer-implemented programs that offer financial rewards for individuals or departments for going a certain number of days without an injury may discourage workers from reporting. A recent report by the California State Auditor documented one such case where the use of economic incentives on the San Francisco-Oakland Bay Bridge project was identified as a likely cause of significant underreporting of injuries.[9]
- Employees do not want to be labeled as accident-prone.
- Employers implement programs that discipline or even terminate workers when they report an injury, discouraging workers from reporting.
- Workers may be reluctant to apply for workers' compensation; many others do not know how to use the workers' compensation system.

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[7] Boden, L.I. and A.Ozonoff, "Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses," *Annals of Epidemiology*, In Press, Available online February 20, 2008.

[8] Azaroff, L.S., Levenstein, C., and Wegman, D.H. Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting. *American Journal of Public Health*, Vol. 92, No. 9, pp 1421-1429, September 2002.

[9] California State Auditor, Bureau of State Audits. *San-Francisco-Oakland Bay Bridge Worker Safety: Better State Oversight Is Needed to Ensure That Injuries Are Reported Properly and That Safety Issues Are Addressed.* Report 2005-119. February 2006. Report available at http://www.bsa.ca.gov.

- Foreign-born workers, whether in the country legally or not, face additional barriers to reporting. They may not know how or to whom to report the injury. They may fear being fired or harassed or being reported to the Bureau of Citizenship and Immigration Services.

Underreporting of workplace injuries and illnesses is not a new phenomenon. Numerous government-driven and independent studies have documented the problem of underreporting and made recommendations to correct it, yet little mention ever is made of underreporting when the BLS statistics are released. Under the Bush administration, officials at OSHA largely ignored the issue of underreporting, continuing to rely on employer reports of workplace injuries as evidence that policies were working, despite overwhelming evidence that this information is unreliable. Moreover, there were no efforts or initiatives to enhance enforcement on OSHA injury and illness recordkeeping requirements.

In 2008 and 2009, the problems of underreporting of workplace injuries and illnesses were the subject of Congressional attention and action. In June 2008, the House Education and Labor Committee held an oversight hearing to explore the extent, causes and impact of injury underreporting. The Senate Labor Appropriations Subcommittee reviewed the issue during the hearing on the FY 2009 Department of Labor appropriations bill. The committee then acted to provide funding for a number of initiatives on underreporting. The final FY 2009 omnibus funding bill provided $1 million for an enhanced OSHA recordkeeping enforcement program; $1 million for the Bureau of Labor Statistics to further study problems of injury underreporting; and $250,000 for NIOSH research on underreporting.

At the request of Senators Edward Kennedy and Patty Murray of the Senate Health, Education, Labor and Pensions Committee and Representatives George Miller and Lynn Woolsey of the House Education and Labor Committee, the Government Accountability Office (GAO) is conducting an in-depth study on underreporting and employer injury recordkeeping practices. The GAO report on the results of the study is expected to be published in the fall 2009.

Hopefully these initiatives will provide additional information on the extent and sources of injury and illness underreporting and lead to changes in policies and practices to address problems of injury underreporting.

### *Cost of Occupational Injuries and Deaths*

The cost of occupational injuries and deaths in the United States is staggering. In March 2009, Liberty Mutual Insurance, the nation's largest workers' compensation insurance company, released its 2008 Workplace Safety Index on the leading causes and costs of compensable work injuries and illnesses based on 2006 data.[10] The report revealed that the most disabling workplace injuries cost U.S. employers $48.6 billion—nearly $1 billion per week—in direct costs alone (medical and lost wage payments). Based on calculations used in its previous Safety Index, the Liberty Mutual data indicate businesses pay between $144.9 billion and $289.8 billion

[10] 2008 Liberty Mutual Workplace Safety Index. Report available at: http://www.libertymutualgroup.com/omapps/ContentServer?cid=1138365240689&pagename=LMGResearchInstitute/cms_document/ShowDoc&c=cms_document

annually in direct and indirect (overtime, training and lost productivity) costs on workers' compensation losses. (Indirect costs are estimated to be two to five times direct costs.)[11] These figures are derived using disabling incidents (those resulting in an employee missing six or more days away from work). These cases represent only the most serious injuries and relying only on these cases significantly underestimates the overall cost of injuries and illnesses. Moreover, Liberty Mutual bases its cost estimates on BLS injury data. Thus all of the problems of underreporting in the BLS system apply to the Liberty Mutual cost estimates as well.

## OSHA ENFORCEMENT AND COVERAGE

When it comes to job safety enforcement and coverage, it is clear that OSHA lacks sufficient resources to protect workers adequately. A combination of too few OSHA inspectors and low penalties makes the threat of an OSHA inspection hollow for too many employers. More than 8.8 million workers still are without OSHA coverage.

OSHA's resources remain inadequate to meet the challenge of ensuring safe working conditions for America's workers. In FY 2008, there were at most 2,043 federal and state OSHA inspectors responsible for enforcing the law at approximately eight million workplaces.[12] In FY 2008, the 799 federal OSHA inspectors conducted 38,652 inspections (727 fewer than in FY 2007), and the 1,244 inspectors in state OSHA agencies combined conducted 57,720 inspections (245 more than in FY 2007).

At its current staffing and inspection levels, it would take federal OSHA 137 years to inspect each workplace under its jurisdiction just once. In five states (Arkansas, Florida, Georgia, Louisiana, and Delaware), it would take 150 years or more for OSHA to pay a single visit to each workplace. In 20 states, it would take between 100 and 149 years to visit each workplace once. Inspection frequency is better in states with OSHA-approved plans, yet still far from satisfactory. In these states, it would now take the state OSHA's a combined 66 years to inspect each worksite under state jurisdiction once.

The current level of federal and state OSHA inspectors provides one inspector for every 66,258 workers. This compares to a benchmark of one labor inspector for every 10,000 workers recommended by the International Labor Organization for industrialized countries.[13] In the states of Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Mississippi, Nebraska, and Texas, the ratio of inspectors to employees is greater than 1 per 100,000 workers.

Federal OSHA's ability to provide protection to workers has greatly diminished over the years. When the AFL-CIO issued its first report "Death on the Job: The Toll of Neglect" in 1992, federal OSHA could inspect workplaces under its jurisdiction once every 84 years, compared to once every 137 years at the present time. Since the passage of the OSHAct, the number of

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[11] April 16, 2002, News Release, Liberty Mutual Research Institute for Safety.

[12] This reflects the number of federal inspectors plus the number of inspectors reflected in the FY 2008 state plan grant applications. It does not include compliance supervisors.

[13] International Labor Office. Strategies and Practice for Labor Inspection, G.B.297/ESP/3. Geneva, November 2006. The ILO benchmark for labor inspectors is one inspector per 10,000 workers in industrial market economies.

workplaces and number of workers under OSHA's jurisdiction has more than doubled, while at the same time the number of OSHA staff and OSHA inspectors has been reduced. In 1975, federal OSHA had a total of 2,405 staff (inspectors and all other OSHA staff) and 1,102 inspectors responsible for the safety and health of 67.8 million workers at more than 3.9 million establishments. In 2008, there were 2,147 federal OSHA staff responsible for the safety and health of more than 135.3 million workers at 8.9 million workplaces.

At the peak of federal OSHA staffing in 1980, there were 2,951 total staff and 1,469 federal OSHA inspectors (including supervisors). The ratio of OSHA inspectors per one million workers was 14.9. By 2007, there were only 948 inspectors officers, or 6.4 inspectors per million workers, the lowest level in the history of the agency.

The number of employees covered by federal OSHA inspections was 1.4 million in FY 2008, the same as in FY 2007. The average number of hours spent per inspection increased between FY 2007 and FY 2008, from 18.7 hours to 19.7 hours per safety inspection and from 33.3 hours to 34.9 hours per health inspection.

In the state OSHA plans, in FY 2007, there were 2,401,319 employees covered by inspections, with safety inspections averaging 16.7 hours and health inspections 28.1 hours.

Penalties for significant violations of the law remain low. In FY 2008, serious violations of the OSHAct carried an average penalty of only $921 ($960 for federal OSHA, $872 for state OSHA plans). A violation is considered "serious" if it poses a substantial probability of death or serious physical harm to workers. In FY 2008, South Carolina had the lowest average penalty for serious violations at $331, while California continued to have the highest average penalty at $4,890 per serious violation.

The number of willful violations issued by federal OSHA increased from 404 in FY 2007 to 497 in FY 2008. The average penalty per repeat violation increased to $4,077 in FY 2008 from $3,660 in FY 2007. The average penalty per serious violation increased in FY 2008 to $960 compared to $906 in FY 2007 and the average penalty for a willful violation increased in FY 2008 to $41,658 from $36,720 in FY 2007.

In the state OSHA plan states, in FY 2008, there were 182 willful violations issued, with an average penalty of $28,943 and 2,367 repeat violations with an average penalty of $2,021 per violation.

In March 2003, federal OSHA announced an Enhanced Enforcement Program (EEP) to focus on persistent violators. The policy relies primarily on enhanced oversight by OSHA or consultants. But there are no provisions for enhanced monetary penalties as part of the program. In 2008, OSHA modified the program to tighten the criteria for inclusion in the program. In FY 2008, there were 475 inspections involving EEP cases, compared to 719 EEP cases in FY 2007, 467 EEP cases in FY 2006, 593 EEP cases in FY 2005 and 313 EEP cases in FY 2004.[14, 15, 16]

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[14]U.S. Department of Labor Fiscal Year 2008 Budget Justification of Appropriation Estimates for Committee on Appropriations, Volume II – OSHA.

[15]"EEP Cases in FY 2005 Nearly Double over Previous Year's Tally, OSHA Figures Show," Bureau of National

In March 2009, the U.S. Department of Labor Office of Inspector General (OIG) issued a report highly critical of OSHA's implementation of the Enhanced Enforcement Program.[17] The OIG found that in 97 percent of the EEP cases evaluated, OSHA's follow-up was deficient or lacking. The OIG found that OSHA's failures may well have contributed to workplace fatalities. At 45 of the worksites identified where OSHA oversight and follow-up was deficient, 58 workers were subsequently killed by job hazards.

OSHA enforcement in cases involving worker fatalities is also very weak. According to OSHA inspection data, the average total penalty in a fatality case in FY 2008 was just $11,311, for federal and state OSHA plans combined. For federal OSHA, the average penalty per fatality investigation was $13,462, and for the state OSHA plans, the average penalty was $8,615 in FY 2008. These data include several large cases with high penalties that raise the averages. These data also include enforcement cases that are still under contest, and it is likely that after settlements and final resolution these penalty levels will be much lower. In fact, for the previous five fiscal years (FY 2003-2007), OSHA inspection data (which reflects such settlements) shows the current average penalty per fatality investigation to be approximately $6,700.

A state-by-state analysis of fatality investigations shows that penalties in cases involving worker deaths vary widely from state to state. In FY 2008 Utah had the lowest average penalty for fatality investigations, with $1,106 in penalties assessed, followed by South Carolina ($1,383) and Louisiana ($1,453). Georgia had the highest average penalty ($97,963), followed by New Hampshire ($54,331) and Maine ($50,780).

An April 2008 report on OSHA enforcement in fatality cases prepared by the Majority Staff of the Senate Committee on Health, Education, Labor and Pensions also found that penalties in cases involving worker deaths were extremely low. For all federal OSHA fatality investigations conducted in FY 2007, the median final penalty (after settlement) was $3,675. For willful violations in fatality cases, the final median penalty was $29,400, less than half the statutory maximum of $70,000 for such violations.[18]

Criminal enforcement under the Occupational Safety and Health Act is exceedingly rare. According to information provided by OSHA, since the Act was enacted, there have been only 71 convictions for criminal violations. In FY 2008, the Department of Labor referred 14 enforcement cases to the Justice Department for criminal prosecution, two of which have been prosecuted to date and resulted in guilty pleas.

The criminal penalty provisions of the OSHAct are woefully inadequate. Criminal enforcement is limited to those cases where a willful violation results in a worker's death or where false

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Affairs, *Occupational Safety and Health Reporter*, Volume 35, Number 48, December 8, 2005.

[16] http://www.osha.gov/dep/enforcement/enforcement_results_07.html

[17] U.S. Department of Labor, Office of Inspector General – Office of Audit, "Employers with Reported Fatalities Were Not Always Properly Identified and Inspected Under OSHA's Enhanced Enforcement Program", March 31, 2009, Report Number: 02-09-203-10-105

[18] Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers, Majority Staff, Committee on Health, Education, Labor and Pensions, April 29, 2008.
http://kennedy.senate.gov/imo/media/doc/discounting%20death1.pdf

statements in required reporting are made. The maximum penalty is six months in jail, making these cases a misdemeanor. Criminal penalties are not available in cases where workers are endangered or seriously injured, but no death occurs. This is in contrast to federal environmental laws, where criminal penalties apply in cases where there is "knowing endangerment" and make such violations a felony.[19]

As a result of the weak criminal enforcement provisions of the OSHAct, in recent years the Justice Department launched a new Worker Endangerment Initiative. This initiative focuses on companies who put workers in danger while violating environmental laws, and prosecutes such employers using the much tougher criminal provisions of environmental statutes. Under the initiative, the Justice Department has prosecuted McWane, Inc. a major manufacturer of cast iron pipe, responsible for the deaths of several workers; Motiva Enterprises for negligently endangering workers in an explosion that killed one worker and caused major environmental releases; British Petroleum for a 2005 explosion at a Texas refinery that killed 15 workers; W.R. Grace for knowing endangerment of workers exposed to asbestos contaminated vermiculite in Libby Montana; and Tyson Foods for exposing employees to hydrogen sulfide gas which resulted in the poisoning of several workers at multiple facilities.[20,21]

Legislation has been introduced in both the House and the Senate that would strengthen the OSHAct's criminal penalties, extending criminal violations to cases that result in serious injuries and making them a felony. While not as strong as the criminal provisions under environmental laws, these changes would be a major improvement over the existing law.

Under the Bush administration, OSHA placed great emphasis on the expansion of OSHA's voluntary programs. In particular, OSHA expanded its program of "alliances." These alliances emphasize outreach, education and the promotion of safety and health. They have no set criteria and are less structured than OSHA's other voluntary programs (such as consultation and partnerships). Most of the alliances are between OSHA and employer groups and have excluded unions from participation.

In FY 2008, OSHA formed 97 new alliances bringing the total number of active alliances to 475. OSHA's Voluntary Protection Program (VPP) was also expanded with 230 new VPP sites approved, bringing the number of federal OSHA VPP sites to 1,517.[22]

The current OSHA law still does not cover 8.8 million state and local government employees. Although these public employees encounter the same hazards as private-sector workers, in 26 states and the District of Columbia they are not provided with protection under the OSHAct.

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[19] Statement of Edwin G. Foulke, Assistant Secretary, Occupational Safety and Health Administration, Before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Committee on Appropriations, U.S. House of Representatives, March 20, 2007.
[20] Frontline:A Dangerous Business Revisited, March 2008, http://www.pbs.org/wgbh/pages/frontline/mcwane/penalty/initiative.html
[21] Goldsmith, Andrew D. Worker Endangerment Initiative, PowerPoint Presentation, American Bar Association, Occupational Safety and Health Committee, Miami Beach Florida, February 2009.
[22] OSHA Directorate of Cooperative and State Programs

Similarly, millions who work in the transportation and agriculture industries and at Department of Energy contract facilities lack full protection under the OSHAct. These workers theoretically are covered by other laws, which in practice have failed to provide equivalent protection. The void in protection is particularly serious for flight attendants. The Federal Aviation Administration (FAA) has claimed legal jurisdiction for airline cabin crews but has refused to issue necessary workplace safety rules. Efforts by the FAA and OSHA initiated in 2000 to resolve this situation were jettisoned by the Bush administration, which instead announced a program limited to voluntary activities to be overseen by the FAA. Hopefully, under the Obama administration safety and health protection for flight attendants will be addressed administratively by a change in FAA policy or by legislation mandating safety and health protection from these workers.

## REGULATORY ACTION

During the eight years of the Bush administration, rulemaking at OSHA virtually ground to a halt. During its first term, the administration moved to withdraw dozens of safety and health rules from the regulatory agenda, ceasing all action on the development of these important safety and health measures. Rules withdrawn at OSHA included measures on indoor air quality, safety and health programs, glycol ethers and lock-out of hazardous equipment in construction. At MSHA, 17 safety and health rules were withdrawn, including rules on mine rescue teams and self-contained self-rescuers.

During its first five years, the Bush administration failed to issue any significant safety and health rules, compiling the worst record on safety and health standards in OSHA and MSHA history. During its entire tenure, three significant final OSHA standards were issued.

In February 2006, OSHA issued a final standard on hexavalent chromium, as a result of a lawsuit brought against the agency by Public Citizen and the United Steelworkers, and subsequent court order.

In February 2007, a final standard updating OSHA's electrical safety requirement was issued. This rule largely codified changes previously adopted in the National Electrical Code and NFPA standards that were already required by many states and localities.

In November 2007, OSHA issued a rule on Employer Payment for Personal Protective Equipment, which had languished under the Bush administration for seven years. The rule, which requires employers to pay for the safety equipment that must be provided under OSHA standards, was only issued after a lawsuit by the AFL-CIO and United Food and Commercial Workers (UFCW) and Congressional intervention. This rule is particularly important for low-wage workers and immigrant workers who work in dangerous industries like meat-packing, poultry and construction.

But for other rules on the OSHA regulatory agenda, there was little or no action.

Standards on crystalline silica, beryllium, confined spaces in construction and a globally harmonized system for hazard communication languished. A rule on electric power transmission and distribution, proposed in 2005, stalled. A rule on cranes and derricks was finally proposed in October 2008, more than four years after a negotiated rulemaking committee transmitted a draft recommended rule to OSHA, and after a series of fatal crane collapses in New York, Miami and other cities.

The Bush administration also failed to take regulatory action to address newly identified hazards. In February 2007, OSHA denied a union petition for an emergency temporary standard to protect health care workers and emergency responders in the event of a flu pandemic on grounds that a pandemic had not yet occurred. The agency also denied a petition for an emergency standard on the chemical diacetyl, a butter flavoring agent used in microwave popcorn and other foods, that has caused a rare and fatal lung disease (bronchilitis obliterans) in exposed workers. Only after the House of Representatives passed legislation mandating OSHA to issue a diacetyl standard within 90 days, did the Bush administration announce it would commence rulemaking on this hazard. The agency promised to move expeditiously, but then delayed any action. In February 2008, following an explosion at the Imperial Sugar refinery in Georgia that killed 14 workers, several unions petitioned OSHA to issue an emergency standard on combustible dust. The Bush administration denied the petition, opposed legislation passed by the House of Representatives in April 2008, mandating action on a combustible dust standard, and refused to even add a combustible dust standard to the regulatory agenda.

In the final months of the Bush administration, the Department of Labor (DOL) proposed a rule on risk assessment that would have made it more difficult for OSHA and MSHA to develop and issue protective standards on occupational health hazards. The rule, proposed on August 29, 2008, had not been listed on the regulatory agenda and was developed by DOL political appointees, not agency career staff. The rule would have required the agencies to issue an advanced notice of proposed rulemaking soliciting detailed information about hazards, exposures and risk and to respond to all comments received, before moving forward with a proposed rule. The requirements of the risk assessment rule would have added more delays to the standard setting process, which is already glacially slow, and could have resulted in weaker protections for workers. The DOL proposed risk assessment rule generated great opposition, including the introduction of legislation to block its issuance in final form. Due to this opposition, the rule was not finalized by the Bush administration, and it is fully expected that the Obama administration will withdraw it.

The Obama administration has not yet set forth its priorities and plans for safety and health regulations. To date, neither an OSHA or MSHA assistant secretary has been named, nor has the administration's first regulatory agenda been issued. But there have already been several actions demonstrating a commitment to moving forward on needed rules. The Obama administration's budget blueprint for FY 2010 includes increases in funding for the development of safety and health standards and enforcement. In addition, on March 16, 2009, Secretary of Labor Hilda Solis announced that OSHA was expediting the development of a standard on the food flavoring chemical diacetyl, by withdrawing the advanced notice of proposed rulemaking (ANPR) and instead proceeding to the review of a draft rule by a small business panel as required under the Small Business Regulatory Enforcement Fairness Act. The ANPR on diacetyl had been issued

on the last day of the Bush administration as an extra step in the rulemaking process that would have delayed the diacetyl rule by many months.

## STATUS ON KEY SAFETY AND HEALTH ISSUES

With the failure of the Bush administration to take action on so many safety and health problems, the country has fallen further and further behind in protecting workers' safety and health on the job. The list of problems that need attention is long. But there are several issues that have broad based impacts that are of particular concern that need attention.

### *Ergonomics*

Ergonomic injuries still are the biggest job-safety hazard faced by workers. In 2007, musculoskeletal disorders accounted for almost one-third of all workplace injuries.

During the Bush administration, efforts to address ergonomic hazards suffered huge setbacks. In March 2001 the OSHA ergonomics standard was repealed under the Congressional Review Act. Soon after, the administration also repealed the OSHA recordkeeping requirement to identify all musculoskeletal disorders on the workplace injury and illness log. The Bush administration's "comprehensive plan" to address ergonomic hazards announced in 2002 turned out to be a sham. The administration issued just four ergonomics guidelines—for the nursing home industry, retail grocery stores, poultry processing and the shipbuilding industry. During the Bush administration, federal OSHA issued a total of 20 general duty clause citations for ergonomic hazards with only one ergonomic citation issued in 2005, no ergonomic citations issued in 2006 or 2007 and only three citations in 2008. The average penalty for these citations was $1,874.

At the state level, efforts to adopt ergonomic protections have also been met with great industry opposition. In 2003, industry groups led a successful ballot initiative to overturn the Washington State ergonomics rule. Efforts to enact ergonomics legislation stalled in Connecticut and Minnesota. In Michigan, an Ergonomics Standard has been under development since 2002 and has moved forward slowly in the face of intense industry opposition. A draft rule with minimum requirements for assessing and addressing ergonomic risk factors and for providing training was approved and recommended by the MIOSHA Ergonomics Advisory Committee on January 30, 2008. The draft rule was considered by the Occupational Health Standards Commission and the General Industry Safety Standards Commission and approved with some small modifications on January 14, 2009. The rule now goes to MIOSHA for informal approval and public hearings and comments. Industry groups have continued to fight the rule, looking to the state legislature to block its issuance. Gov. Jennifer Granholm has vetoed legislation to stop the ergonomics rule in the past. Hopefully, this process, which began in 2002, will soon come to a successful conclusion.

One area where there has been significant progress on ergonomics is the adoption of safe patient handling legislation. In 2007 and early 2008, three states adopted safe patient handling laws, bringing the number of states with such requirements to nine. Currently the states of Ohio, New York, Texas, Washington, Hawaii, Rhode Island, Maryland, Minnesota and New Jersey have

safe patient handling laws, and a number of other states are considering similar legislation.

The Obama administration has not yet indicated the approach it will take to addressing ergonomic hazards. As a candidate, President Obama stated that if elected he would move to reinstate OSHA's 2000 ergonomics standard. But such an action is both legally and politically difficult. The OSHA ergonomics standard was repealed under the Congressional Review Act (CRA), which prohibits the agency from issuing a new rule that is substantially the same as the original rule unless the new rule is authorized by Congress. The OSHA ergonomics standard is the only rule that has been overturned under the CRA, so there is no history or precedent to provide guidance on what type of ergonomics standard would be permissible under the CRA.

But, in addition to a new ergonomics rule, there are other actions that could be taken to increase attention to ergonomic hazards. These include reinstating the MSD column on the OSHA 300 log, enhancing enforcement of recordkeeping on musculoskeletal disorders as was done in the late 1980's and early 1990's, instituting special emphasis programs in high risk industries, and conducting more aggressive enforcement on ergonomic hazards under the general duty clause provisions of the Occupational Safety and Health Act.

### *Pandemic Flu*

The threat of an influenza pandemic poses serious consequences to the health of the entire population of the United States and the world. If an influenza virus attains the ability to be easily transmitted from person to person, the impact could be devastating. Under some estimates, 30 percent of our entire population could become ill, with 10 million requiring hospitalization and 1.9 million resulting deaths. To respond effectively in a pandemic, millions of health care workers, firefighters, emergency medical services personnel, home health care workers and other responders will be needed to care for those who are ill from the virus. It is essential that we protect the health and safety of these workers so that they can care for those who are sick.

In November 2005, the Department of Health and Human Services issued its *Pandemic Influenza Plan.* As initially issued, the plan's infection control provisions were very weak, with dangerous and illegal respiratory protection guidance that recommended that workers wear surgical masks rather than NIOSH-certified respirators. In response to criticisms on the plan raised by occupational health professionals, unions and others, the Centers for Disease Control with the involvement of NIOSH developed revised recommendations for respiratory protection to protect health care workers against pandemic influenza. The revised guidance recommends the use of N-95 NIOSH approved respirators at a minimum for all individuals involved in direct patient care activities, and was incorporated into the HHS Pandemic Influenza Plan in October 2006.

In December 2005, the American Federation of State, County and Municipal Employees (AFSCME) along with the AFL-CIO and other labor organizations petitioned OSHA to issue an emergency temporary standard to protect health care workers and other responders in the event of a pandemic. In February 2007, OSHA denied the petition claiming that an emergency standard was not warranted because "no human influenza virus exists at this time." Instead of issuing an emergency standard, the Department of Labor instead has decided to rely on guidelines and recommendations. In February 2007, OSHA issued guidelines on "Preparing

Workplaces for a Pandemic" and in May 2007 it issued guidelines on protecting health care workers and responders. However, such guidelines are only advisory and there is no obligation for employers to implement them.

In July 2008 the Departments of Health and Human Services and Homeland Security issued guidance on allocating vaccine during a pandemic and placed health care workers and emergency service providers at the top of the priority list for receiving the vaccine. But compared to previous years, in 2008 there was very little activity on pandemic flu as concern about an imminent occurrence of a pandemic waned. However, the threat of a pandemic is still quite real and serious and the lack of planning in advance of a pandemic could prove disastrous.

A recent survey conducted by the AFL-CIO and unions on the preparedness of health care facilities to protect health care workers in the event of a flu pandemic found preparations sorely lacking.[23] The survey found that more than one-third of the facilities are not adequately prepared to protect health care workers and that, due to this lack of readiness, 43 percent of the survey respondents believe that most or some of their fellow workers will stay home. To address these deficiencies, the unions have recommended a number of actions, including the development and issuance of a federal OSHA standard to address airborne transmissible diseases.

With no regulatory action at the federal level to protect health care workers from pandemic influenza, Cal/OSHA has already moved to develop a comprehensive rule that would protect health care and emergency service workers against all aerosol transmissible diseases. The standard has been under development for several years and is expected to be considered for adoption by the California Safety and Health Standards Board in May 2009.

Hopefully the Obama administration will follow the lead of Cal/OSHA and move to develop a similar federal standard to protect health care workers from airborne transmissible diseases, including pandemic influenza.

### *Chemical Exposure Limits and Standards*

Occupational exposures to toxic substances pose a significant risk to millions of American workers. According to NIOSH, occupational diseases caused by exposure to these substances are responsible for an estimated 50,000 deaths each year. One of OSHA's primary responsibilities is to set standards to protect workers from toxic substances. But since the OSHAct was enacted in 1970, OSHA has issued comprehensive health standards for only 29 substances. Most of these standards were set in the first two decades of the Act. In recent years, regulations for chemical hazards have ground to a halt. The last toxic substance standard that was issued on hexavalent chromium in 2006 came only as a result of a court order.

The OSHA permissible exposure limits (PELs) in place under 29 CFR 1910.1000 that govern exposure for approximately 400 toxic substances were adopted in 1971 and codified the ACGIH Threshold Limit Values from 1968. Most of these limits were set by ACGIH in the 1940's and

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[23] AFL-CIO, et al, *Healthcare Workers in Peril: Preparing to Protect Worker Health and Safety During Pandemic Influenza, A Union Survey Report*, April 16, 2009. http://www.aflcio.org/issues/safety/upload/panflusurvey.pdf

1950's based upon the scientific evidence then available. Many chemicals now recognized as hazardous were not covered by the 1968 limits. In 1989 OSHA attempted to update these limits, but the revised rule was overturned by the courts because the agency failed to make the risk and feasibility determinations for each chemical as required by the Act. The result is that many serious chemical hazards are not regulated at all by federal OSHA or subject to weak and out-of-date requirements. Some states, including California and Washington, have done a better job updating exposure limits, and as a result workers in those states have much better protection against exposure to toxic substances.

Several years ago, the American Industrial Hygiene Association (AIHA), major industry groups and labor attempted to reach agreement on a new approach to update permissible exposure limits through a shorter process that would allow quick adoption of new limits that were agreed upon by consensus. Unfortunately those efforts stalled when small business groups objected to an expedited process that would apply to a large number of chemicals and the Bush administration refused to take a leadership role in developing and advancing an improved process for setting updated exposure limits.

In 2007, the state of California moved to establish a new procedure for updating chemical exposure limits, that utilizes a two-part advisory committee process to recommend revised or new permissible exposure limits.[24] Under the process Cal/OSHA develops a list of candidate substances for proposed consideration by an advisory committee. A Health Expert Advisory Committee (HEAC) reviews scientific evidence on identified substances and recommends a permissible exposure limit based upon health effects. A separate Feasibility Advisory Committee (FAC) then considers technical and economic feasibility issues to determine if the health based recommended PEL should be modified. Cal/OSHA maintains the responsibility to recommend draft PELs to the Cal/OSHA Standards Board that has the authority to adopt final limits. This process was intended to expedite the adoption of revised PELs, but the process has been slower than expected. To date, the HEAC has recommended revised PELs for five substances, but recommendations from the FAC are still pending and no new PELs have been adopted under the process.[25]

The American Industrial Hygiene Association, the unions and others have identified updating OSHA permissible exposure limits as a top priority for the new administration. It is hoped that under the Obama administration OSHA will take a leadership role in working with the safety and health community, and if necessary the Congress, to update exposure limits for toxic chemicals and improve the process for keeping these limits up to date in the future.

## MINE SAFETY AND HEALTH

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[24]Policy and Procedure for the Advisory Committee Process for Permissible Exposure Limit (PEL) Updates to Title 8, Section 5155, Airborne Contaminants, California Division of Occupational Safety and Health, March 2007 http://www.dir.ca.gov/dosh/DoshReg/PEL-Process-3-07-final-draft.pdf.

[25] Cal/OSHA PEL Project Status List (Updated 4/10/09) http://www.dir.ca.gov/dosh/DoshReg/5155%20Status%20sheet%20revised%20for%20posting%20after%20March%2025%20mtg.xls

In 2006 and 2007, a series of mining disasters claimed the lives of dozens of miners and brought renewed attention to mine safety. In January 2006 an explosion at the Sago mine in West Virginia killed 12 coal miners. Within a few weeks' time, disasters at eight other mines, including the Aracoma Alma mine in West Virginia and Darby mine in Kentucky, claimed additional lives. And by the end of 2006, the toll was 47 coal miners killed on the job compared to 23 coal mine deaths in 2005. In August 2007, six miners and three rescue workers were killed by roof falls at the Crandall Canyon mine in Utah where the operator engaged in dangerous retreat mining practices.

These mining fatalities exposed weaknesses in protections and significant deficiencies in MSHA oversight, enforcement and regulation under the Bush administration. In the wake of these tragedies, in June 2006 Congress enacted the first improvements in mine safety legislation since 1977 with enactment of the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). This legislation has resulted in some needed changes, but much more needs to be done.

The Mine Safety and Health Act is administered by the Mine Safety and Health Administration (MSHA) and applies to both underground and surface mines, and to both coal mines and other metal and non-metal mining operations (e.g., gold, lead, sand and gravel). The MSHAct requires a minimum of four inspections per year in underground mines, and two inspections per year for surface mines. The level of oversight in the mining industry is greater than for those industries subject to OSHA, which does not provide for any mandatory routine inspections.

Since the passage of the MSHAct there have been significant reductions in mining fatalities and injuries. According to MSHA in 1977, there were 139 coal mine deaths among 237,506 coal miners. The number of coal mine deaths declined over the years and reached a low of 23 fatalities in 2005. But in 2006, that trend reversed, with 47 coal miners killed on the job—more than double than in 2005. In 2007, 34 coal miners were killed and in 2008, 29 died. The BLS injury survey shows that reported coal mine injuries have also declined from a rate of 12.4 per 100 for bituminous mining and 21.6 per 100 for anthracite mining in 1977, to 4.7 per 100 for all coal mining operations in 2007, the last year of available BLS injury data.

Mine fatalities have also declined in metal and non-metal mines, from 234 deaths among 285,165 miners in 1977, to 33 deaths among 255,186 miners in 2007. According to BLS, the injury rate for metal mines declined from 7.4 per 100 in 1977 to 3.3 per 100 in 2007, and the injury rate in non-metal mines from 5.1 per 100 to 3.1 per 100.

While reported injuries and mine fatalities have declined, the latest data from NIOSH's Coal Worker's Health Surveillance Program show that black lung disease is on the rise. After declining by 90 percent from 1969 after the Coal Mine Health and Safety Act was passed, in 1995 the prevalence of black lung began to increase. Since that time NIOSH reports that the prevalence of black lung among those who have been in the surveillance program for more than 20 years has more than doubled and continues to rise. Severe and advanced cases of black lung have been found in miners as young as 39 years of age.[26]

[26] http://www.cdc.gov/niosh/topics/surveillance/ords/CWHSP-News-Fall2008.html

Prior to the 2006 mining disasters and the passage of the MINER Act, the Bush administration pushed a deregulatory and cooperative approach to mine safety. Mining industry officials were appointed to head MSHA and to other key agency positions. Important mine safety and health rules were removed from the MSHA regulatory agenda, including rules on mine rescue teams, self-contained self-rescue devices, and flame resistant conveyor belts—measures that could have helped to prevent the deaths at the Sago mine and Alma mine in 2006. Instead there were efforts to roll back existing protections, including a proposal to increase the amount of allowable coal dust and a rule to allow the use of coal conveyor belts as a source of mine ventilation – a practice prohibited under the MSHAct. In metal and non-metal mining, the administration stayed the implementation of a rule reducing the amount of allowable diesel particulates issued by the Clinton administration. After being sued by the United Steelworkers union, MSHA agreed to implement the rule.

On the enforcement side, the Bush administration promoted compliance assistance and voluntary compliance. From FY 2001 to FY 2005, the coal enforcement staff at MSHA was reduced from 1,233 to 1,043 positions and the coal enforcement budget cut by nine percent in inflation adjusted terms. After the 2006 coal mine disasters, through emergency action the Congress increased the coal enforcement staff by 170 positions to 1,186 positions. Analyses of MSHA enforcement data conducted by Knight-Ridder in the aftermath of the Sago disaster found a 43 percent reduction in major fines during the first five years of the Bush administration compared to the last five years of the Clinton administration. The median fine for major violations under Bush was $27,139 compared to a median fine of $47,913 (inflation adjusted) during the Clinton administration.[27]

The Sago disaster and subsequent fatal incidents spurred action. In June 2006, Congress enacted the Mine Improvement and New Emergency Response Act (MINER Act). The law requires coal operators to develop and implement an accident response plan that requires additional oxygen, improved communications and tracking, and enhanced training, and calls for these measures to be upgraded as new technology becomes available. It also requires ready availability of mine rescue teams and new stronger standards for sealing abandoned mine areas, and calls for research and recommendations on belt flammability and rescue chambers. It strengthens MSHA enforcement by enhancing penalties for flagrant violations and setting mandatory minimum penalties for the most serious of violations.

In response to the legislation, MSHA moved to develop and issue a standard to strengthen mine evacuation requirements, a standard to strengthen requirements for alternative mine seals to withstand 50 psi of pressure, and a rule increasing the civil penalties for significant and flagrant violations.

In December 2008, MSHA issued a final rule regulating the use of belt air for ventilation and a rule establishing requirements for alternative refuges in underground coal mines. Both of these rules were mandated by Congress in the Consolidated Appropriations Act of 2008. The United Mine Workers of America have sought court review of both of these rules on grounds that they are not sufficiently protective.

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[27]"Knight-Ridder and MSHA Dispute Penalty Data from Agency's Website", Legal Publication Services, *Mine Safety and Health News*, January 23, 2006.

As a result of the MINER Act, MSHA has stepped up its enforcement activities. The statutory increases in penalties provided under the Act have led to much higher penalties and many more significant MSHA enforcement actions. In December 2008 MSHA assessed $23 million in penalties compared to $3 million in penalties assessed in December 2006.[28] The agency is also moving against mine operators who fail to pay delinquent penalties, a longstanding problem at the time of Sago. For example, in February 2009 the agency filed a lawsuit against Kentucky Darby LLC, for its failure to pay more than $500,000 in fines for violations that led to the 2006 explosion at the Darby #1 mine that killed five miners.[29] And in March 2009, MSHA issued a withdrawal order to shut down operations at Double A Mining in Kentucky for failure to pay $313,820 in delinquent penalties.[30]

In addition, since 2007 MSHA has put 59 mine operators on notice that they have been found to have a pattern of significant and substantial violations, which if not corrected will result in stiff penalties and closure orders for the unsafe areas.[31]

The Obama administration has not yet named an Assistant Secretary for Mine Safety and Health nor outlined its regulatory agenda for MSHA. But MSHA, like OSHA, needs strong leadership committed to strong enforcement of the law and to the development of protective standards including a new coal dust standard to protect miners from black lung.

## THE JOB SAFETY BUDGET

Funding for the nation's job safety and health programs has historically been limited, particularly when compared to the scope of responsibilities of the job safety agencies and the extent of the problems that need to be addressed. For FY 2009, the omnibus appropriations bill enacted in February 2009 provided $513 million in funding for OSHA, $347 million for MSHA, and $290 million for NIOSH. For each agency, the appropriated funding was greater than the funding requested by the Bush administration ($502 million for OSHA, $332 million for MSHA and $246 million for NIOSH), and greater than funding provided in FY 2008. The biggest increases in appropriated funds were for OSHA and MSHA enforcement.[32]

During the eight years of the Bush administration, there were repeated attempts to cut the budget of the job safety agencies. While the proposals for deep cuts were rejected by the Congress, over the years there was an erosion in agency resources and staff, particularly for OSHA and NIOSH. Since FY 2001, when the Bush administration took office, the number of OSHA staff has been reduced by 223 positions. Federal OSHA enforcement staffing levels have been cut from 1,683 to 1,557 positions and staffing for the development of safety and health standards from 100 to 83

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[28] Penalty Dollars Assessed and Percent Contested January 2006-February 2009 http://www.msha.gov/stats/ContestedCitations/Civil%20Penalties%20Assessed%20and%20Contested.pdf

[29] MSHA News Release February 2, 2009, http://www.msha.gov/MEDIA/PRESS/2009/NR090202.asp

[30] MSHA News Release, March 23, 2009, http://www.msha.gov/MEDIA/PRESS/2009/NR090323a.asp

[31] http://www.msha.gov/POV/POVsinglesource.asp

[32] H.R. 1105 Omnibus Appropriations Act, 2009, Joint Explanatory Statement, Division F, http://www.rules.house.gov/111/LegText/111_omni2009_2.htm

positions. During this time, the Bush administration favored employer voluntary efforts, increasing the budget for federal compliance assistance for employers by $22 million since FY 2001. At the same time, repeated attempts were made to eliminate funding for OSHA's worker safety and health training grant program. But the Congress maintained the program, although funding it at a reduced level of $10 million in FY 2009, compared to $11.2 million in FY 2001.

In addition, as part of the American Recovery and Reinvestment Act (also referred to as the Stimulus) enacted in February 2009, supplemental funding was provided for OSHA enforcement and other DOL enforcement programs.

The Obama administration released the blueprint of its FY 2010 budget proposal in February 2009. This blueprint provides a general overview of the budget at the department level, not specific funding proposals for individual agency programs which will be released shortly. President Obama's FY 2010 budget blueprint proposes a $600 million increase for the Department of Labor, and increases funding for OSHA enforcement and whistleblower protection.

## SAFETY AND HEALTH LEGISLATION

Since the Democrats took control of the House and Senate in 2007, there has been enhanced oversight and legislative activity on job safety and health. The key committees with responsibility for safety and health are chaired by Senator Edward Kennedy (D-MA) and Rep. George Miller (D-CA), longtime strong supporters of worker safety and health protections, along with subcommittee chairs Senator Patty Murray (D-WA) and Rep. Lynn Woolsey (D-CA) who come from states with strong OSHA programs. Similarly, the committees with responsibility for funding job safety programs are headed by strong supporters of these programs and worker protections.

During the 110$^{th}$ Congress, there were dozens of hearings on worker safety and health. The House Education and Labor Committee held numerous hearings on mine safety, OSHA's failure to regulate, the BP refinery explosion and chemical plant safety, combustible dust hazards, OSHA enforcement, the underreporting of workplace injuries and illnesses and more. The Senate Health, Education Labor and Pensions (HELP) Committee examined mine safety, the current state of OSHA and safety and health, repeated patterns of serious violations, OSHA enforcement and penalties in fatality cases, and the energy workers' compensation program and initiated a number of investigations about MSHA and OSHA enforcement practices. In both the House and the Senate, the Appropriation Subcommittee on Labor, Health and Human Services, Education and Related Agencies also held numerous hearings. In 2008, the appropriations committees were also successful in their efforts to remove a rider from the OSHA appropriations bill that prohibited the agency from enforcing the annual fit testing requirements for respirators for workers exposed to tuberculosis.

There was also significant legislative activity on job safety and health issues as well.

In April 2007, Senator Kennedy, Rep. George Miller and Rep. Lynn Woolsey introduced the

Protecting America's Workers Act (S. 1244, H.R. 2049), a bill that addressed key deficiencies in the OSHA law. This legislation would strengthen OSHA by expanding coverage to uncovered workers, enhancing whistleblower protections, increasing penalties for serious and willful violations and strengthening the criminal penalty provisions of the OSHAct.

The House of Representatives took legislative action to further strengthen mine safety protections, building on the MINER Act that was enacted in 2006 after the Sago disaster. The S-MINER Act (H.R. 2768), introduced by Rep. George Miller, which builds on the foundation set in the MINER Act, would further improve emergency response, put in place much-needed protections to prevent disasters and protect workers from crippling injuries and diseases. In January 2008, the bill was passed by the House by a vote of 214-199, despite a threatened veto from President Bush. The House also adopted legislation (H.R. 2693) to mandate OSHA to take emergency action to issue a standard on the butter flavoring agent diacetyl, which has caused a deadly lung disease among popcorn and flavoring manufacturing workers. Legislation (H.R. 5522) to mandate OSHA to issue a combustible dust standard, following the death of 14 workers at the Imperial Sugar Refinery in Georgia, was also passed by the House in 2008.

On the Senate side, Republican opposition prevented movement on most safety and health legislation. One bill that did advance was legislation sponsored by Senator Patty Murray (D-WA) that would ban the future use of asbestos (S. 742). The Ban Asbestos in America Act was passed by the Senate after a compromise was reached that exempted asbestos products containing less than 1 percent by weight from the prohibition. This 1 percent threshold would allow the continued use of asbestos products that would expose workers and the public to significant levels of asbestos. The House introduced an asbestos ban bill (H.R. 6903) that removed the 1 percent threshold, but no action was taken before the Congress adjourned.

The health problems suffered by the 9/11 responders also received significant Congressional attention in the 110th Congress. Hearings on the extent of health problems among responders and residents exposed to toxic substances from the collapse of the World Trade Center were held in both the House and the Senate.

A bipartisan bill—the James Zadroga 9/11 Health and Compensation Act (H.R. 3543)—that would establish a comprehensive health monitoring and treatment program and reopen the Victim's Compensation Fund was introduced in the House. After hearings, a modified version of the bill was reintroduced in September 2008 with the intent of bringing the legislation to the House floor, but time ran out at the end of the session.

With Democratic majorities in both the House and the Senate and a Democratic President elected in 2008, there are new opportunities for moving forward with legislation to improve safety and health protections in the 111th Congress.

Both the House and Senate are working to update the Protecting America's Workers Act—legislation to improve and strengthen the Occupational Safety and Health Act—which will be introduced shortly. This bill is major legislative priority for the labor movement in the 111th Congress.

Legislation requiring OSHA to develop and issue a standard on combustible dust (H.R. 849) has been reintroduced, and it is expected that bills on mine safety, whistleblower protection and safe patient handling will also be reintroduced.

Legislation (H.R. 847) to provide monitoring, health care and compensation to the thousands of responders and residents who are now sick as a result of exposures from the collapse of the World Trade Center has also been reintroduced (H.R. 847). Hearings on the bill have been held in the Judiciary Committee and Energy and Commerce Committee, and it is hoped that this legislation will be acted on in the first session of the 111th Congress.

## WHAT NEEDS TO BE DONE

Very simply, workers need more job safety and health protection. Eight years of inaction and neglect by the Bush administration on major hazards and increased emphasis on employer assistance and voluntary compliance has left workers' safety and health in serious danger. The Obama administration must restore the commitment to protecting workers, provide strong leadership at both OSHA and MSHA and move forward on a new course.

The OSHAct needs to be strengthened to make it easier to issue safety and health standards and to make the civil and criminal penalties for violating the law tougher. Workers need to be given a real voice in the workplace and real rights to participate in safety and health as part of a comprehensive safety program to identify and correct hazards. Coverage should be extended to the millions of workers who fall outside the Act's protection.

Action is needed to fully implement the provisions of the MINER Act to protect miners in the event of an emergency and to increase penalties for serious and repeated violations. Further improvements to strengthen the Mine Act are needed to prevent further catastrophes. Tightening permissible exposures for coal dust should be a priority to protect miners from black lung disease, which is again on the rise.

OSHA must get back to the business of setting needed safety and health rules. Standards on silica, beyllium, and cranes and derricks, which have stalled, should be issued promptly and rules on diacetyl, combustible dust and airborne infectious diseases should be expedited. An OSHA standard still is needed to protect workers from ergonomic hazards and crippling repetitive strain injuries and back injuries, which continue to represent the most significant job-safety problem in the nation.

The widespread problem of injury underreporting must be addressed and employer policies and practices that discourage the reporting of injuries through discipline or other means must be prohibited. OSHA needs to keep up with new hazards that face workers as workplaces and the nature of work change.

The serious safety and health problems, and increased risk of fatalities and injuries, faced by Hispanic and immigrant workers must be given increased attention.

OSHA and MSHA need additional funding to develop and enforce standards and to expand worker safety and health training. Similarly, additional funds are needed for NIOSH to support enhanced research on safety and health problems.

With strong leadership from the Obama administration and a renewed commitment by the nation as a whole, there is an opportunity to achieve real reforms and improvements in safety and health protections and to put the country back on track to fulfilling the promise of safe jobs for all of America's workers.