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Subcommittee on Workforce Protections
House Committee on Education and Labor

Hearing on

"Protecting America's Workers Act: Modernizing OSHA Penalties"

March 16, 2010
Washington, DC

Chairman Woolsey, Ranking Member McMorris Rodgers, and members of the Subcommittee, thank you for the opportunity to testify today.

I am Eric Frumin. I serve as the Health and Safety Coordinator for Change to Win, and have worked in this field for 36 years. Change to Win is a partnership of five unions and 5.5 million workers, in a wide variety of industries, building a new movement of working people equipped to meet the challenges of the global economy in the 21st century and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement and dignity on the job. The five partner unions are: International Brotherhood of Teamsters, Laborers' International Union of North America, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers International Union.

On behalf of Change to Win, we greatly appreciate the leadership of Chairman Miller, Chairman Woolsey and this Subcommittee in holding this hearing, and for your determined interest in the serious problems confronting workers, ethical employers, OSHA and others concerned with the severe gaps in OSHA's enforcement powers, including specifically the question of outdated penalties.[1] These shortcomings endanger workers' lives, and Congress has the power to close the gaps and strengthen the protections that workers deserve. We strongly support the Protecting America's Workers Act – PAWA (HR 2067).

We also support the changes which we now understand the Committee is considering to further improve the bill you introduced last year. These include the improvements in Title II to protect workers whose employers would rather ruthlessly retaliate against employees who complain about hazards or violations -- instead of holding themselves accountable for violating the law and endangering their employees. These improvements provide the protections that have served workers well under other laws, and fixes a severe problem which has hindered OSHA enforcement for decades.

[1] We will not attempt to repeat all the relevant testimony offered at the other recent hearings that the Committee and the Subcommittee have held on the issues covered by PAWA, including those on March 12, April 23, June 18 and June 24, 2008, and April 28, April 30 and October 28, 2009.

In addition, we support other related legislation introduced by your Committee to close the loopholes in the OSHAct, such as HR 2113, to improve the reporting practices of large corporations regarding their violations and their employees injuries on the job, and HR 2199 to better and more quickly protect workers facing imminent dangers of severe hazards.

Let's first recognize that the OSHAct has made a substantial difference for workers and employers. For 2008, BLS has reported that 5,071 workers died from injuries on the job, an average of 14 workers every day. While still completely unacceptable, it is down from significantly from the 6,632 that BLS reported in 1994.[2] (An estimated 50,000 more workers lost their lives due to occupational diseases, which necessitates long-overdue action to reduce and wherever possible eliminate the widespread hazards from toxic materials in the workplace.)

And for 2008, the BLS tells us that employers reported 3.7 million work-related injuries and illnesses.[3] We know – and the Labor Department and others have conceded -- that this number does not reflect the full extent of job injuries.[4,5] And we believe the real number is estimated to be substantially greater. But it is also unquestionable that the actual numbers and rates of non-fatal injuries and illnesses has declined substantially since 1970 – particularly in highly hazardous industries and occupations.

But 40 years on, the OSHAct's enforcement program is too weak in many respects. Over the years OSHA's ability to effectively conduct enforcement programs has been greatly diminished.[6] Even with the very important additional resources which President Obama and Secretary Solis have added, the number of inspectors has still not nearly kept pace with the growth of the American workforce. We certainly welcome these additional resources, as well as the many enforcement initiatives adopted by Secretary Solis and the other new leaders within the Labor Department. However, we also recognize that no Secretary, Assistant Secretary or Labor Solicitor can overcome the basic and severe limits of the Act itself.

The Administration's improvements in OSHA's enforcement and penalty policies could and should help strengthen enforcement – as soon as possible. And they will need to be supported by Congressional action to provide the necessary resources, especially if the new penalty provisions are adopted.

But many of the deficiencies in enforcement rest with the OSHAct itself and must be addressed through Congressional action. The OSHAct's enforcement program is too weak – especially the maximum and minimum penalties – to deter misconduct, particularly in comparison with environmental and other safety laws.

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[2] US Bureau of Labor Statistics, *Census of Fatal Occupational Injuries.*

[3] US Bureau of Labor Statistics, *Annual Survey of Occupational Injuries and Illnesses.*

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

[5] *Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*, US Government Accountability Office, GAO 10-10, October 15, 2010.

[6] Testimony of Ms. Margaret Seminario, House Committee on Education and Labor, April 28, 2009, p. 13.

For example, the penalties for serious violations are absurdly low. Serious violations of the OSH Act are violations capable of causing "death or serious physical harm" – hazards that can very seriously injure, sicken or even kill workers.

For such violations, the current law allows a maximum penalty of $7,000. However, OSHA's own data shows that the average penalty issued by Federal inspectors for such serious violations in FY 2009 was only $970. Excluding California, where the law already calls for higher penalties, the average serious penalty assessed by state plans is only 65 percent of the federal OSHA average.[7]

Aside from OSHA, every other federal enforcement agency -- except the IRS -- is covered by the Federal Civil Penalties Inflation Adjustment Act, which requires increases in penalties for inflation. The last time that the Congress adjusted these penalties was in 1990 – the only time in 40 years that Congress has increased the penalties since it passed the Act in 1970. Thus, the real effect of OSHA penalties has been reduced by about 40% since 1990. The penalty provisions of PAWA would do so by increasing the maximum penalties for Serious and Other violations from $7,000 to $12,000, and for Willful and Repeat violations from $70,000 to $120,000. It is high time to correct this terrible disparity.

Grossly inadequate deterrence

The current penalties do not provide a serious deterrent to serious misbehavior by employers. OSHA continues to find and cite repeated violations as well as so-called "failure-to-abate" penalties where employers don't even fix the violations for which OSHA has cited them at the same worksites. Cases involving willful and repeated violations commonly trigger the additional detailed investigations and higher penalties in subsequent inspections. But why should negligent managers feel free to engage in such negligence in the first place? Stronger sanctions are clearly necessary to make them fix these dangerous conditions the first time rather than see workers suffer needless additional injury.

The problem of recidivist behavior is not limited to small employers. Major employers in particular fail to get the message. OSHA recently announced a record $87 million penalty at BP, after a previous citations with record penalties of $21 million.Of that $87 million, nearly $57 million was to penalize BP for failing to keep its previous promises to OSHA, its employees, its shareholders and the community to stop these abusive practices and to abate serious hazards which OSHA had already identified.

In 2005, OSHA cited the Cintas Corp. for failing to guard its heavy-duty automated laundry equipment – despite a near fatal incident the year before on a similar piece of equipment, and common knowledge in the industry about this hazard. OSHA only imposed a penalty of $2125, which itself was later reduced. Shortly thereafter, Eleazar Torres Gomez was killed after being thrown into an industrial dryer while trying to clear a large conveyor, and another employee was severely injured in Washington state. Eventually, multiple Cintas plants in eight states across the country were found to have repeatedly violated the same or similar applicable standards. Only many months later, after these multiple worker complaints, OSHA inspections and a nearly $3

[7] Data supplied by the Occupational Safety and Health Administration, from its Integrated Management Information System.

million penalty, did Cintas finally agree to fix all its 106 locations in 36 states across the country with similar hazards.

It should not have required Mr. Torres Gomez's gruesome death in an industrial dryer, and the significant sanctions that OSHA later imposed, to force Cintas to take seriously its simple legal obligation to guard hazardous machines and protect its hardworking and loyal employees. The first citation and penalty in 2005, for a deadly hazard that was already well-known to the employer, should have been sufficient to trigger action across the company – particularly in a company whose own policies require local management compliance with corporate directives.

In other cases, where there are no willful or repeat violations, OSHA is confronting a fatality and potential violations for the first time. In these cases, the deterrence is even worse. The current penalties for common serious violations, in cases of worker deaths, are completely unacceptable.

When WalMart's managers in Valley Stream, NY completely failed to plan for the huge crowds at their major store on the Thanksgiving Friday, 2008, and a store employee was literally trampled to death as a result of that poor planning, the only sanction WalMart suffered was a $7000 penalty. And despite this negligible sanction, WalMart is still vigorously challenging that penalty on appeal.

In 2008, Raul Figueroa, a mechanic at Waste Management, Inc. (WMI) in South Florida was killed by the hydraulic arm of the garbage truck he was repairing. The ultimate penalty was only $6,300.[8] Waste Management is one of the largest companies in the solid waste industry. What difference does a $6,300 penalty make to a giant corporation?

As revealed by the 2008 study by the Majority Staff for the Senate Committee on Health, Education, Labor and Pensions, among all federal OSHA fatality investigations conducted in FY 2007, the median initial penalty was just $5,900.[9] Worse, after negotiation and settlement, the median final penalty for workplace fatalities was reduced to only $3,675. For willful violations in fatality cases, the median final penalty was $29,400, less than half the statutory maximum of $70,000 for such violations.

The message to employers, workers, their communities and corporate shareholders is pretty clear: workers' lives don't mean much, and corporate executives have little to fear from the Secretary of Labor under the current law.

<u>Where employers use contract labor for especially hazardous tasks, the potential sanctions are non-existent for the corporations and executives who control the workplace.</u>

In many cases, such as that of Xcel Energy, Inc.., the employer hires others to do the most hazardous jobs, in part because the employer is fully aware of the dangers of doing the work with its own employees. Having hired a disreputable painting contractor with a history of OSHA

[8] OSHA Inspection # 311088033

[9] *Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers* – Report of the Majority Staff of the Committee on Health, Education, Labor and Pensions, U. S. Senate, April 29, 2008.

violations to paint the inside of a large hydroelectric tunnel,[10] the Xcel Corp. ignored its own confined space policy and allowed the contractor's work to proceed under very hazardous conditions. Shortly thereafter, five men died when a fire started among the chemicals they were handling in the tunnel. Under the current OSHA statute, with the exception of the construction industry, only the contractor business itself as well as its officers, could be held accountable for allowing those conditions to exist in the first place. The huge corporations which hire these disreputable contractors are exempt from liabililty for OSHA violations and subsequent prosecution.

Fortunately, the US Attorney in Denver decided to take a more creative approach, and secured an indictment of not just the contractor and its officers, but also against Xcel Corp. for "aiding and abetting" the contractor.[11] But the corporate executives at Xcel Corp. still faced no more of a threat than did the ones at Cintas – since it was only the corporation itself that was charged. It remains to be seen now whether or not the Xcel executives take the steps to fully protect their employees. But it is certain that none of them will suffer any personal loss of freedom or penalties for the horrific consequences of their company's abysmal failures.

A better model exists under environmental and other criminal law

The negligible penalties commonly provided under the OSHAct – and the lack of deterrence they exact -- contrasts very strongly with the comparable provisions under other Federal laws on human and environmental health and safety. Whether we look at financial penalties, the severity of the available criminal sanctions, the degree of harm required to impose serious sanctions, or other measures, the OSHAct shows a blatant disregard for the lives and health of American workers.

Environmental laws have explicit criminal sanctions – with jail terms of up to 15 years – for knowing violations of environmental protection regulations and knowing endangerment of workers. There is no need under these laws to demonstrate that anyone was actually harmed, much less actually killed.

For nearly 20 years, EPA's enforcement policies have also placed deterrence as its top priority in enforcement proceedings – ahead of "Fair and Equitable Treatment of the Regulated Community" or "Swift Resolution of Environmental Problems." [12] And EPA has used its criminal authority vigorously and frequently – at least in comparison to the lackluster track record on criminal sanctions by the Labor and Justice Departments under the OSHAct. As the previous Assistant Attorney General Ronald Tenpas said recently in his comments on their prosecutions of employers with both environmental and worker safety violations:

> "There are obviously plenty of good corporate citizens out there who want to do right by their workers and want to do the right thing, but there are always going to be some for

[10] M. McPhee, *Xcel, contractor fined $1 million in Georgetown tunnel deaths,*, Denver Post, March 24, 2008; http://www.denverpost.com/search/ci_8679504

[11] Indictment: United States v. Xcel Energy Corp and others, Case 1:09-cr-00389-WYD, District Court, Middle District of Colorado, Aug. 27, 2009.

[12] EPA Civil Penalty Policy GM-21, 1984.

whom it's important that they know there's the threat of prosecution and there's the threat of going to jail and there's the threat that their company bottom line is going to be hit and hit significantly if they don't comply with the law."

"At the end of the day, we work with the penalties that Congress has decided over time are the appropriate ones to provide. In some of those cases, McWane being an example, we have found there may be violations related to worker safety, but there are also more serious violations related to the environment where penalties are typically much more significant: maximum five years, 10 years, jail time. So we've tried to make sure we're using the full-range of enforcement options we have, including the environmental statutes for those situations."[13]

It is time to fix this disparity, once and for all.

Criminal sanctions and prosecutions

Finally, only a small handful of OSHA cases with willful violations – and only those involving fatalities – are prosecuted for criminal violations. With hundreds of fatality investigations annually, only a literal handful are referred to the Justice Department for prosecution, and some of those are never pursued. One reason so few cases are treated this way is that the worst penalty these criminals face is a six-month sentence – a mere misdemeanor. Given the average caseload of an Assistant U.S. Attorney, it is no surprise that such cases fail to attract the prosecutorial zeal that is required to investigate complicated, non-routine cases involving issues that federal prosecutors rarely see in their careers.

Contrast that with the average of 360 cases referred annually by EPA to DOJ for criminal prosecutions during the last 7 years of the Bush Administration alone. In 2009, the prosecutions yielded 176 defendants receiving in 57 years of jail time and $64 million in penalties – more cases, fines and jail time in one year than during OSHA's entire history.[14]

Why are these cases treated so differently? One reason is that, as the Committee heard last year, the environmental laws carry maximum penalties of three to five years per substantive count – and 15 years for crimes involving knowing endangerment (regardless of whether any injury occurs).[15]

The OSH Act should be amended to provide similar penalties. PAWA goes part of the way by raising the maximum sentence to 5 years for the first offense, and 10 years for a second offense – far less than the 15 years available to prosecutors under environmental law, but, as felonies, a substantial improvement over the mere six-month misdemeanor under current the current OSHAct.

[13] Interview of Ronald Tenpas, Frontline: A Dangerous Business Revisted, Dec. 13, 2007; http://www.pbs.org/wgbh/pages/frontline/mcwane/interviews/tenpas.html
[14] Testimony of Ms. Margaret Seminario, House Committee on Education and Labor, April 28, 2009, p. 9.
[15] Testimony of Mr. David Uhlmann, House Committee on Education and Labor, April 28, 2009, p. 2.

To make matters worse, the criminal sanctions only apply to cases where the willful violations actually kill a worker. Short of that, no matter how badly the worker was injured or diseased, and no matter how egregious the employer's behavior, there is not even the threat of criminal prosecution.

Again, PAWA fixes this serious gap by applying the criminal sanctions to not only those willful violations that kill workers, but also to the same kinds of violations that seriously injury or sicken them. Again, this is considerably less jail time than would be the case if the same hazard were prohibited under our environmental laws.[16] But it is vast improvement over the virtual immunity which negligent employers now enjoy from criminal prosecution when they willfully endanger the safety of their employees.

Finally, we understand that the Committee is considering applying such penalties to cases of "knowing" violations, rather than the "willful" violations under current OSHA law – a category which does not exist elsewhere in environmental or other criminal law. As the Committee heard last year,[17] this is a much better grounds for prosecution, since it is already familiar to prosecutors, and denies employers the defense that they were ignorant of the law. We strongly support this change, and urge the Committee to assure that it is included in any final legislation.

The disparity in criminal sanctions is evident: as long as it is only a misdemeanor to kill a worker or lie to an OSHA inspector, many such cases will linger and die while cases under other laws promising greater deterrence will get the attention of prosecutors. Simply put, under the OSHAct, there is nothing resembling justice for the families and co-workers of those who suffer or die at the hands of negligent employers.

State Plan inadequacies

Notwithstanding the strengths and weaknesses of the current Federal OSHA enforcement program, state plans have greatly different approaches to fatality investigations and sanctions, in addition to the much weaker practices on penalties mentioned above. These variations include not only the level of penalty,[18] but also whether to classify violations as serious in the first place,[19] as well as the nature of the follow-up enforcement involving other locations of the same company. Thus, our problems with the absence of strong deterrence through higher penalties is magnified further for the millions of workers in the 23 states where the enforcement is administered by state authorities.

Under the current OSHAct, the Secretary of Labor has had exceptional difficulty forcing states to conform their enforcement programs to the performance levels of federal OSHA. However, at a minimum, PAWA would force states to increase their penalties and criminal sanctions as well.

[16] Ibid, p. 5.
[17] Ibid, p. 12.
[18] Testimony of Ms. Margaret Seminario, House Committee on Education and Labor, April 28, 2009, p. 14-15.
[19] Statement of Chairman George Miller, House Committee on Education and Labor, Oct. 29, 2009: "only 29 percent of Nevada's citations were classified as 'serious.' Compare that to 44 percent for other state plans and 77 percent for federal OSHA."

Recently, the Wyoming Governor's Worker Fatality Prevention Task Force recommended that the state legislature adopt the same penalties that you have proposed in PAWA to help stop the fatalities in the state's construction and oil/gas drilling industries – deaths that have kept Wyoming's place as having the highest rate of worker deaths in the entire country. Outrageously, after both bi-partisan sponsorship as well as an overwhelming vote for passage by the state's House, the Wyoming Senate voted it down two weeks ago in a tie vote. And this was after the state's oil/gas industry –publicly, at least -- supported this legislation.

As the Wyoming example makes clear, even where governors or legislators recognize the same faults with the penalties under their own OSHA laws as you have recognized with federal law, the challenge of fixing that problem is a practical impossibility. Other than California, no state has increased its penalties above the federal minimums, and we should not expect the states to do so short of action by the Congress in passing PAWA. Only action by the US Congress is going to close this gap.

Conclusion

The penalties proposed by PAWA are *very* modest. The new criminal sanctions are equally modest. Even with these improvements, we all recognize that if passed, PAWA will not put the OSHAct on an even par with the sanctions that negligent employers have already faced for years under our environmental laws.

However, these updated penalties and criminal sanctions will begin to give government inspectors and civil and criminal prosecutors the essential tools they need to more effectively deter abusive employer conduct, tools that their counterparts in many other federal agencies already routinely use to enforce similar laws on environmental protection. Indeed, Congress has increased the penalties under other laws, while allowing OSHA's penalties to linger in their weakened state. Honest, responsible employers will survive – and indeed even thrive – with a safer, secure and more productive workforce if you give OSHA the same powers. And until then, dishonest and irresponsible employers will continue to injure and kill workers with virtual impunity.

We respectfully call upon Congress to modernize and strengthen OSHAct's penalties, as soon as possible. In this way, our nation can better strive to deliver the promise the Congress made when it passed OSHA 40 years ago: "… to assure safe and healthful working conditions for each working man and woman and … by providing an effective enforcement program."

I will be happy to answer any questions.

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