

A LEGACY OF FAILURE: IMMIGRANT LABOR AND THE OCCUPATIONAL SAFETY & HEALTH REGIME

*Jayesh M. Rathod**

INTRODUCTION

The United States is witnessing an epidemic of workplace fatalities and injuries among foreign-born workers, particularly among those of Latino origin.¹ This article is the first in a series of three articles, together forming a scholarly project that unearths the causes of, and proposes remedies for, this epidemic. This first contribution, *A Legacy of Failure*, examines how the history, structure, and operation of the Occupational Safety and Health Administration (“OSHA”) have worked to obscure the workplace safety concerns of immigrant workers, and have left these workers with no meaningful voice in the regulatory regime. The second article in the series, entitled *Dying to Work*, will explore how labor and immigration laws, operating in the context of shifting economic, social, and political currents, affect the behavior of immigrant workers with respect to occupational safety and health. The final article will analyze this phenomenon from the perspective of employers who hire immigrant workers, and will consider the multiple forces that influence their perceptions of immigrant labor, and correspondingly, their decisions vis-à-vis workplace safety and health.

In this first article, I offer a critique of the Occupational Safety and Health Administration (OSHA), which has been complicit in the subordination and exploitation of the immigrant workforce, and has tacitly condoned employers’ non-compliance with occupational safety laws. Specifically, I argue that structural features of the occupational safety and health regime have historically disadvantaged the most marginalized workers in the U.S., and have prevented OSHA from fulfilling its statutory mandate. These structural limitations, when coupled with the multiple ways

* Practitioner-in-Residence, American University Washington College of Law. Prior to joining the faculty at American, the author was a Staff Attorney at CASA of Maryland, where he represented day laborers, domestic workers, and construction workers in employment and immigration matters.

¹ In this article, I use the term “Latino” to describe persons of Latin American ancestry. Much of the federal government data regarding occupational safety and health relies upon the term “Hispanic.”

in which law and society have subordinated foreign-born workers, have rendered these workers particularly susceptible to workplace injuries and deaths.²

In Part II of this Article, I will detail recent epidemic of occupational fatalities and injuries among foreign-born workers in the United States, drawing particular attention to the plight of Latino immigrant workers, who are at greatest risk for workplace fatalities. In Part III, I will explore the origins of the federal Occupational Safety and Health Act (*hereinafter*, “the Act”), the broad mandate of OSHA, and its oversight and enforcement functions. Following this discussion, in Part IV of the paper, I will expose how the same structure and operations of OSHA (described in Part III) contain inherent limitations, which impede OSHA’s ability to execute its mandate, and have disadvantaged immigrant workers. I close the paper with a set of recommendations – tailored specifically towards the regulatory regime – that can be implemented to curtail this epidemic of fatalities and injuries. These recommendations serve a broader purpose of reclaiming the agency of the most vulnerable workers in our society and their advocates, and bringing an end to the legacy of their invisibility in the occupational safety and health regime.

I. THE EPIDEMIC OF WORKPLACE FATALITIES AMONG FOREIGN-BORN WORKERS IN THE UNITED STATES

The incidence of workplace injuries and deaths among foreign-born workers in the United States is reaching new heights.³ In recent years, stories have emerged from across the country, together displaying a disturbing pattern. On the Las Vegas Strip, construction of the new “City Center” residential and commercial complex has resulted in the deaths of

² Also underlying this epidemic of workplace injuries and fatalities is the ongoing political debate relating to the role of the immigrant worker in the United States. In recent years, this debate has propagated a troubling public discourse and a clear legal backslide – both of which are anchored in the commoditization of immigrant (in particular, Latino immigrant) labor. This first article will focus primarily on the structure and operations of federal and state regulatory agencies related to workplace safety and health. While it is difficult to draw a direct causal connection line between these deep-seeded social and political currents and the specific policy choices made by government regulators, these currents nevertheless contribute heavily to this epidemic. In the articles that will follow *A Legacy of Failure*, I will more closely examine how these factors subtly influence law, and in turn, the choices that workers and employers make with respect to occupational safety and health.

³ Most of the statistics that follow relate to fatalities among foreign-born workers, as opposed to injuries or illnesses. The United States government does not make data available regarding injuries or illnesses among foreign-born workers.

almost a dozen immigrant workers, most of whom have fallen from upper levels of the structure, due to inadequate fall protection equipment.⁴ In the agricultural fields of central California, with no access to water, an immigrant farm worker recently died of heatstroke and dehydration. And along the East Coast of the United States, particularly in strong housing markets, a spike in residential renovation and landscaping work has come at a significant cost: countless debilitating injuries among immigrant laborers.

These news reports regarding workplace fatalities among immigrants are supported by the data collected by the U.S. government and other sources.⁵ Over the last several years, data from the federal Bureau of Labor Statistics (BLS) has consistently shown that foreign-born workers account for approximately 20% of all workplace fatalities in the United States.⁶ For the year 2006, the BLS reported that of a total of 5,840 workplace fatalities, 1,046 (or 17.9%) of these fatalities involved foreign-born workers.⁷ Among the foreign-born worker fatalities in 2006, 667 (or 11% of the total number of fatalities) were foreign-born *Latino* workers. In absolute numbers, both of these figures were the highest ever recorded by the BLS for the time that this data has been kept.⁸ The BLS has released only preliminary data for 2007, but the initial data reported suggest that the trend has continued to the present.

As suggested above, the number of work-related fatalities involving Latino workers in the United States has steadily increased.⁹ According to the BLS, in 2005, fatal work injuries among foreign-born Latino workers

⁴ Alexandra Berzon, “Workers walk off CityCenter site in protest,” *Las Vegas Sun*, June 3, 2008.

⁵ The Bureau of Labor Statistics (BLS), a subdivision of the U.S. Department of Labor, is the most comprehensive source of statistics about workplace injuries and fatalities. BLS obtains its data by surveying nearly 300,000 representative workplaces. BLS data is necessarily incomplete, as many employers simply are not surveyed, and the agency relies upon voluntary reporting for those it does survey. Many immigrant workers are employed in relatively unregulated industries, by smaller employers, which makes the reporting of workplace injuries and deaths even more unlikely.

Although the BLS plays an important role in the collection and distribution of data, its data has significant limitations. As noted above, the BLS does not distribute data on occupational injuries among foreign-born workers. Additionally, BLS does not provide make the raw data relating to foreign-born workers publicly available.

⁶ Bureau of Labor Statistics, U.S. Department of Labor

⁷ Bureau of Labor Statistics, Revisions to the 2006 Census of Fatal Occupational Injuries File.

⁸ Bureau of Labor Statistics, Revisions to the 2006 Census of Fatal Occupational Injuries File (describing these figures as a “series high”).

⁹ Committee on Earth Resources, National Resource Council, *Safety is Seguridad: A Workshop Summary*, at 47, available at <http://www.nap.edu/catalog/10641.html>

increased by nearly five percent over the previous year, reaching 625 fatalities.¹⁰ The number jumped once more in 2006, to 667 fatalities. Indeed, Latino immigrants have comprised the majority of workplace fatalities among foreign born workers in recent years; the preponderance of these workers has been from Mexico.

The data reported in the last few years is only one component of a much longer trend. Between 1992 and 2002, for example, the incidence of workplace fatalities among foreign-born workers increased by 46 percent. And because approximately half of the foreign-born workforce is of Latino origin,¹¹ fatalities among Latino workers also increased during that same period, by approximately one-third. Yet during the same period, the overall number of workplace fatalities decreased from 6,217 in 1992, to 5,524 in 2002. (As noted above, however, the total number of workplace fatalities has increased slightly in recent years.)

This rise is not attributable solely to an increased proportion of foreign-born employees in the workforce. For example, although the share of foreign-born employment increased by 22 percent between 1996 and 2000, the share of fatal occupational injuries for this same population increased by 43 percent.¹² Moreover, the proportion of fatalities suffered by foreign-born workers in the United States consistently has been greater than the BLS's estimates as to the foreign born workforce generally.

According to recent studies, Latino men have the greatest overall relative risk of fatal occupational injury of any gender, race or ethnic group. Their risk of dying on the job is 22 percent higher for Latino men than the relative risk for all men. When data regarding occupational fatalities for foreign-born workers is disaggregated, the most significant risk factor for these workers' relative fatality risk appears to be their region of origin.¹³

¹⁰ Bureau of Labor Statistics, News Release, National Census of Fatal Occupational Injuries in 2005 (August 10, 2006) (on file with author).

¹¹ AFL-CIO (citing Bureau of Labor Statistics). Approximately 22 percent are Asian.

¹² Loh, Katherine and Richardson, Scott, "Foreign-born Workers: Trends in Fatal Occupational Injuries, 1996-2001," *Monthly Labor Review*, June 2004. A separate study found that Latino immigrants comprise 11 percent of the U.S. labor force, yet experienced 14 percent of the fatal occupational injuries in the year 2000. New York Committee for Occupational Safety and Health, "Workplace Safety and Health Issues Confronting Immigrant Workers: NYCOSH Testimony to the Senate Subcommittee on Employment, Safety, and Training of the Committee on Health, Education, Labor, and Pensions" (February 27, 2002) (on file with author).

¹³ Loh and Richardson.

A. Dangerous Industries

Apart from the region of origin, other important determinants of risk for occupational fatalities and injuries are occupation, and also the industry in which the worker is employed. Immigrant workers are more likely to be employed in construction, manufacturing, transportation, and the service (e.g., leisure and hospitality) industries, as compared with the native-born population.¹⁴ Logically, the trends of increased workplace fatalities and injuries map directly onto these industries. According to the 2005 National Census of Fatal Occupational Injuries, conducted by the BLS, fatal work injuries were highest in the private construction sector in 2005, as compared with any other industry.¹⁵ The construction sector led with the greatest number of fatalities in both 2006¹⁶ and 2007.¹⁷ Similarly, the AFL-CIO has reported that nearly one in four fatally injured foreign-born workers was employed in the construction industry.¹⁸

For Latino immigrant workers, the construction industry led the number of fatalities suffered by that population; approximately 30% of foreign-born Latino workers who had suffered fatal workplace injuries in recent years were employed in that sector.¹⁹ The risk of Latino immigrant construction workers is disproportionate to their representation in the industry. In 2000, Latino construction workers made up less than 16 percent of the construction workforce, but suffered 23.5 percent of the fatalities. In that same year, Latino construction workers were nearly two times more likely to be killed by occupational injuries than their non-Latino counterparts.²⁰

Fatal accidents in the construction industry range in nature, from transportation accidents to falls or contacts with objects and equipment. These broad categories – transportation accidents, and falls or contacts –

¹⁴ Bureau of Labor Statistics, Labor Force Characterization of Foreign-Born Workers.

¹⁵ There were 1,186 fatal work injuries in 2005 in the private construction sector, out of a total of 5,702 fatalities. Bureau of Labor Statistics, News Release, National Census of Fatal Occupational Injuries in 2005 (August 10, 2006) (on file with author).

¹⁶ Bureau of Labor Statistics, Revisions to the 2006 Census of Fatal Occupational Injuries File.

¹⁷ Bureau of Labor Statistics.

¹⁸ AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs* (August 2005).

¹⁹ Bureau of Labor Statistics.

²⁰ Xuwen Dong, M.S., and James W. Platner, “Occupational Fatalities of Hispanic Construction Workers from 1992 to 2000,” *American Journal of Industrial Medicine*, Vol. 45, No. 1 (2004), at 45-54.

account for nearly half of the workplace fatalities among foreign-born workers. Nearly one-quarter of the fatalities among foreign-born workers were attributed to assaults and violent acts, typically in the retail and transportation industries.²¹

B. Occupational Safety & Health Data: Additional Considerations

Additional considerations are important in the evaluation of the data. First, the available data does not specify the relative size (in terms of employees) of the workplace where the fatality occurred. Studies have shown, however, that fatal and serious accidents are more likely to occur in small and mid-size businesses, for various reasons. Smaller employers lack the resources and expertise to improve safety practices. Moreover, because smaller outfits tend to have abbreviated life-cycles, they typically have less incentive (and indeed, less capacity) to improve the safety infrastructure of their workplaces. In addition, smaller firms are less concerned about negative publicity or backlash from consumers.²²

Second, although the data regarding foreign-born workers are alarming, it is likely that injury and death rates for immigrant workers are vastly undercounted. With insecure immigration status, restricted ability to work (particularly in the case of temporary employment visas), and/or a lack of marketable job skills, immigrant workers are less likely to report injuries, or aggressively pursue the reporting and investigation of the fatalities of family members or colleagues. Although many immigrant workers may be inhibited from reporting as a result of to fear of immigration consequences or termination from their jobs, others are simply unaware of the range of protections and benefits available to non-citizens in the areas of occupational safety and health.²³ An additional factor, as referenced above, is the employment of significant numbers of immigrant workers in the “informal” economy, where there is little training, high turnover, and a fundamental lack of accountability by employers – in short, where immigrant labor is treated as an expendable commodity. Finally, as noted above, the BLS does not release data on the numbers of foreign-born workers who have experienced workplace injuries in the United States.

Third, despite perceptions to the contrary, this level of fatalities and

²¹ AFL-CIO, *Immigrant Workers at Risk*, at 3.

²² See Fiona Haines, *Corporate Regulation: Beyond “Punish or Persuade”* 9, 131-37 (1997).

²³ Workers may not even identify some of their “aches and pains” as compensable work-related injuries or illnesses.

injuries in the workplace are not a necessary byproduct of an industrialized economy. As compared with most other industrialized countries, American workplaces are objectively more dangerous. In fact, studies have shown the United States has the worst safety record for construction fatalities among many industrialized nations.²⁴ To cite one example: during a recent 10-year period, approximately 2,200 Americans died in scaffolding accidents. Japan, on the other hand, did not have a single scaffold-related death during that period.²⁵ This comparison suggests that the failures of the occupational health regime are attributable to a unique set of historical conditions and present-day factors.

Another fourth consideration when examining the data is that, as a general matter, inexperienced workers typically have higher injury rates than workers who are more familiar with their jobs and the tasks involved.²⁶ Also, young male workers tend to have very high injury rates – in part, because they are given more hazardous jobs, and in part because they tend to be less risk-averse and to behave more recklessly.²⁷ Although demographic data regarding the foreign-born population in the United States is typically incomplete or unreliable, BLS data, along with data regarding migration patterns suggest that the foreign-born workforce is disproportionately male, and leans towards younger workers. As explored more fully below, this does not suggest that country of origin is inconsequential to the workplace safety calculus. Rather, the more logical conclusion is that gender and age are factors that bring into relief the challenges posed by national origin.

Finally, underreporting by *employers* may also contribute to inaccuracies in the data. Some employers have complained that the reporting provisions in the Act are unclear.²⁸

Having considered these limitations (and complications) of the data, the statistical and anecdotal evidence still suggest a troublesome trend of occupational fatalities among foreign-born workers, especially Latino immigrants. The sections that follow explore how the federal and state regulatory regime has contributed to this trend.

²⁴ McGarity, at 4.

²⁵ McGarity, at 4. Although one would want to look at the absolute numbers of workers in the two countries that would have been susceptible to the injuries, this statistic

²⁶ Mendeloff, *Regulating Safety*, at 100.

²⁷ Mendeloff, *Regulating Safety*, at 101.

²⁸ Mendeloff, *Regulating Safety*, at 138.

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT: HISTORY, MANDATE, AND STRUCTURE

In examining the root causes of the recent spike in workplace injuries and fatalities among immigrants, a natural starting point is OSHA, the federal agency charged with protecting the nation's workers. OSHA's core responsibilities are to establish, and to enforce, laws and regulations related to workplace safety and health.²⁹ In order to understand the limitations of OSHA as it currently operates, it is necessary to examine the history of OSHA and the Act. Below, I examine that history, and describe the basic structure and operations of the regulatory regime.

A. Workplace Safety Before OSHA

Before the Act was passed, responsibility for regulating workplace safety and health was left to state agencies. Prior to the Act, the role of the state was "to educate employers" about workplace safety matters, but not to obtain full compliance or modify the economic incentives that employers faced.³⁰ States occasionally resorted to criminal trials as a vehicle for redressing workplace fatalities.³¹ For most workplace safety and health violations, however, fines were rare.³²

B. History of OSHA and the Act

The Occupational Safety and Health Act, enacted in 1970, marked the culmination of nearly a century of organized activism related to workplace safety and health in the United States. With the arrival of the industrial revolution, and the accompanying mechanization of work which introduced new dangers to the low-wage workforce, the call for worker protections intensified. The growing strength of unions around the turn of the century, and in the early part of the 20th century, facilitated the passage of important factory safety legislation. Continued attention to the issue over the decades that followed, and a sequence of high-profile accidents in mining and other industries, laid the political foundation for the Act.

²⁹ Occupational Safety and Health Act, § 2.09 (purpose and intent); Lofgren, *Dangerous Premises*, at 1.

³⁰ Mendeloff, *Regulating Safety*, at 1.

³¹ Mendeloff, *Regulating Safety*, at 1.

³² Mendeloff, *Regulating Safety*, at 83-85.

Unions played a prominent role in the passage of the Act.³³ As late as the mid-1960s, however, occupational safety and health did not figure prominently on the political agenda for organized labor.³⁴ Although significant legislative proposals relating to occupational safety and health began to surface in the late 1960s, at that time, unions did not embrace them as a top-priority matter.³⁵

A series of public incidents began to turn the tide related to workplace safety and health. In November 1968, a blast killed 78 miners in Farmington, West Virginia.³⁶ Around the same time, a movement was emerging to assist those who suffered from black lung disease, suffered by workers in the coal industry.³⁷ By 1970, organized labor began to prioritize a comprehensive workplace safety bill.³⁸

As different versions of the legislation were introduced, discussions arose as to how much authority would reside within the Department of Labor, and how much would be left to an independent agency. Ultimately, the responsibility for standard-setting and inspections were left with the Department of Labor.³⁹ The Act was signed into law by President Nixon in December 1970.

³³ Some authors have noted that unions pushed aggressively for the passage of the Act, in part because it could not achieve similar protections through the collective bargaining process. *See, e.g.*, Mendeloff, *Regulating Safety*, at 16 (describing how, prior to the Act, many unions were unable to bargain effectively regarding workplace safety and health concessions). Interesting parallels exist to unions' current-day efforts to achieve a federal legislative fix for the health care crisis, given the challenges of addressing their members' needs through collective bargaining.

³⁴ Mendeloff, *Regulating Safety*, at 17.

³⁵ Mendeloff, *Regulating Safety* at 17.

³⁶ "Farmington: 'fires of hell' killed 78 coal miners," *Huntington Advertiser*, November 20, 1978; Mendeloff, *Regulating Safety*, at 17.

³⁷ Mendeloff, *Regulating Safety*, at 17-18.

³⁸ Mendeloff, *Regulating Safety*, at 18. As Mendeloff explains, political considerations partly explained the sudden prominence of workplace safety on the unions' agenda. One of the most vocal supporters of federal legislation was I.W. Abel, president of the Steelworkers. Abel may have been motivated by his alliance with the Mine Workers, or by emerging health and safety concerns within his own union. Mendeloff, *Regulating Safety*, at 18.

³⁹ One might conclude that Unions favored this arrangement because of their close connections with the then-existing Department of Labor. Senator Holland (D-XX) remarked that, in the minds of both employers and the public, "the Labor Department always . . . is most sympathetic in its attitude towards the labor organizations." Mendeloff, *Regulating Safety*, at 20 (quoting U.S. congress, Senate, Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970*, 92nd Cong., 1st sess., June 1971, p. 476).

To provide some context to this history of OSHA: during this period of American history, immigrant workers played a notable, but largely invisible role in the economy. Although farm worker organizing efforts were gaining prominence around this time, the workers whose plight drew attention to workplace safety issues – and the unions who advocated for the law – had few, if any, ties to the foreign-born workforce.

C. Structure, Standards & Rulemaking

The Act sets out a broad mandate for the promotion and protection of occupational safety and health. The stated purpose of the Act is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁴⁰ The Act also includes a “general duty clause,” which requires every employer “to 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.”⁴¹

One of the core responsibilities of OSHA is the promulgation of regulations (commonly known as “standards”) related to occupational safety and health. Around the time the Act was being some standards already existed regarding workplace safety and health. Some of these standards were part of federal law, and were being enforced by the Department of Labor.⁴² Another set of standards, commonly known as the “consensus” standards, were guidelines developed largely by industry representatives, with some contributions, and ultimately, assent, from government and organized labor.⁴³ Congress sought to integrate these protections into the OSHA framework by requiring the Secretary of Labor to promulgate existing standards within two years of the effective date of the Act.⁴⁴ Under Section 4(b)(2) of the Act, certain federal standards were automatically incorporated into the new regulatory structure, with the adoption of the Act.

All of the consensus and federal standards were promulgated by OSHA on May 29, 1971.⁴⁵ Observers criticized the “hasty and wholesale

⁴⁰ 29 U.S.C. § 651.

⁴¹ 29 U.S.C. § 654(a)(1)

⁴² Mendeloff, *Regulating Safety*, at 36; *see generally* Walsh-Healey Contracts Act?

⁴³ Mendeloff, *Regulating Safety*, at 36.

⁴⁴ OSHA § 6(a).

⁴⁵ Mendeloff, *Regulating Safety*, at 38.

adoption” of the standards, which, in some cases, contained errors, were inapplicable to health and safety matters, were vague, or had been misprinted by OSHA in its posting in the Federal Register.⁴⁶

Since the passage of the Act and the initial adoption of standards, numerous other regulations have been promulgated by the Secretary of Labor, who is authorized to develop permanent standards. Pursuant to Section 6(b)(1) of the Act, the Secretary may propose, revoke, or modify a standard whenever she “determines that a rule should be promulgated in order to serve the objectives of this Act ...”⁴⁷ Individuals who are adversely affected by an OSHA standard may appeal its validity to the U.S. Court of Appeals, before which the Secretary’s determinations will hold “if supported by substantial evidence.”⁴⁸ (Note that although the Act refers to the Secretary of Labor, within the Department of Labor, decisions on standards are delegated to the head of OSHA.⁴⁹) The Act also allows for an informal rulemaking process, with the intent of accelerating needed protective regulations.

OSHA standards are meant, *inter alia*, to prescribe the use of protective equipment, labels, and other measures, and to clarify the appropriate levels of exposure to potentially harmful particles and chemicals. In adopting standards, OSHA must consider whether “engineering controls,” as opposed to the use of personal protective equipment, can ameliorate any health and safety risks. Before turning to personal protective equipment, “feasible administrative or engineering controls must first be determined and implemented in all cases.”⁵⁰

⁴⁶ Mendeloff, *Regulating Safety*, at 39.

⁴⁷ Mendeloff, *Regulating Safety*, at 48.

⁴⁸ OSHA § 6(f). When reviewing the propriety of a Section 6 standards, courts typically look at the following factors:

- (1) whether the Secretary’s notice of proposed rulemaking adequately informed interested persons of the action taken;
- (2) whether the Secretary’s promulgation adequately set forth the reasons for action;
- (3) whether the statement of reasons reflects consideration of factors relevant under the statute;
- (4) whether presently available alternatives were at least considered; and
- (5) if the Secretary’s determination is based in whole or in part on factual matters subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.

Synthetic Organic Chemical Manufacturers Association v. Brennan, 503 F.2d 1160 (1974).

⁴⁹ Mendeloff, *Regulating Safety*, at 51.

⁵⁰ Mendeloff, *Regulating Safety*, at 43; Walsh-Healey Act.

Employers have the obligation of complying with standards promulgated by OSHA, which are designed to require conditions and practices “reasonably necessary or appropriate” to provide safe or healthful employment.⁵¹ Employers may seek a variance from a standard, “if an equal or better protective method is found.”⁵²

Beyond these general guidelines, there is no established priority-setting process for OSHA regulations. The high-level administrators at OSHA are typically political appointees; therefore, the focus of the standard-setting process – and the general level of engagement on workplace safety issues – may vary depending upon the administration in power.

To inform the rulemaking process, the Act created the National Institute for Occupational Safety and Health (NIOSH), which was situated within the agency now known as the Department of Health and Human Services.⁵³ The mandate of NIOSH is to conduct research and analysis upon which OSHA can base its occupational safety and health standards.⁵⁴ NIOSH also educates the public about workplace safety and health issues.⁵⁵

The standard-setting process has been criticized by employers for the limited attention it gives to the issue of cost.⁵⁶ In the early years of the Act, efforts were made by some within the federal government to draw attention to the costs associate with OSHA standards. These efforts were met with resistance.⁵⁷ Currently, the Act allows the Secretary of Labor to consider whether implementation of a standard is “feasible.” Beyond this standard, however, there is little concrete guidance regarding the appropriate weight to be given to costs when deciding upon new standards.

The Act contemplates that state governments may play an active role in the promotion of occupational safety and health, and in the enforcement of OSH standards. Pursuant to the Act, OSHA may delegate primary enforcement authority to states, provided that the state enforcement does not leave workers with less protection than federal enforcement would

⁵¹ 29 U.S.C. §§ 654(a)(2), 652(8).

⁵² Lofgren, *Dangerous Premises*, at 1.

⁵³ Mendeloff, *Regulating Safety*, at 1.

⁵⁴ 29 U.S.C. § 656(a)(2).

⁵⁵ Lofgren, *Dangerous Premises*, at 1.

⁵⁶ Mendeloff, *Regulating Safety*, at 50.

⁵⁷ Mendeloff, *Regulating Safety*, at 65 (describing the Council on Wage-Price stability).

give. In practice, these “state-plan” states must develop and operate their own occupational safety and health programs, and must show that their programmatic plans are, at a minimum, “at least as effective” as the efforts of OSHA.⁵⁸ Where a state plan exists and has been approved, OSHA may subsidize the agency’s operational costs.⁵⁹

Currently, 21 states and one U.S. territory have approved “state plans” under OSHA.⁶⁰ Of these, four cover only public-sector employees.⁶¹

D. Inspection & Enforcement Provisions

The Act details procedures for enforcing the Act and its accompanying regulations, through inspections, investigation, and the imposition of penalties. OSHA is to conduct investigations in response to employee complaints, particularly when there are “reasonable grounds” to believe a violation that threatened “physical harm or an imminent danger” had occurred.⁶² Inspections are often triggered by a confidential complaint filed by workers.⁶³ OSHA may also proactively initiate an inspection, particularly in industries that are deemed to be unsafe by the agency.⁶⁴

An OSHA inspection is typically conducted in three phases: an opening conference, the inspection (or “walkaround”), and a closing conference.⁶⁵ During the opening conference, the inspector meets with an employer representative (and if available, an employee representative), and explains the role of OSHA, along with rights and responsibilities of the different parties. The inspector typically provides an overview of what will occur during the inspection.⁶⁶ During this initial conference, the inspector may ask questions to learn more about the company and its operations, and may also request documentation and records related to workplace health and safety, including the OSHA 200 Form, which is used to record injuries,

⁵⁸ 29 U.S.C. § 667.

⁵⁹ Mendeloff, *Regulating Safety*, at 2; 29 U.S.C. §§ 672-73.

⁶⁰ These jurisdictions are Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, and Wyoming.

⁶¹ These are Connecticut, New Jersey, New York, and the Virgin Islands.

⁶² 29 U.S.C. § 658(f).

⁶³ Lofgren, *Dangerous Premises*, at 1.

⁶⁴ Lofgren, *Dangerous Premises*, at 2.

⁶⁵ Lofgren, *Dangerous Premises*, at 2.

⁶⁶ Lofgren, *Dangerous Premises*, at 2.

illnesses, and fatalities.⁶⁷

The inspector, during the walkaround, will visually examine the premises, with an eye to violations of OSHA regulations. The inspector may also conduct tests and privately interview employees during the inspection.⁶⁸ The inspection concludes with a closing conference, during which the inspector presents his or her findings. If the inspector has found a violation, she may issue a citation at the closing conference, or soon thereafter.⁶⁹ An inspector may alternatively choose to conduct further inspections and testing, at a later date.⁷⁰ If issued, a citation must be posted in the workplace, indicating the violations that were discovered.⁷¹

The Act allows an “employee representative” to accompany the OSHA representative during all phases of workplace inspection.⁷² Likewise, an employer may accompany an OSHA inspector during an inspection.⁷³

The Act provides for civil and criminal penalties when it is determined that an employer has violated the Act. OSHA may impose monetary penalties for “nonserious” violations.⁷⁴ In the event of a “serious” violation, defined as one that “involves a substantial probability of causing death or serious physical harm and one which the employer either knew about or could reasonably have been expected to know about,” a penalty is mandatory.⁷⁵ Failure to correct the violation within the period of time specified by OSHA may result in additional fines.⁷⁶

⁶⁷ Lofgren, *Dangerous Premises*, at 2. The OSHA 200 form is used to log workplace illnesses and injuries, in workplaces with eleven or more employees. *See* Lofgren, *Dangerous Premises*, at 89.

⁶⁸ Lofgren, *Dangerous Premises*, at 3.

⁶⁹ Lofgren, *Dangerous Premises*, at 3.

⁷⁰ *See generally* Lofgren, *Dangerous Premises* (describing inspections of the mortuary? And other workplaces, where multiple tests were conducted over a period of months, before citations were issued).

⁷¹ 29 U.S.C. § 658; Mendeloff, *Regulating Safety*, at 2.

⁷² 29 U.S.C. § 657; Mendeloff, *Regulating Safety*, at 2; Lofgren, *Dangerous Premises*, at 1. In practice, some employers have chafed at the presence of an employee representative, especially when citations are discussed. *See., e.g.,* Lofgren, *Dangerous Premises*, at 62 (recounting a closing conference, during which the employer asked that the union representative be excused for the discussion of fines).

⁷³ Lofgren, *Dangerous Premises*, at 1.

⁷⁴ 29 U.S.C. § 666.

⁷⁵ OSHA; Mendeloff, *Regulating Safety*, at 2.

⁷⁶ OSHA Act.

Under the Act, if an employer is found to have willfully endangered its workers, the employer *may* also be charged with a misdemeanor.⁷⁷ In other words, if an employer intentionally disregards or is plainly indifferent to safety standards and a fatal accident results, the maximum penalty the employer would face is six months imprisonment.⁷⁸ More severe penalties are available, but as described below, are rarely invoked.

The Act ostensibly protects workers who face retaliation for exercising their rights under the Act.⁷⁹

A separate agency, the Occupational Safety and Health Review Commission – was created as an appellate body, to review employer appeals of OSHA penalties and citations, and to serve as a check to OSHA’s enforcement efforts.⁸⁰ An employer must file an appeal within 15 working days of receipt of the citation.⁸¹ Employees may also appeal a decision *not* to issue a citation.⁸² Likewise, employees may challenge the amount of time an employer is given to correct a workplace safety hazard.⁸³

III. A LEGACY OF FAILURE: THE REGULATORY REGIME AND IMMIGRANT WORKERS

In the decades since the creation of OSHA and the passage of the Act, the agency has faced significant criticism. Indeed, OSHA has been described as “the paradigmatic case of bureaucratic inefficiency and regulatory failure.”⁸⁴ Most observers agree that a number of factors have frustrated the realization of OSHA’s mandate: relative lack of political power, inadequate resources, and a fundamentally flawed structure for regulation and enforcement. Although political power and the availability of resources have fluctuated depending on the administration in power, the

⁷⁷ OSHA.

⁷⁸ In contrast, the maximum penalty for willfully endangering a protected fish under the Clean Water Act is fifteen years imprisonment. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 *Admin L. Rev.* 1071, 1081-82 (2005).

⁷⁹ OSHA § 11; Mendeloff, *Regulating Safety*, at 2; Lofgren, *Dangerous Premises*, at 1. The protections include the possibility of reinstatement or back pay.

⁸⁰ 29 U.S.C. § 661. This bifurcation of responsibilities was the result of a compromise between Democrats and Republicans in Congress during the passage of the Act. *See also* Mendeloff, *Regulating Safety*, at 2; Lofgren, *Dangerous Premises*, at 1.

⁸¹ Lofgren, *Dangerous Premises*, at 4.

⁸² Lofgren, *Dangerous Premises*, at 4.

⁸³ Lofgren, *Dangerous Premises*, at 4.

⁸⁴ Lobel, 1074.

structural flaws have consistently beleaguered OSHA. The consequence has been low inspection rates, paltry penalties, and infrequent prosecutions, which, in turn, have failed to lower workplace injury rates, particularly among the most isolated and vulnerable workers.⁸⁵

In this section, I will examine how the history, structure, and operation of OSHA – described in Section II above – have worked to disadvantage foreign-born workers.

A. Priority-Setting and the Role of Unions

Multiple aspects of OSHA’s regulatory approach are susceptible to criticism. First, OSHA lacks a consistent, established standard for determining the annual priorities of the agency. Naturally, given limitations on resources and manpower, inspections must be targeted, and only a handful of safety standards can be tackled in a given year. Rather than consistently relying upon (arguably) objective criteria, such as statistics documenting trends in illnesses and fatalities, OSHA’s regulatory agenda is shaped by interest group demands, pressure from legislators and the executive branch, and information gathered by its own staff and by other agencies.⁸⁶ A natural result of this process is that workers in the informal economy, who often are not equal participants in the political process or in the institutions that have leverage over that process, are unable to marshal the attention and resources of OSHA regulators.

Among the institutions that have advocated for *stronger* protections in this realm, organized labor has played the most prominent role. Historically, unions have been vigorous advocates for greater workplace safety and health protections.⁸⁷ Unions have criticized OSHA for, *inter alia*, its preoccupation with costs, its deference to employers, its meager

⁸⁵ Lobel.

⁸⁶ See, e.g., President Bill Clinton, *The New OSHA: Reinventing Worker Safety and Health*, National Performance Review (May 1995), at B-6 (describing a “priority planning process” in which OSHA selected input from stakeholders, and received feedback from “nearly 200 representatives of labor, industry, professional, and academic organizations, state government, and the general public”).

⁸⁷ There are several ostensible reasons for unions’ support for greater OSH protections, including, most notably, the welfare of their members, and the political gains that accompany the greater protections afforded to workers. In one sense, however, OSH standards may actually undercut unions. The emphasis on eliminating workplace risks may create incentives to develop technology which, in turn, may displace workers and reduce union membership. Mendeloff, *Regulating Safety*, at 76.

penalties, and inadequate staff.⁸⁸ Unions have also criticized OSHA for the delays in promulgating standards.⁸⁹

Mendeloff writes of the central role that unions play with respect to enforcement efforts:

In some respects the OSH Act relies on unions to active it, through worker complaints and surveillance of management, both of which are more likely to occur at unionized workplaces, where unions can use the act to gain leverage in bargaining. Yet if OSHA were totally dependent upon worker invocations, it would largely fail to correct hazards at nonunion plants...⁹⁰

Mendeloff's assertions are confirmed by the empirical data on this issue. In at least one analysis of cases, OSHA allowed for a shorter abatement period (following workplace inspections) at unionized workplaces, as compared with non-union workplaces. One logical explanation is that the union presence counterbalanced any deference shown to the employer.⁹¹

Other studies have demonstrated that employee complaints to OSHA are more likely to occur at unionized workplaces.⁹² Unionized firms are also likely to receive higher penalty costs and be required to correct violations more quickly.⁹³

As described above, Unions played a key role in advocating for the passage of the Act, and quickly occupied a prominent role in advocacy on OSH matters. Indeed, authors writing in the late 1970s opined that the

organized labor movement is the Department of Labor's (and OSHA's) chief client, and the department is expected to show at least some partiality to the interests of organized labor. OSHA, established a labor's behest, is overseen by congressional committees dominated by the AFL-CIO and

⁸⁸ Mendeloff, *Regulating Safety*, at 3-4.

⁸⁹ Mendeloff, *Regulating Safety*, at 4 (describing union attacks on OSHA for delays in developing health standards).

⁹⁰ Mendeloff, *Regulating Safety*, at 33.

⁹¹ Mendeloff, *Regulating Safety*, at 46.

⁹² Rober Scherer, et al., *OSHA Inspection: Process and Outcomes in Programmed Inspections Versus Complaint-Investigated Inspections*, 8 *Emp. Resp. & Rts. J.* 245 (1995).

⁹³ David Weil, *Building Safety: The Role of Construction Unions in the Enforcement of OSHA*, 13 *J. Lab. Res.* 121 (1992).

depends primarily upon labor backing to ward off attacks upon its authority.⁹⁴

In this vein, other observers noted that those who benefited most from OSHA were “overwhelmingly blue collar workers, mostly unionized, and mostly men.”⁹⁵

Since the late 1970s, unions have experienced a gradual decline in their relative power vis-à-vis the federal government, and have suffered a concomitant decline in their membership. Needless to say, the leverage that unions once exercised over OSHA no longer exists. Nevertheless, unions continue to occupy the space of worker safety advocate in the sphere of OSHA rulemaking and enforcement. Unions continue to take a leadership role on workplace safety efforts, and nearly every prominent national union has personnel dedicated to protecting workers from on-the-job hazards. This advocacy has become a defining characteristic of unions; in other words, vigilance over workplace safety, along with more tangible items such as health care coverage or a pension, is among the bundle of “benefits” that a union offers to prospective members. Unions therefore use OSHA standards and noncompliance as a way to gain bargaining strength, during organizing campaigns, and also after a collective bargaining agreement is in place.

Given that unions have occupied this advocacy space, the following question arises: Have unions been attentive to the workplace safety and health needs of foreign-born workers? Historically, unions excluded certain classes of marginalized workers, including African-Americans, and more recently, immigrant workers. Moreover, unions have traditionally supported restrictionist immigration policies; over the last decade, however, as membership numbers decline and the population of immigrant workers has risen, unions have begun to reverse course. They have adopted a more inclusive attitude towards immigrant workers. Nevertheless, many unions – particularly those in the building and construction trades – are struggling with organizing and outreach efforts among immigrants. The culture in many of these unions is slow to shift. The result is that many of the immigrant workers who are most vulnerable to workplace hazards are not unionized, and moreover, lack any meaningful voice in the regulatory process.⁹⁶

⁹⁴ Mendeloff, *Regulating Safety*, at 73-74.

⁹⁵ Mendeloff, *Regulating Safety*, at 35.

⁹⁶ One might argue that community-based organizations serving immigrants can occupy this role. Although many non-profit organizations focus on the rights of immigrant

B. Rulemaking: Delays and Focus on Larger Industries

OSHA's standards have faced criticisms from all sides, including employers, who have deemed some of the standards to be irrelevant.⁹⁷ Two other criticisms that have been leveled against OSHA standards are that they focus too much on safety hazards, as opposed to health; and that OSHA has emphasized the use of "engineering controls," as opposed to personal protective equipment, to reduce health risks.⁹⁸

For foreign-born workers, however, certain structural limitations in the standard-setting process pose particular challenges. One such limitation is the very pace of OSHA's regulatory efforts. The rulemaking process is slow, and is unresponsive to a dynamic economy and fluid labor market. Many of the existing standards related to occupational health have taken approximately three years to finish; a significant number of others have taken five or six years. The promulgation of standards related to occupational safety has followed a similarly slow trajectory.⁹⁹

Despite the allowance for informal rulemaking, many regulations stagnate in an appeals process, as employers challenge on appeal whether there is "substantial evidence" to support a standard.¹⁰⁰ Other standards fail to even make it through the OSHA rulemaking process: one example is a regulation that has been pending since 1999 relating to employer payment for personal protective equipment. Under this proposed standard, which clarifies a policy formally adopted by OSHA in 1994, employers are to assume the cost for equipment needed to protect individual workers from safety and health risks. Low-wage workers in the informal economy are in great need of protective equipment, such as safety goggles, gloves, or harnesses, to protect them from formidable safety hazards.¹⁰¹ But, because of the entrenched bureaucracy at OSHA and the delays in the rulemaking process, this need of foreign-born workers is not fully addressed.

Another feature of the rulemaking process that disadvantages

workers, relatively few devote attention to occupational safety and health matters.

⁹⁷ Mendeloff, *Regulating Safety*, at 3.

⁹⁸ Mendeloff, *Regulating Safety*, at 36.

⁹⁹ Federal Register; McGarity & Shapiro.

¹⁰⁰ Lobel.

¹⁰¹ AFL-CIO Report.

foreign born workers is the focus on larger employers, in more established industries. Many of the most vulnerable low-wage workers occupy positions with smaller employers, and/or in the informal economy. Immigrant workers often occupy positions that are created in response to emerging needs – for example, clean-up workers in the aftermath of natural disasters,¹⁰² or drywall installers in areas with temporary housing booms. The standards, on the other hand, focus on very established industries. (The influence of unions also factors in here, as unionized workplaces are often larger, or are branches of national companies.¹⁰³)

C. Inspections

The existing standards and procedures for worksite inspections systematically disadvantage foreign born workers.

OSHA will typically initiate an inspection based upon a workplace complaint, or based on a record of workplace health and safety violations. Neither of these criteria will necessarily trigger an inspection at a worksite where immigrant workers are at risk. Foreign born workers may be inhibited from filing a complaint, due to multiple factors, including limited English proficiency, lack of familiarity with their rights or the legal process, fear of jeopardizing one's immigration status, the need for job security, and more. Additionally, OSHA may not know to flag an employer that relies heavily on immigrant workers, and that fails to report workplace injuries (and/or discourages its employees from doing so).

(Unions once again play a pivotal role in the effectiveness of the regulatory regime. Where a workplace is organized, a union can request an OSHA inspection.¹⁰⁴ The Union can then monitor compliance with the results of the inspection. Absent a union, there are few entities with the leverage to challenge the employer on its workplace safety record.)

Statistically speaking, OSHA inspections are relatively rare occurrence, absent a complaint or a serious accident. Even when inspections do occur, an employer can refuse entrance to an inspector unless the inspector has an administrative warrant issued pursuant to a “neutral”

¹⁰² Many immigrant workers traveled to the Gulf Coast region to participate in the cleanup efforts after Hurricane Katrina. Many of these workers were paid below the minimum wage or otherwise mistreated in the workplace. *See, e.g., In re: MFC Contractors Inc.* (D. Md).

¹⁰³ Mendeloff, *Regulating Safety*, at 46.

¹⁰⁴ Mendeloff, *Regulating Safety*, at 91.

selection process.¹⁰⁵ Moreover, unless there is an obviously dangerous situation at the workplace, the employer can usually delay the inspection by a few days if it objects to the warrant.

When inspections do occur, OSHA also typically focuses on larger employers for its inspections; this, too, leaves out many foreign-born workers, due to their concentration in smaller, less regulated workplaces. This emphasis on larger employers stems, in part, from an underlying ambiguity in the regulatory regime – namely, the appropriate weight to be given to the *costs* of ensuring compliance. Some might argue that OSHA must necessarily focus on the larger industries, because the cost of regulating every single workplace is simply too great. Some economists have argued that “society should choose the least costly method for achieving [injury or diseases], and that there “is no justification for seeking equal levels of risk in every occupation, factory, or industry”¹⁰⁶ (Note that this justification for targeting larger worksites for inspections also applies to the rationale for targeting larger, more visible industries for rulemaking.)

OSHA may also be reluctant to target smaller employers due to cost considerations. Some small- and medium-sized companies have expressed concern that the cost of compliance with OSHA regulations will mean layoffs among employees, or other cutbacks that ultimately harm workers.¹⁰⁷ It is impossible, however, to avoid moral judgments about the “cost” of saving one life over another, or the “cost” of a life versus the economic cost of compliance.¹⁰⁸ Yet, some continue to argue, under a purely economic analysis, that workplace accidents and illnesses should be prevented only to the extent that it “becomes more expensive to prevent them than to allow them to occur.”¹⁰⁹

Even when OSHA does inspect a workplace with foreign-born workers, it faces significant problems during the inspection process itself. Linguistic barriers often arise between inspectors and employees who do not speak English. OSHA has been cited by the Office of the Inspector General of the Department of Labor for poor language abilities among its

¹⁰⁵ *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

¹⁰⁶ Mendeloff, at 6 (quoting Robert S. Smith, *The Occupational Safety and Health Act: Its Goals and Its Achievements* American Enterprise Institute 1976, at p. 25).

¹⁰⁷ See, e.g., Lofgren, *Dangerous Premises* at 67-68 (describing an employer whose threatened that abatement of an OSHA-cited hazard would lead to a reduction in his workforce).

¹⁰⁸ Mendeloff, at 6.

¹⁰⁹ Mendeloff, at 7.

inspectorate. Inspectors themselves have reported the involved in speaking with limited English proficient (LEP) employees.¹¹⁰

A shared language may not be sufficient to build trust between OSHA inspectors and foreign born employees. Even though inspectors may interview employees in private, immigrant workers may fear retaliation for speaking candidly about workplace concerns. Moreover, immigrant workers, especially those with a tenuous immigration status, are unlikely to welcome a conversation with a federal government employee. This has been an even greater challenge in recent years, with heightened immigration enforcement efforts. To complicate matters further, federal immigration enforcement officers have used the scheduling of a workplace safety meeting as a ruse for conducting a worksite raid.

Moreover, in recent years, OSHA has opted for even fewer inspections, and has emphasized more programs of collaborative, semi-voluntary compliance. In order to be successful, these programs rely on employers who take the initiative to reveal both its successes and challenges with workplace safety, and to partner with a federal agency. Once again, these employers are generally larger entities, in more established industries, and who have already some safety and health plan in place. The most vulnerable workers, who labor for smaller employers, sometimes in temporary or nascent segments of the economy, are effectively overlooked by this regulatory approach.

Another limitation of OSHA's inspection regime is the relative inattention to occupational illnesses. Since the passage of the Act, OSHA inspections and citations have focused on safety hazards, as opposed to health threats.¹¹¹ In the early years of the Act, a paucity in trained industrial hygienists contributed to this problem; the imbalance has continued through the present day.

Even when inspections occur, inspectors may not detect violations of standards, given the thousands of standards they must become familiar with.¹¹² Relatedly, although inspections are a critical component of the

¹¹⁰ See, e.g., Lofgren, *Dangerous Premises*, at 94 (describing how the author communicated with employees during an inspection by presenting the workers with a card written in Spanish)

¹¹¹ Mendeloff, *Regulating Safety*, at 41.

¹¹² Mendeloff, *Regulating Safety*, at 88. See generally Don J. Lofgren, *Dangerous Premises, an Insider's View of OSHA Enforcement* (describing the wide range of

regulatory regime, they are not a comprehensive solution. One must consider whether occupational injuries and deaths are causally linked to non-compliance with an OSHA standard. In his analysis of 512 workplace accidents in California in the 1970s, Mendeloff found that “inspectors probably could have detected the violations in less than half of the cases.”¹¹³

D. State Plans

Another wrinkle to OSHA’s regulatory framework is its relationship with the occupational safety and health departments of individual states. As described above, the Act empowers states to assume primary enforcement authority for occupational safety and health matters. The limitation of this approach is that it requires OSHA to police the enforcement efforts of the states; and lapses in OSHA oversight, when coupled with regulatory failures on the state level, can lead to disastrous consequences.¹¹⁴ The result is that vulnerable workers are subject to the vicissitudes of state political processes, which may be even more beholden to powerful economic interests, and may be even less willing to engage with certain sectors of the economy.¹¹⁵

E. Penalties

Finally, OSHA has faced criticism for its limited civil penalties, and for its infrequent prosecutions.¹¹⁶ A Congressional report on occupational safety determined that “a company official who willfully and recklessly violates federal OSHA laws stands a greater chance of winning a state

industries and standards that an OSHA inspector must be able to navigate).

¹¹³ Mendeloff, *Regulating Safety*, at 87.

¹¹⁴ McGarity & Shapiro, at 174 (describing a failure in North Carolina). Of the 23 state-plan states, eight have established stricter penalties than provided for on the federal level.

¹¹⁵ *See, e.g.*, Lofgren, *Dangerous Premises*, at 27 (describing the politicization of OSHA enforcement efforts in California, and how a new administration was expected to bring a new, “more relaxed” approach to OSHA enforcement).

¹¹⁶ The relevant legislative history suggests that the Department of Labor lacked the political will to impose and enforce fines, even *before* the Act had passed through Congress. Then-Secretary of Labor George Schultz noted that, given the “tight labor markets,” “to become known as an employer with unsafe practices is to have the reputation of operating an undesirable place to work. And this in many ways is the most severe penalty that is involved.” Mendeloff, *Regulating Safety*, at 23 (quoting Senate, Committee on Labor and Public Welfare, *Hearings*, 1970, p. 88).

lottery than being criminally charged.”¹¹⁷ Regrettably, more recent statistics have revealed that the odds of winning the lottery to be even greater. Over the past two decades, of all of the workplace fatality cases that were found eligible for prosecution after hours of investigation, 93 percent of those cases were not prosecuted. Since the enactment of the Act, fewer than one dozen employers have been imprisoned under federal laws for causing a worker’s death.¹¹⁸

Another challenge arises if an employer chooses to appeal an OSHA citation. Typically, appeals are scheduled several months after the citation date. Lofgren describes the problems that flow from this scenario:

With such long delays, a temporary job can be completed and a contractor may have a new name and address long before action can be taken. And, while the citation is under appeal, the contractor is not liable for repeat citations, which carry higher penalties.¹¹⁹

The problems cited by Lofgren are especially problematic for immigrant workers, who are often employed by smaller, undercapitalized contractors.

Although enforcement and deterrence are major components of OSHA’s mandate, the agency is scarcely scratching the surface.

F. Invisibility of Immigrant Workers

Immigrant workers are marginalized in the regulatory process not simply because they lack advocates, or because they are disparately impacted by limitations in the regulatory regime. The historical invisibility of immigrant workers – especially Latino workers – also contributes to their challenges in the workplace safety context.

Public attention to worker safety issues is greatest when the individuals affected are made visible, and are identifiable:

Their spokesmen can testify at hearings, bringing along those already afflicted owing to lax standards or enforcement in the past. They can ask, “What will you do to protect us?” In this situation, the culture’s strictures

¹¹⁷ David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. Times, Dec. 2, 2003, at A1.

¹¹⁸ *Id.*

¹¹⁹ Lofgren, *Dangerous Premises*, at 34.

against putting a money value on life are heavily reinforced. OSHA officials do appear to show less concern for costs when the potential beneficiaries are more easily identifiable.¹²⁰

Over many decades, law has been complicit in rendering Latino immigrant labor “invisible” and easily commodified. Throughout much of the 20th century, U.S. immigration law has been structured to provide for a low-cost, disposable pool of Latino immigrant labor. The infamously exploitative *Bracero* program, under which approximately one million Mexican workers were temporarily admitted into the United States to serve the needs of the agricultural sector, is indicative of the way in which law has tacitly (yet indelibly) framed Latino immigrant labor as an expendable resource. This commoditization of Latino immigrant labor also surfaced several decades earlier, during the Great Depression, in the context of the repatriation of an excess of unskilled Mexican immigrant laborers.

Given these historical and legal underpinnings, Latino immigrant laborers are perceived as a temporary resource, and are used to meet shifting needs of the market; furthermore, they are viewed as a replaceable resource. Latino immigrant workers entered the national consciousness with these attributes, and have continued to occupy that space, despite efforts to underscore their demographic complexity. This historic categorization of Latino immigrant labor dovetails with the mark of “foreignness” that Latino immigrants generally (along with Asian immigrants) carry in the context of a society built around Black-White relations.¹²¹ This set of historical conditions, and the ongoing subordination and dehumanization of the Latino immigrant laborer, has rendered the group vulnerable in the workplace.

Latino immigrant workers continued to be categorized as expendable labor, to the present day. Current debates around immigration reform, and efforts to create new categories of “guest worker” visas reinforce the perception of Latino immigrant labor as a commodity to be used on a short-term basis and then discarded. The Latino immigrant worker has emerged as the central protagonist in the immigration reform debate. This is wholly consistent with the “foreignness” that has been ascribed to Latino immigrants, and the general expectation that the sojourn of Latino workers in the United States will be temporary, and will cleanly

¹²⁰ Mendeloff, *Regulating Safety*, at 72-73.

¹²¹ See Robert S. Chang, et al., *Centering the Immigrant in the Inter/National Imagination*, 85 Cal. L. Rev. 1395, 1414 (1997).

meet the needs of the market. And when these Latino immigrant workers overstay their employment visas, and/or begin to occupy a broader role in the economy and society, the demands for their removal from some sectors have been immediate and fierce. The controversies that have encircled day laborer centers perfectly highlight these interrelated factors.

The data regarding the trend in workplace fatalities and injuries among foreign-born workers, particularly Latino immigrant workers, raises a host of questions about the underpinnings of the trend. To be sure, fatality and injury rates, and corresponding enforcement efforts, may fluctuate depending on political considerations and the relative power of OSHA in a given administration. The trend, however, is not simply a reflection of a lack of political will or financial resources, but is reflective of a more complex set of underpinnings, including the multi-faceted subordination of the foreign-born workers in the United States, both historically, and in the context of current debates regarding the role of immigrant workers in the U.S. economy. These underpinnings, when viewed through the lens of OSHA's structural limitations, provide insight into the agency's failure to protect the immigrant workforce.

G. Addressing Imbalances of Power in the Workplace

Occupational safety and health regulations can be viewed as serving many purposes. Perhaps most fundamentally, the history of these regulations reflects the need for government intervention, on the side of disadvantaged workers, to adjust the balance of power in the employer-employee relationship.¹²²

The need for government regulation in the area of workplace safety and health is particularly important for the protection of immigrant workers, as other mechanisms for protection or to make workers whole are generally inapplicable to this segment of the population. Some critics of OSHA, for example, have called for the deregulation of labor markets, on the premise that unregulated markets can address health and safety concerns through embedded structural features. One such feature would be the payment of a "wage premium" to workers to compensate them for workplace risks. Under this theory, an employer would choose to abate workplace risks, up to the point when additional compensation to the workers is less expensive than additional efforts to create a safe and healthy workplace. In other words, some workplace risks are directly addressed by the employer, and

¹²² McGarity, at 17. Thomas O. McGarity, *et al.*, *Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration* viii (1993).

the workers are compensated for additional risks. Economists who espouse this theory point to empirical studies showing a direct correlation between the level of safety risks in a particular industry, and the wage rates paid in that industry.¹²³

Although there is considerable literature on the existence of wage premiums, this literature fails to consider whether workers – particularly immigrant workers – have exercised an autonomous choice between accepting a wage premium and forcing an employer to reduce or eliminate workplace risks. The reality, of course, is that most low-wage immigrant workers in the United States lack the power to make such a choice: for economic migrants, who often face significant competition for employment, and who have only temporary lawful immigration status or are undocumented, the meaningful negotiation of the terms of employment is a rare occurrence. The predominance of at-will employment relationships further inhibits workers’ ability to “voluntarily” accept workplace health and safety risks.¹²⁴ This evidenced by the fact that, from a statistical perspective, immigrant workers’ hourly wages are lower on average than those for native-born residents.¹²⁵ In addition, in order to make an informed choice about wage premiums, a worker must have accurate information about the risks that they face.¹²⁶

IV. PROPOSED SOLUTIONS

A complex and inter-related set of factors have placed foreign-born workers in a vulnerable position vis-à-vis workplace safety and health, and have left them marginalized in the regulatory regime.

¹²³ John Worrall, *Compensation Costs, Injury Rates, and the Labor Market*.

¹²⁴ Although the focus of this article is on *preventive* measure that can and should be taken to reduce the safety risks faced by immigrant workers, there are legal remedies available to immigrant workers who succumb to work-related injuries, illnesses, and/or fatalities. In nearly all states, workers’ compensation benefits remain available to all workers, regardless of their immigration status. Since the U.S. Supreme Court decision in *Hoffman Plastic Compounds*, however, some states have attempted to amend their workers’ compensation laws so as to cut off coverage for undocumented workers. Indeed, in some states, undocumented workers are ineligible for vocational rehabilitation benefits. The fact that many immigrant workers return to their respective countries of origin after suffering a workplace injury or illness, even further complicates their access to state workers’ compensation systems. All of these considerations highlight the need for strong preventive and regulatory efforts. (Tort law).

¹²⁵ Urban Institute, “Immigrant Families and Workers, Facts and Perspective, Brief No. 4, A Profile of the Low-Wage Immigrant Workforce,” November 2003.

¹²⁶ Mendeloff, *Regulating Safety*, at 9.

To its credit, however, OSHA *has* taken some steps to address the rise in workplace fatalities and injuries among foreign-born workers. In October 2001, OSHA formed a special task force to examine the issue of raising fatalities among Hispanic workers. The agency has also cultivated relationships with community-based organizations that work closely with the Latino community. In addition, OSHA created a Hispanic/ESL coordinator position in each of its ten regions. These coordinators work with individuals, businesses, and other institutions in the community to coordinate education and outreach to Spanish-speaking workers.

While the measures taken by OSHA do have some superficial appeal, more fundamental and aggressive steps must be taken to bring the occupational safety concerns of immigrant laborers to the forefront. Indeed, the data from the Bureau of Labor Statistics has demonstrated that OSHA's efforts have been largely unsuccessful. A set of comprehensive reforms, on the other hand, will serve three important purposes: it remedies some of the entrenched limitations of the regulatory regime related to occupational safety and health; it serves to cultivate a voice for immigrant laborers in a regulatory process that, by its nature, will always have some political dimension; and it counters the historical subordination of the immigrant laborer.

The proposals are as follows:

Implement Comprehensive Data Collection Plan for Illnesses, Injuries, and Fatalities Among Foreign-Born Workers

Although the existing data already suggests a significant problem, BLS and OSHA should develop more specific protocols related to data collection and foreign-born workers. In particular, there is negligible data regarding workplace illnesses and injuries among foreign-born workers.

One strategy may be to rely upon workers' compensation data (collected at the state level), which is likely to be more comprehensive, and which provides greater insight into the nature of the accidents that have occurred.¹²⁷

Invest in Community Partnerships and Training Initiatives

¹²⁷ Mendeloff, *Regulating Safety*, at 149.

There have been repeated calls for closer collaboration between OSHA and community-based organizations that work with vulnerable immigrant workers. Through formal, effective partnerships, governmental and non-governmental entities can work closely on the filing of complaints. OSHA might also consider receiving complaints from community groups on behalf of vulnerable immigrant workers.¹²⁸ The advantage of this approach is that many of these organizations emphasize leadership development and self-sufficiency for immigrant workers.

Trainings and grant making are important related components. During the Carter administration, OSHA implemented an experimental program, entitled *New Directions*. The goal of the program was to “utilize labor unions, trade associations, educational institutions, and nonprofit organizations to provide to employers and employees job safety and health education and training, including assistance in hazard recognition and control, and training in employer and worker rights.”¹²⁹ OSHA awarded \$3.5 million to 66 private organizations.

In recent years, the Susan Harwood Training Program has served a similar purpose, although threats of budget cuts are looming.

Develop a Language Access Plan for Worksite Inspections

Linguistic competence is a major barrier for OSHA, in its inspections and enforcement efforts. OSHA must increase the percentage of its inspectorate that is fluent in Spanish and other languages spoken by immigrant workers.

Additionally, the complaint process must be accessible to non-English speakers. OSHA might also allow non-profit organizations to file complaints on behalf of workers, and to steward them through the process.

Create a “Citizen Enforcement” Provision for OSHA Enforcement

The Environmental Protection Administration (EPA) offers some

¹²⁸ See Action Recommendations from the National Conference on Immigrant Workers Safety and Health, University of Massachusetts, Lowell, September 27-29, 2004 (on file with author).

¹²⁹ Benjamin W. Mints, “Occupational Safety and Health: The Federal Regulatory Program – A History,” in *Fundamentals of Industrial Hygiene* 710 (1988). During the Reagan years, the New Directions Program was cut substantially.

useful guidance for incorporating the voice of the citizenry in the regulatory process. In the environmental context, Congress has empowered the victims of pollution to participate in the standard-setting process, and to enforce the environmental laws without government participation or approval. These “citizen enforcement” provisions allow affected citizens to sue in federal district court to enforce environmental permits and emissions limitations.¹³⁰ Similar models can be established to empower workers to enforce OSHA standards in court, in the absence of action by OSHA.

In a similar vein, advocates and workers might make greater use of the Administrative Procedures Act (APA) to accelerate rulemaking. The APA requires OSHA and other administrative agencies to give “interested persons” the right to petition an agency to promulgate a regulation. The courts are authorized to compel agency action that is “unreasonably delayed.”¹³¹

Facilitate the Participation of Immigrant Workers in the Investigation Process, and Provide Greater Protections for Workers Who Chose to Report Violations

Currently, workers are not allowed to participate in the settlement discussions between OSHA and employers that are being investigated. Providing a role for workers in these conversations is consistent with a recognition of their humanity and broader role in the economy and society.

Section 11(c) of the Act prohibits an employer from discriminating against any employee because that employee exercised any right afforded by the Act.¹³² The provision was included in an effort to create a space for employee participation in the enforcement of OSHA standards. Despite this intent, the provision is under-utilized, and scarcely allows for active employee participation.

Increase Penalties for Violations

OSHA might consider assessing higher fines against employers whose workplaces register higher rates of injury. This is consistent with the provision in the Act that provides that penalties should be assessed “giving due consideration . . . to the good faith of the employer, and the history of

¹³⁰ See, e.g., Clean Air Act § 304, 42 U.S.C. § 7604; Clean Water Act § 505, 33 U.S.C. § 1365.

¹³¹ 5 U.S.C. §706(1).

¹³² 29 U.S.C. § 660(c)(1).

previous violations,” as well as to the size of the firm.”¹³³

Inspections

A system of random inspections focused on smaller firms could be used to ensure compliance. The current inspection regime typically excludes smaller companies, where many foreign-born workers are employed. Intensive accident investigations focused on smaller firms might also help to expose the risks borne by immigrant workers.¹³⁴

CONCLUSION

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¹³³ Mendeloff, *Regulating Safety*, at 136; OSHA Act § 17(j).

¹³⁴ Mendeloff, *Regulating Safety*, at 139.