December 1975

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OCCUPATIONAL SAFETY AND HEALTH ACT: THE RIGHT OF A WORKER TO A SAFE WORK PLACE ENVIRONMENT

ARTHUR J. MARINELLI, JR.*

"On the job safety has become one of modern industry’s most pressing problems. The annual toll taken by occupational accidents and illness is of frightening proportions, and existing efforts to meet this problem are plainly insufficient."

I. INTRODUCTION

Federal law has played an expansive role in enabling the nation’s workers to freely organize and to bargain collectively. It has also regulated wages and hours and employment discrimination for some time now. Broad scale efforts to improve job health and safety resulted in the passage in 1970 of a “milestone in the field of worker protection,” the Occupational Safety and Health Act of 1970 (OSHA or the Act). The declared Congressional purpose of the Act is “to assure so far as possible every working man and woman in the nation safe and healthy working conditions and to preserve our human resources . . . .” The Act has a very broad scope, applying to virtually all employees and employers engaged in business affecting interstate commerce.

The Act was not passed in response to some sudden disaster, but was an attempt by Congress to contribute to the health and welfare of American workers by requiring employers to furnish their employees with hazard-free employment conditions. Con-
gress was alarmed by what Senator Jacob Javits called our "industrial carnage" which resulted in more than 14,500 workers killed in industrial accidents each year and nearly 2.5 million disabled workers. This article reviews briefly the legislative history and structure of OSHA and examines some of the issues and problems of the Act.

II. SCOPE OF THE ACT

Congress passed the Act in accordance with the powers granted to it under the Commerce Clause of the Constitution. The Act applies to all employers who have employees whose business affects interstate commerce. Since "affecting commerce" is a much broader term than "engaging in commerce", jurisdiction under the Act is not difficult to obtain.

The Act covers employees regardless of the size of the business they work for and regardless of the activities they perform. The Act's coverage excludes United States and state government employees, regulated coal miners, and atomic energy workers covered by other federal safety legislation. The Secretary of Labor has clarified the coverage of the Act by noting that it does not cover domestic servants, members of a farmer's or a rancher's immediate family, and persons performing religious services. The Act does cover professionals, agricultural employees, employees of nonprofit and charitable organizations and religious organizations performing secular tasks. While attempts in Congress have failed to limit the coverage of the Act so as to relieve small busi-

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11 U.S. CONST. art. 1, § 8, cl. 3.
18 Id. § 1975.4(b)(2).
19 Id. § 1975(c).
20 Id. § 1975.4(b)(1).
21 Id. § 1975.4(b)(2).
22 Id. § 1975.4(b)(4).
23 Id. § 1975.4(c)(1).
nessmen of the financial burden of achieving compliance with the Act, future attempts will undoubtedly be made to limit application to employers of more than fifteen employees\textsuperscript{24} or some smaller number.\textsuperscript{25}

The Occupational Safety and Health Review Commission has ruled that it is deprived of subject matter jurisdiction only where a federal agency other than the Department of Labor has actually exercised authority vested in it by statute to enforce standards affecting working conditions and will exercise jurisdiction over employers and employees who could be, but are not, so regulated by another federal agency.\textsuperscript{26}

III. History

Federal involvement in health and safety matters increased with the labor movement of the 1930's, resulting in the enactment of the Walsh-Healy Public Contracts Act of 1936\textsuperscript{27} and the Davis-Bacon Act of 1931.\textsuperscript{28} These two acts along with advances made in safety and health in the 1950's and 1960's\textsuperscript{29} covered only a small proportion of all jobholders, but set the stage for the enactment of a broad scale health and safety act. Congress became convinced that there was an urgent need for new safety and health legislation.

\textsuperscript{24} See, e.g. H.R. 15417, 92 Cong., 2d Sess. (1972), passed by the Senate 62-22 and the House 240-167. This bill was vetoed on Aug. 16, 1972.

\textsuperscript{25} See, e.g. H.R. 16654, 92 Cong., 2d Sess. (1972), it would have limited application to employers of more than three and would have exempted over one-half of all employers from the Act. It was vetoed on Oct. 27, 1972.


Ten years of enforcement of the Maritime Safety Act, during which time accident frequency rates dropped 53 percent for longshoremen and 41 percent for shipyard workers, illustrated the effectiveness of limited federal safety legislation.

Enforcement of state health and safety legislation suffered from manpower and financial shortages. This situation prompted Congressman Joseph M. Gaydos to observe: "It is a fact that in the States today there are 1,600 occupational health and safety inspectors and 2,800 game wardens. Elk and deer are better protected than working men and women." State workmen's compensation laws were designed to compensate for losses after the fact and were not primarily designed to prevent accidents and health hazards. The workmen's compensation laws usually provided inadequate benefit schedules for employee loss. Collective bargaining could not produce a safer working environment for the nation's workforce, particularly for the large part of the workforce that is not organized and frequently in the past efforts to produce controls over safety and health were met with opposition by companies as invading their managerial perogatives in order to save money.

The focus by Congress on the whole environmental crisis caused Congress to become concerned with the workplace where over 80 million workers spend over one-third of their day. The inadequacy of the then existing state and federal laws and the awareness by Congress of the need for national legislation found Congress more receptive to a Nixon administration bill on occupational safety and health.

The determination of congressional intent is always a difficult task for any complex and hotly debated bill, especially where the debate is so heated as to be described as "the most bitter labor-management fight in years." The Democrats with strong labor support favored the Daniels bill which would have placed author-

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ity with the Department of Labor to promulgate standards, conduct investigations and hearings and provide an appeals system within the Department of Labor. The Steiger and Sikes bill was based on traditional separation of powers concepts with an independent board promulgating health and safety standards, inspection by the Secretary of Labor, and a separate board hearing violation appeals. Congressman Steiger persuaded the House to adopt his bill rather than the Committee supported Daniels bill. The Senate passed the labor backed Williams bill, including Senator Jacob Javits' amendment providing an independent adjudicatory body. The conference committee ironed out the major differences between the two bills by accepting the provision giving the Secretary of Labor authority to set health and safety standards but providing for a three member board, the Occupational Safety and Health Review Commission, to exercise administrative review. Both houses adopted the conference compromise and President Nixon signed the bill on December 29, 1970, to be effective April 28, 1971.

The legislation has been hailed as a new bill of rights for employees, creating substantive federal rights. The Act establishes comprehensive record keeping and reporting requirements, requires employer compliance with health and safety standards, grants broad investigatory powers to the Secretary of Labor, and provides for an independent commission to adjudicate alleged violations.

IV. Standards

Unlike the National Labor Relations Act which sets out basic do's and don't's, OSHA provides only a general duty clause and specific safety and health standards which have the force and ef-

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42 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE,
92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act
44 Id. § 654(a)(2).
45 Id. § 657(a). See also 29 C.F.R. §§ 1903.3 (a), 1903.4 (1975).
47 Id. § 158.
fect of law are to be promulgated by the Secretary of Labor. Not only does the Secretary of Labor create the standards but his interpretation of standards is entitled to "great weight . . . as long as it is one of several reasonable interpretations." The Secretary may change standards as industrial safety and health hazards evolve.

The broad grant of authority to the Secretary is found in the language of the Act itself. "The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard . . . whenever . . . [he] . . . determines that a rule should be promulgated in order to serve the objectives of this chapter . . . ." A standard must be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

Standards are subject to judicial review and require evidence to support them. The court in Associated Industries of New York State, Inc. v. United States Department of Labor, finding that evidence failed to support the order of the Department of Labor setting minimum numbers of lavatories in industrial establishments, stated:

[W]hen the Department imposes a standard considerably more stringent than that which apparently has been found satisfactory by many states with a long history of protection to industrial workers, and particularly when it does so over explicit objections grounded on that history, then it has an obligation to produce some evidence justifying its action. We can find none in the record here.

The Act authorizes the promulgation of three kinds of standards: interim, permanent, and emergency. For the first two years after OSHA was passed the Secretary of Labor could promulgate a preexisting standard as an interim occupational safety and health standard if he found that the standard was either a national consensus standard or was an established federal standard.

45 Brennan v. Southern Contractors Serv., 492 F.2d 498, 501 (5th Cir. 1974).
47 Id. § 655(b).
48 Id. § 660.
49 Id. at 342 (2d Cir. 1973).
50 Id. at 352-53.
51 29 U.S.C. § 652(9) (1970). The national consensus standard must: (1) Have been adopted and promulgated by a nationally recognized standards-producing
without following the requirements of the Administrative Procedure Act.\textsuperscript{48} The greatest number of national consensus standards came from the American National Standards Institute, Inc. (ANSI) and the National Fire Protection Association (NFPA).\textsuperscript{49} Established federal standards were considered proper because they "have already been subjected to the procedural scrutiny mandated by law under which they were issued."\textsuperscript{50} Although the Act gave the Secretary of Labor two years to promulgate these interim standards after the Act became effective, the initial group of these standards were announced soon after the Act became effective,\textsuperscript{61} giving a 90 day grace period to employers to come into compliance voluntarily.\textsuperscript{62}

For the Act to accomplish its intended goal standards must explicitly define employer obligations by identifying hazards and specify what must be done to eliminate hazards. Many of the original national consensus standards were so vague as to be unenforceable or by their terms imposed no duty on employers.\textsuperscript{63} Constitutional due process requires fair warning and involves the doctrine of unconstitutional vagueness. As stated in \textit{Cramp v. Board of Public Instruction},\textsuperscript{64} "[A]n act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."\textsuperscript{65}

\textsuperscript{48} Id. § 652(10). An "established Federal standard" is defined as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970." Id.
\textsuperscript{53} Id.
\textsuperscript{55} 368 U.S. 278 (1961).
\textsuperscript{56} Cramp v. Board of Public Instr., 368 U.S. 278, 287 (1961).
For example, one ANSI safety requirement for sawmills, adopted by the Secretary of Labor as a national consensus standard, required that the "hazardous area around ring barkers and their conveyors shall be fenced off or posted as a prohibited area for unauthorized persons." Both "hazardous area" and "unauthorized persons" are vague. As the court stated in *Brennan v. OSAHRAC*, "The difficulty in the present case arises from the use of the imprecise term 'impractical'. . . . The term . . . is simply not precise enough . . . . The fault lies in the wording of the regulation."

Another problem in adopting national consensus standards arises from the fact that many were written originally as guidelines for voluntary compliance and were re-promulgated as OSHA standards with the non-mandatory words changed to mandatory ones. This often changed the meaning of the rule. The court in *Secretary v. Oberhelman-Ritter Foundary, Inc.* held that for the altered wording to be valid, the changes should have been executed under the full notice procedures of the Federal Register for modification of standards since the standards lose their identity as national consensus standards when they become mandatory rather than recommended.

While national consensus and existing federal standards provided a foundation for safety improvement in the early years of the Act, the uncritical adoption of a number of these standards required careful rewriting of existing regulations to avoid overly broad regulations. If inspectors of the Labor Department must guess at the meaning of a standard and its application, the employer will certainly have an even greater difficulty interpreting and voluntarily complying with the standard.

A second type of standard is the permanent standard which may be a newly promulgated standard or a revised old standard. The Act empowers the Secretary to initiate action when suggested by interested persons, unions, representatives of employers, the Secretaries of Labor or Health, Education and Welfare, the National Institute for Occupational Health and Safety, a state or

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local government, or a nationally recognized standards producing organization.\textsuperscript{71} The Secretary may request an advisory committee to provide him with recommendations or suggestions.\textsuperscript{72} The Secretary is required to publish the proposed regulation in the Federal Register and interested persons have 30 days to submit written comments, information, or requests for a public hearing. If timely objection is made, a notice of the standard and the time and place of hearing are published in the Federal Register.\textsuperscript{73} The Secretary issues the standard within 60 days after the hearing is held unless he concludes that the rule should not be issued, although he may delay the effective date for 90 days to allow an employer to familiarize himself and his employees with the requirements of the standard. When the Secretary of Labor promulgates a standard he must publish reasons supporting the standard.\textsuperscript{74}

The Act contains provisions for granting both temporary and permanent variances from standards.\textsuperscript{75} Employees of an employer who requests a variance must be notified and given an opportunity to participate in a hearing on whether the variance should be granted.\textsuperscript{76} The Secretary of Labor may grant a temporary variance where an employer shows that he can not comply with the standard by the effective date because of lack of equipment, facilities, or personnel.\textsuperscript{77} The employer must demonstrate the steps taken to protect employees against hazards covered by the standard and must submit a plan to comply with the standard as soon as practicable before a variance is granted.\textsuperscript{78} When an employer requests a permanent variance he must show by a preponderance of the evidence that the substituted conditions of employment are as safe and healthful as those proposed by the standard.\textsuperscript{79} In granting a variance, the Secretary of Labor may provide conditions and practices which must be adopted or maintained by the employer before the variance is granted.\textsuperscript{80}

The Secretary may establish emergency standards without

\textsuperscript{71} Id. § 665(b)(1).
\textsuperscript{72} Id.
\textsuperscript{73} Id. § 655(b)(1).
\textsuperscript{74} Id. § 655(b)(8).
\textsuperscript{75} Id. § 655(b)(6)(d).
\textsuperscript{76} Id.
\textsuperscript{77} Id. § 665(b)(6).
\textsuperscript{78} Id.
\textsuperscript{79} Id. 1 665(d).
\textsuperscript{80} Id. § 665(b)(6)(d).
following the time consuming permanent standards procedure where he believes that employees are subject to grave danger from exposure to toxic or physically harmful substances or hazards and it is necessary to quickly impose a standard to protect them.\textsuperscript{81} Emergency temporary standards become effective as soon as they are published in the Federal Register but the formal rule making procedures for permanent standards must begin immediately and the emergency standards can be effective for only six months.\textsuperscript{82}

Any employer who feels adversely affected by any new published standard may challenge the standard in the United States Court of Appeals in the circuit where he resides or has his principal place of business within 60 days after its promulgation. Legal action does not stay the implementation of the standard and the standard will be upheld if "supported by substantial evidence in the record considered as a whole."\textsuperscript{83}

The significance of standards is illustrated by the most sweeping, most expensive and controversial job safety regulation ever proposed by the Labor Department in a plan to continue an existing limit of 90 decibels as the noise level at the workplace.\textsuperscript{84} It is expected that 170 witnesses will testify and it could cost 31 billion dollars to hold down job noise to levels that unions and others say are required to avoid hearing damage.\textsuperscript{85}

V. GENERAL DUTY CLAUSE

Congress added the general duty clause to cover situations where precise standards did not exist to cover all potentially dangerous situations.\textsuperscript{86} The general duty clause of the Act provides that:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{81} Id. § 665(c)(1).
\item \textsuperscript{82} Id. § 665(c)(2).
\item \textsuperscript{83} Id. § 665(f).
\item \textsuperscript{84} Mossberg, \textit{Hearings on Tough Job-Noise Ceilings Start Today, and an Up-roar Is Certain}, Wall St. J., June 23, 1975 at 24, col. 1.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} S. Rep. No. 1282, 91st Cong., 2d Sess. 9-10 (1970).
While the number of general duty clause cases continues to dwindle because of the detailed standards effective in most cases, there always will be employment situations that fall outside the scope of highly specific standards.

The legislative history of the clause, while extensive, is not dispositive of the many issues arising under the clause since much of the debate evolved around whether to include a general duty clause in the statute at all. Congress sought to embody the common law principle that, "individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others." The common law defenses of contributory negligence, fellow servant negligence and assumption of risk are not available to a general duty clause violation. The preventive and noncompensatory purposes of the Act are furthered when such common law defenses are not recognized and employer liability is based on a statutory hazard without regard to employee fault. The Act does not exact compensation for injuries nor affect workmen's compensation in any way.

A violation of the employer's general duty clause requires a finding of the existence of a hazard which arises out of a condition of employment. The hazard must be recognized and must be "causing or . . . likely to cause death or serious physical harm." The legislative history and the definition by the Department of Labor show that a "recognized hazard" is a condition that a

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93 Id. § 654 (a)(1) (1970).
94 Representative Daniels stated: "A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry." 116 Cong. Rec. 38,377 (1970).
95 A hazard is "recognized" if it is a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs and (b) detectable (1) by means of the senses (sight, smell, touch, and hearing), or (2) is of such wide general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its exist-
reasonably prudent employer would recognize as such or is recognized throughout the industry as a hazard. In *National Realty & Construction Co. v. Occupational Safety & Health Review Commission* the court stated that the standard for recognition is "the common knowledge of safety experts who are familiar with the circumstances of the industry or the activity in question." 

Though the legislative history of the term "recognized hazard" seems to suggest that it includes only those hazards which can be detected directly by the human senses, the United States Occupational Safety and Health Review Commission has held that recognized hazards also include those which can be detected only by instrumentation. In *American Smelting & Refining Co.* the company was charged with a violation of the general duty clause on the basis of tests by OSHA showing that the air in certain areas of the company’s refineries contained levels of lead dust considered hazardous by OSHA and that the industry recognized it as a hazard and had developed tests for its detection.

To establish a violation of the general duty clause it must be shown that the recognized hazard is "causing or likely to cause death or serious physical harm." The general duty clause does not cover hazards likely to produce only minor injuries or illnesses. Courts will usually defer to the Commission’s expertise
in this matter as expressed in National Realty & Construction Co.:103 "If evidence is presented that a practice could eventuate in serious physical harm upon other than a freakish or utterly implausible occurrence of circumstances, the Commission's expert determination of likelihood should be accorded considerable deference by the courts."104 While the occurrence of an accident is relevant to the issue of causation, it is not conclusive as to the type of injury that is the probable consequence of the hazard.105

In National Realty & Construction Co. v. Occupational Safety & Health Review Commission106 the court held that the Secretary of Labor has the burden of proof as to each element107 of a violation of the general duty clause. This requires the Secretary to prove that the employer failed to (a) render his workplace "free" of a hazard which was (b) recognized and (c) causing or likely to cause death or serious physical harm.108 A standard of "preventability" was used in determining whether an employer's workplace is "free" of a hazard.109 In the National Realty case a foreman was riding on the running board of a front end loader that was descending an earthen ramp when the engine stalled. The loader began to accelerate and the foreman jumped off the machine but he died when it fell on top of him. The court found that the hazard of riding heavy equipment was recognized and likely to cause death or serious physical harm but held for the employer because the Secretary failed to produce evidence as to effective and feasible measures which National Realty could have taken to prevent the hazard from existing.110

National Realty followed several decisions of the Commission. One case held that an employer furnishing an aluminum ladder to employees working near power lines did not violate the general duty clause since the employer could not reasonably anticipate that his employees would use the ladder near a power line where

shortness of breath. On the other hand, breaks, cuts, bruises, concussions or similar injuries . . . would not constitute serious physical harm. FIELD MANUAL ¶ 4360.2, at 1591 (1974).

103 489 F.2d 1257 (D.C. Cir. 1973).
104 Id. at 1265.
105 Id. at 1251 (1974).
106 489 F.2d 1257 (D.C. Cir. 1973).
107 29 C.F.R. § 2200.73(a) (1975); 489 F.2d at 1268.
108 489 F.2d 1257, 1265 (D.C. Cir. 1973).
109 Id. at 1266.
110 Id. at 1267.
wood ladders were available and the building being painted was sufficiently removed from the power line.111

Another case, Hansen Brothers Logging,112 also established a rule of practicality. The commissioners pointed out that "to require the respondent to provide one-to-one supervision of its employees would place respondent under the unreasonably burdensome duty of having to establish the whereabouts of each of its employees prior to every operation of its equipment."113 The case involved the accidental death of an employee who stepped into the swing radius of a crane used as a log loader in a logging operation. The company had instructed the employee to stay clear while the crane moved and had repeatedly reminded him of the obvious hazard. The company had no warning that the employee would disobey company policy.114

The cases show that both courts and the Commission require a finding of feasibly curable inadequacies in an employer's safety program before the employer can be cited for violating the general duty clause. The National Realty case provides guidelines for interpreting the general duty clause by enumerating the elements in the Secretary's burden of proof.

VI. RECORDKEEPING REQUIREMENTS

The recordkeeping requirements of the Act affect nearly all American businesses. Congress recognized that keeping accurate statistics is a fundamental precondition for meaningful administration of the new law,115 especially in discovering special problem areas where the accident rate is above acceptable norms.116 While accurate injury statistics do not prevent accidents, they indicate special problem areas where engineers can design improvements to prevent accidents and suggest special safety programs which can be implemented where injury rates prevail.

The Act requires that each employer keep a log of all recorda-

113 Id.
114 Id.
ble occupational injuries and illnesses that occur during the calendar year. 111 Recordable occupational injuries and illnesses include all those which result in fatalities, lost workdays, require medical treatment, involve loss of consciousness or restriction of motion, or disrupt employment by termination or transfer to another job. 112 In addition to the log of occupational injuries, a supplemental log, OSHA form 101, is used to record in detail the circumstances surrounding each recordable injury or illness 113 and at the end of the year the employer must compile and submit an annual summary of these events to the OSHA Area Director. 114 The employer must post the annual OSHA summary in a conspicuous place where notices to employees are customarily posted. 115

He must keep all the records at the establishment level 116 and make them available to compliance officers who ask to see them during the course of inspections. 117 Employers who wish to keep records in a form other than that prescribed by the Secretary may file a petition with the director of the Bureau of Labor Statistics in the region where the establishment is located. 118 The Bureau of Labor Statistics desires the record keeping system to be “brought to the lowest possible level in the company” 119 and will require “documentation and justification for an exception . . . in clearcut and unassailable terms.” 120

The Secretary of Labor has ruled that employers with no more than seven employees do not need to maintain OSHA records ex-

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111 29 C.F.R. § 1904.2 (1975) provides in pertinent part: “Each employer shall maintain in each establishment a log of all recordable occupational injuries and illnesses for that establishment . . . . Each employer shall enter each recordable occupational injury and illness on the log as early as practicable but no later than 6 working days after receiving information that a recordable case has occurred. OSHA Form No. 100, or any private equivalent may be used.”
112 Id. § 1904.12 (c).
113 Id. § 1904.4.
114 Id. § 1904.5 (a).
115 Id. § 1904.5 (d)(1).
116 Id. § 1904.6 provides that OSHA forms 100, 101, and 102 shall be kept at the establishment.
117 Id. § 1904.7.
118 Id. § 1904.13 (a).
120 Id.
cept for records of fatalities or multiple hospitalization accidents. They are, however, required to participate in any statistical survey of occupational injuries and illnesses conducted by the Bureau of Labor Statistics. The failure to maintain the records required under the Act can lead to fines and willful falsification may result in a criminal penalty. Failure to maintain OSHA forms is a prima facie violation of the regulations and the burden is on the employer to prove that his establishment is using required forms.

VII. INSPECTIONS

Enforcement of the Act is accomplished by the right of entry for government personnel to inspect the place of employment. The responsibility for enforcing the Act is placed in the Department of Labor's Occupational Safety and Health Administration (OSHA) which maintains a network of regional offices through which the OSHA Compliance Safety and Health Officers report to the OSHA Area Directors.

Inspections fall into four categories: catastrophe or fatality investigations, complaint investigations, Target Industry Program investigations, and general inspections. The first category is prompted by accidents at the workplace and the second is likely to result from employee complaints. The Target Industry Program is designed to focus inspections on certain industries with high accident frequency rates. General inspections are conducted when time and manpower permit. A study of OSHA inspections in Ohio during fiscal 1973 showed that the largest number of inspections resulted from complaints by employees. In 172 Target Industry Program inspections in Ohio during 1973 only one

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128 Id. § 1906.15(b).
129 Id. § 1904.9(b).
130 Id. § 1904.9(a).
133 Id. ¶ 4327.2, at 1534.
134 Id.
135 Id. at 1535.
third of the establishments were found in compliance with the Act.\textsuperscript{138}

Generally the employer has no advance notice of an inspection since Congress provided that any person giving advance notice without authority can be criminally fined or imprisoned.\textsuperscript{139} Congress was convinced that advance notice of inspections under the Walsh-Healey Act\textsuperscript{140} was a "prime cause of the breakdown in that statute's enforcement provisions."\textsuperscript{141} The inspector usually arrives during normal business hours although if he feels that the inspection would be more appropriate during nonbusiness hours, the employer can expect prior notice.\textsuperscript{142} The inspector must identify himself to the person in charge, advise him of the purpose of the visit, and present appropriate credentials.\textsuperscript{143} The Occupational Safety and Health Review Commission has vacated a citation because the inspector failed to present his credentials to the employer before beginning the inspection.\textsuperscript{144}

Compulsory process may be obtained against any employer who refuses to permit a compliance officer to inspect,\textsuperscript{145} though employers can not receive a sanction for refusing to allow a warrantless entry.\textsuperscript{146} While language of the Act seems to eliminate the need for a search warrant,\textsuperscript{147} the safeguards of the fourth amendment do apply to businessmen as well as occupants of residences.\textsuperscript{148} Once a determination is made that a warrant is necessary, the regional solicitor obtains a warrant\textsuperscript{149} and the compliance officer has 24 hours to commence the inspection.\textsuperscript{150}

An opening conference takes place when a compliance officer enters the premises, during which employer and employee repre-

\textsuperscript{138} Id. at page 3.
\textsuperscript{139} 29 U.S.C. § 666(f) (1970); also 29 C.F.R. § 1903.6(a) (1971).
\textsuperscript{142} 29 C.F.R. § 1903.6(a)(2) (1975).
\textsuperscript{143} Id. § 1903.7(a).
\textsuperscript{145} 29 C.F.R. § 1903.10 (1975).
\textsuperscript{149} FIELD MANUAL ¶ 4330.4 (1974).
\textsuperscript{150} Id. at 1548.
sentatives are designated to accompany the compliance officer during his inspection of the worksite. The Act mandates that a representative of both the employer and the employees be given the opportunity to accompany the safety inspector, since Congress sought to have the employees know of the extent to which safety and health laws were being enforced. If no union or safety committee designates an employee representative, the employees may select one of their number to represent them and accompany the compliance officer while he makes the inspection, which is known as the "walkaround."

While an employee representative has the right to participate in the "walkaround", there is no provision for payment of the employee for the time spent accompanying the inspector. A controversial regulation provides that employers generally need not pay employees for time spent on the walkaround.

If the inspector discovers a violation of the law or a standard, he records the facts on an OSHA-1 form and reports it to the area director after completing the inspection. At the end of the inspection the inspector advises the employer of the conditions that may constitute violations of OSHA as well as possible citations and penalties that may be forthcoming at a closing conference. The closing conference is not a mandatory element of the inspection and failure to hold a conference does not invalidate an inspection. The area director must decide whether to issue a citation within the Act's six month statute of limitations period.

If the compliance officer feels that a condition is likely to cause death or serious injury before the danger can be corrected by the usual procedures, he can recommend seeking an injunction to restrain the condition. A follow-up inspection occurs after a period allowed for abatement in the case of a willful or repeated

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134 Field Manual ¶ 4330.6, at 1553 (1974).
135 Id. at ¶ 4330.9.
violation, or where a restraining order has been issued. Action taken by an employer to contest a citation delays a follow-up inspection unless and until the Commission affirms the citation.

VIII. CITATIONS AND PENALTIES

The area director, after reviewing the inspection report made by the compliance officer, decides if violations are present on the employer's premises and whether to issue a citation and, if appropriate, penalties. The type of citation depends on the type of violation discovered. The Act classifies violations as either serious or nonserious, while an additional classification, *de minimis*, is defined in the guidelines established by the Department of Labor. A serious violation exists if a substantial probability of death or physical harm exists and the employer knew or with reasonable diligence should have known of the hazard. A finding of a serious violation results in a mandatory penalty of up to $1,000 per violation. If the situation is not sufficiently dangerous to cause serious harm it is considered a nonserious violation. If the violation has no immediate or direct relationship to health and safety it is described as a "de minimus notice" which does not result in a citation and carries no proposed penalty.

A notice, sent by certified mail, describes with particularity the nature of the violation and refers to the rule allegedly violated. It fixes a reasonable time for the abatement of the violation and advises employers of their right to a hearing. The employer must post the notice at or near each place where a violation occurred. The Commission has dismissed violations when the citation referred to inapplicable standards or when a general standard was cited instead of the applicable specific standard.

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103 Field Manual ¶ 4331.6 (1974).
104 29 C.F.R. § 1903.15(a); 1903.18(a) (1975).
108 Id. at 1589-91.
111 Id. at 1592.
113 Id.
114 Id. § 658(b).
In determining the time for abating a particular violation, the compliance officer considers the seriousness of the violation, the number of exposed employees, and the availability of personnel and equipment necessary to correct the situation. The regulations require employers to submit progress reports of specific corrective action taken to correct the unsafe condition where the abatement period does not exceed 30 days. Where periods longer than 30 days are required for abatement the employer must submit 30 day progress reports.

The Act authorizes a penalty of up to $10,000 per violation for each willful or repeated violation. The death of an employee due to a willful violation can result in criminal penalties of not more than $10,000 or imprisonment of up to six months, or both, while a second conviction involving death may result in a fine of up to $20,000 or imprisonment for up to one year, or both. A citation for a serious violation subjects the employer to a potential penalty of up to $1,000. A de minimus or nonserious violation of the general duty clause does not result in a penalty.

Failure to correct a cited violation within the time allotted for abatement may result in a penalty of up to $1,000 per day after the expiration of the abatement period. A penalty may be adjusted downward by up to 50 per cent, depending on the employer's good faith (20 per cent), size of business (10 per cent), and history of previous violations (20 per cent). The Labor Department has established an even more complicated formula for determining nonserious violation penalties. The formula considers the gravity of the violation by taking into account the severity of the injury or disease likely to result, the extent to which the Act was violated, and the likelihood of the injury.

The Commission's general trend has been to take into account...

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175 Id.
176 Id.
179 Id. § 666(b).
183 Id. at 1625-27.
the particular facts of each case rather than merely apply the penalty formula of the Secretary of Labor. In the case of *Nacirema Operating Co., Inc.* the Commission held that no precise formula may rationally be utilized for consideration of each of the four statutory criteria (gravity of the violation, good faith of the employer, employer size, and history of prior violation) in determining the amount of the penalty assessed since each case contains facts and circumstances peculiar to it alone. In *Chilton Millwork & Lumber Co.* it expressed its feelings against the automatic imposition of a minimum penalty in nonserious violation cases on the grounds that "minor monetary penalties" do not accomplish the basic purposes of the Act.

An employer has fifteen days in which to contest a proposed penalty, the citation upon which it is based, or both. Written notification to the area director that an employer intends to contest the citation or penalty should include the disputed allegations since an allegation is deemed admitted if it is not specifically denied. The employer must notify his affected employees or their authorized representative of his intention to contest and inform them of their right to party status. The Labor Department notifies the Occupational Safety and Health Review Commission which places the action on the commission docket. The Commission functions as an independent adjudicatory agency whose hearings are conducted under the provisions of the Administrative Procedure Act.

A single administrative judge presides over the hearing and writes an opinion which is subject to review by the three member Commission at its discretion. A party's petition for review by the Commission must be received by the Commission within 20 days from that body's receipt of the judge's decision. If no member of the Commission requests review of the administrative judge's order within 30 days, the order becomes the final order of the

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188 Id. § 2200.7(f)-(g) (1972).
190 Id. § 659(c).
191 Id. § 661(f).
192 29 C.F.R. § 2200.91(b) (1975).
Any party has the right to appeal the order of the Commission or of the administrative judge to the circuit court of appeals if review by the Commission is not granted. The court may affirm, modify, or set aside an order of the Commission or grant temporary relief or a restraining order to stay the order of the Commission.

IX. IMMINENT DANGER

Section 13 of the Act sets forth procedures to counteract imminent dangers, defined as conditions and practices "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated" through the enforcement procedures otherwise provided by the Act. The compliance officer must inform the employer and employees of his discovery of an imminently dangerous situation and of his intention to recommend that the Secretary of Labor petition a United States district court to enjoin these conditions and practices.

If the Secretary of Labor arbitrarily or capriciously fails to seek relief, the Act gives to "any employee who may be injured by reason of such failure" the right to bring a mandamus action "to compel the Secretary to seek an [injunctive] order and for such further relief as may be appropriate." One writer has suggested that employees really depend on the judgement of the Secretary of Labor in cases of imminent danger because unless the courts construe the statute by constructive interpretation into a meaningful form of relief, no relief is really available because mandamus is unsatisfactory because of unacceptable delay or uncertainty about the applicability of the writ to contested facts and temporary restraining orders customarily only preserve the status quo.

The court has broad powers to enforce correction of imminent dangers. It may take steps "necessary to avoid, correct, or remove"

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184 Id. § 660(a).
185 Id.
186 Id. § 662.
187 Id.
188 Id. § 662(c).
189 Id. § 662(d).
the danger and may order the operation shut down by denying employment or the presence of any individual where the danger exists.\(^{201}\) The Secretary does not apply the imminent danger section to a hazard which causes physical impairment over a period of time because it could not reasonably be expected to cause death or serious physical harm immediately.\(^{202}\) A health hazard may constitute an imminent danger, usually in extreme situations, such as where a high concentration of airborne toxic substances exists which presents an immediate threat to the lives or health of employees.\(^{203}\) This position appears to be contrary to the legislative history of the Act where the House Committee Report expressly stated that the "section is intended to include the restraining of a specific industrial operation in which lethal substances or conditions are present and exposure to these will cause irreversible harm, even though the resulting physical disability may not manifest itself at once."\(^{204}\) Where a working condition threatens occupational health as well as safety the imminent danger provisions of the Act should apply.\(^{205}\)

X. Federal-State Relationship

The Act does not preclude state action in the field of job safety and health matters and provides for state participation in the federal regulatory scheme. Indeed, one writer describes the relationship this way: "[T]he Act contemplates that the federal government will supervise, coordinate and, to some degree, finance the activities of the states in this area as a skilled conductor directs the efforts of the musicians in his orchestra so that, from the efforts of all, one harmonious sound arises."\(^{206}\)

A state may submit a plan for the development and enforcement of standards to the Secretary of Labor for approval\(^{207}\) and the plan will be approved if it meets or will meet the requirements set

\(^{203}\) Id.
out in the Act. If the Secretary of Labor approves the state plan, the state and the federal governments share concurrent jurisdiction for a minimum three year probationary period. If the Secretary determines that the state plan is "at least as effective" as OSHA he may grant final approval to the state plan. Those areas covered by the state plan after final approval by the Secretary are no longer covered by OSHA except for general duty violations, where concurrent jurisdiction obtains. The Secretary of Labor has authority to revoke approval of a state plan, after giving the state an opportunity for a hearing, upon showing that the plan is not being enforced.

A number of states have approved plans in operation and others are planning to submit plans. A state plan must satisfy a number of statutory and regulatory requirements in order to merit approval by the Secretary. Among the requirements are the regular submission of reports to the Secretary, employer maintenance of records to the same extent as they would have had to be maintained under OSHA, prohibition of advance notice inspections, and the right of entry and inspection as effective as that which exists under the federal act.

**CONCLUSION**

OSHA is the result of years of ineffective enforcement by the states in the field of industrial health and safety. The Act holds bright promise for improving job safety. Statutory protection to achieve the worthy objectives of a healthful, safe working place for all Americans will require the assistance of employers and employees alike. Already industry is using its purchasing power to buy only those pieces of equipment which have built-in safety features and employee cooperation and awareness of good safety and health practice is increasing.

While problems exist in inadequate funding of safety and health programs and in the adoption of overly broad regulations,
these problems can be overcome with additional funds and with a dedicated effort to rewrite existing regulations to clearly identify particular hazards. The Secretary of Labor has been given a broad grant of power under the Act to conduct inspections and make regulations and this responsibility must be met with effective standards, strict enforcement, and additional research. The Act does place additional responsibilities on the employer and will not eliminate all the hazards of the job since many are caused by the negligence of workers themselves. The Act is a major step on the part of the federal government to wind down and end the senseless carnage of the workplace and with union-management cooperation it will provide the impetus to reach the worthy and realistic goal of a safer workplace which ultimately involves the well being of people.