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U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



September 30, 2003

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: JOHN L. HENSHAW 
Assistant Secretary

SUBJECT: Response to OIG's Evaluation of OSHA's Handling of
Immigrant Fatalities in the Workplace
Report No. 21-03-023-10-001

This memorandum is in response to your August 11, 2003, memorandum transmitting the Office of the Inspector General (OIG) draft Report Number 21-03-023-10-001, "Evaluation of OSHA's Handling of Immigrant Fatalities in the Workplace." OSHA appreciates the effort that went into this study and the OIG's willingness to work with OSHA staff in understanding and clarifying the issues involved in this inquiry.

In addition to addressing the specific recommendations in the official draft report, we think it is important to discuss the body of findings and conclusions detailed in the report by the OIG. In response to the rising fatality rate of Hispanic/Latino workers, OSHA established a Hispanic Task Force in August 2001 to evaluate the effectiveness of agency programs, assess workplace needs, solicit input from OSHA stakeholders and adopt programs to address emerging issues related to Hispanic/Latino and immigrant workers. This group meets regularly as part of a dynamic, ongoing process to address these issues. Given the attention OSHA has paid to this subject and its importance, we believe it is valuable for us to discuss and clarify some of the assumptions and characterizations made in the report.

For ease of providing our response, we are following the presentation format outlined by the OIG in the draft report.

Results

1. How does OSHA Examine Immigrant Workplace Deaths?

In answer to this question, the OIG report states simply that OSHA does not separate immigrant worker from non-immigrant workers when investigating workplace fatalities. While this may be factually correct, the implication of this statement would seem to be

that OSHA should treat immigrant worker fatality investigations differently than those of non-immigrants. We respectfully disagree with this implication.

OSHA does not give preferential treatment to one population group over another. Instead, the agency seeks to apply strong, effective, fair enforcement across all population groups. However, as noted in the report, the agency has modified the OSHA-170 form to include information about immigrant workers and language barriers. This change should enable OSHA to gather more accurate information about immigrant workers' deaths and factors that may contribute to the accidents.

OSHA has a concern about this section of the report as it is described in the Executive Summary on p. iii. The Executive Summary language states, "If the fatality involves both an employee and a workplace hazard, OSHA will investigate the events and determine whether violations of OSHA's safety and health standards contributed to the accident." This description is not quite accurate since it implies that OSHA knows before its investigation that a workplace hazard existed. In reality, as can be seen in OSHA's Directive on fatality investigations, OSHA investigates to determine if a workplace hazard was involved in the accident: "In terms of fatality investigation, OSHA will inspect an employee death related from a work-related exposure to attempt to determine the cause of the events, whether a violation of OSHA safety and health standards related to the accident has occurred and any effect the standard violation has had on the occurrence of the accident." We believe the difference in nuance between OIG's description and that contained in OSHA's directive is important and respectfully request that the Executive Summary language be changed to more closely conform with the language utilized in the agency's directive.

2. What Resources Does OSHA Allocate to Investigating Immigrant Workplace Deaths?

Again, while the OIG's statements are factually correct, we remain concerned that they leave the impression that OSHA was somehow remiss in not separately identifying resources devoted to fatality investigations involving immigrants. Specifically, designating resources for investigating immigrant-worker deaths would be a cumbersome and ineffective way to manage resources. Taken to the absurd, as an example, would be a case where there were three fatalities at one site, in one accident. If the victims were Hispanic, African American and Caucasian, would OSHA be expected to maintain and track separate budgets for investigations of these deaths to keep within budgeted parameters?

Sound public policy is evidence-based, that is, founded on facts and solid scientific principles derived from data. Thus, it would be critical to analyze which facts are relevant and contributed to a fatality such as the employment tasks that a worker was performing at the time of the fatality and under what conditions, including language barriers. This type of information, together with effective preventative measures, provides a much firmer foundation for sound policy than a worker's ethnicity.

OSHA looks at data from BLS and industry injury/illness experience rates and other information to do its targeting of those industries that pose the greatest risk to American workers. OSHA is charged to protect all American workers equally. The agency believes that this is best done by targeting high-hazard industries.

3. What Resources Does OSHA Use to Enforce Violations of Workplace Rules in Industries that Primarily Employ Immigrants?

To carry out its mission most effectively the agency targets industries where more injuries, illnesses and fatalities occur. OSHA targets its inspections based on workplace conditions, not according to the race, creed, ethnic background or immigrant status of the workers. The Agency focuses its inspections on workplace hazards and sets priorities according to the workplaces that have the highest incidence of work related injuries and illnesses and the most serious danger and potential for serious harm. The OSH Act requires employers to protect all employees from work place hazards. A high percentage of fatalities in the construction industry are Hispanic/Latino workers; over 50% of OSHA's enforcement efforts are targeted to this industry.

As in the case with the construction industry, OSHA believes that by focusing on the industries with the highest number of accidents, injuries and fatalities, the agency is reaching the immigrant worker populations within OSHA's authority. However, since BLS fatality statistics include fatalities that result from motor vehicle accidents, homicides, and suicides, deaths that may fall outside OSHA's authority to investigate, there may be some confusion about the BLS statistics as compared to OSHA fatality investigations. As noted in the OIG report, local law enforcement authorities have primary enforcement responsibility for investigating these incidents.

OSHA has developed a Strategic Management Plan. As part of the Strategic Management Plan, one of the Agency's strategies is to "improve the targeting to maximize the impact of direct intervention and...determine the best targets for direct interventions." This strategy should continue to ensure that OSHA's activities are directed at those conditions and workplaces that are most in need.

4. How Can OSHA Prevent More Immigrant Workplace Deaths from Occurring?

While recognizing that more can be done to reach this population group, OSHA is doing far more than is acknowledged in the OIG report. OSHA works with many organizations at the area and regional level. The current focus is the Hispanic worker since this population group has the highest increase in workplace fatalities of any ethnic group. However, in the future this focus may change as dictated by the data.

OSHA has been working to provide training and outreach programs for immigrant workers for several years. OSHA's report to the Senate Appropriations Committee highlighted some of these initiatives through 2002. Since the Senate report was written,

OSHA has appointed Hispanic Coordinators in each of its ten regions, developed an internal clearing house of training materials and programs for Spanish speakers, and initiated a variety of other programs to address this segment of the worker population.

The agency has actively pursued new and innovative ways to reach the immigrant community. For example, OSHA awards Susan Harwood Training Grants to a variety of organizations, including colleges, universities and other educational institutions to develop Spanish-language safety and health training programs targeted for immigrant workers. OSHA added a Spanish-language option to its national hotline (1-800-321-OSHA) in June of 2002. Further, the OSHA Hispanic Task Force created an English-to-Spanish glossary of over 200 frequently/commonly used terms for general OSHA and the construction industry. OSHA's Alliance Program enables organizations committed to workplace safety and health to collaborate with OSHA to prevent injuries and illnesses in the workplace. The agency already has initiated several such agreements with various organizations to provide outreach, education, and training in promoting safe and healthful working conditions for immigrant communities. OSHA's efforts are enumerated in the agency's report to the Senate Appropriations Committee.

The OIG report fails to give full credit to the extensive work being performed by OSHA's Hispanic Worker Task Force. Specifically, the Agency has:

- Established a nationwide 1-800 complaint/concern line with Spanish-speaking capability;
- Created a new web page for Spanish-speaking employers and workers;
- Directed all OSHA field offices to reemphasize and reestablish contacts with local police, fire fighters, and other emergency responders for referrals whenever an injury is work-related;
- Developed a list of all Spanish-speaking OSHA employees nationwide;
- Assessed the Agency's resource capability in other languages;
- Participated in the Hispanic Forum at the National Safety Council;
- Conducted a Best Practices meeting for employers with Hispanic/Latino workers at the National Safety Council;
- Participated in the US Hispanic Chamber of Commerce Conference; and
- Participated at the Hispanic Contractors of American Conference.

The OIG report mentions OSHA's work with the Wage and Hour Division (WHD) but does not expand on the initiatives in which OSHA WHD and EEOC are involved. These initiatives, spearheaded by WHD also involve a wide variety of community, faith-based as well as local governmental organizations currently operating, with additional localities slated for the future. These partnerships seek to educate Hispanics and recent immigrant workers on their rights and responsibilities as well as encourage them to report violations of laws enforced by the U.S. Department of Labor's Occupational Safety and Health Administration, Wage and Hour Division, Office of Federal Contract Compliance, and other federal agencies.

In addition to the efforts outlined above, OSHA and NIOSH will hold a joint Hispanic Summit. This is planned for 2004 and will involve many community, faith-based, union, employer, and academic organizations.

The agency appreciates the suggestion that it expand coordination within the Department of Labor and the Federal Government to reach immigrants regardless of their legal status and will pursue working relationships with the Employment and Training Administration as suggested. We will also explore working with the Department of Education to provide information about OSHA through the Family and Literacy programs.

The following responses address the specific recommendations made in the OIG report:

Recommendations

- 1. Ensure that OSHA's compliance staff has sufficient second-language capability to communicate with non-English-speaking workers. This may be accomplished through language training of existing staff and/or through the hiring of bilingual staff as vacancies occur.**

OSHA agrees with this recommendation that it would benefit the agency to have more Compliance Safety and Health Officers (CSHOs) who are fluent in a language other than English. However, we believe it is far more effective to continue to hire employees who are already bilingual, than to teach current employees a new language. Toward that end, the agency is actively recruiting Spanish-speaking employees to add to the 180 employees the agency currently has with such skills in both its enforcement and compliance assistance positions. OSHA also has staff fluent in other languages such as Vietnamese.

In addition to hiring employees who are fluent in more than one language, OSHA is exploring options to use translation tools such as on-the-spot translation services that can be accessed by a cell phone that has speaker-phone capabilities.

- 2. Issue an Interpretation Letter clarifying that OSHA's training provisions require employers to provide training in a manner that employees understand taking into account different languages and literacy levels.**

OSHA agrees with the intent of this recommendation from the OIG that training be given in a language and literacy level understood by the worker. However, the agency is not convinced that the issuance of an interpretation letter is necessary to clarify training provisions. In applying the training provisions in OSHA's standards in a compliance context, the agency has long interpreted the employer's requirement to provide training to mean, "provide in a manner that employees understand." Employers are responsible for training their employees so that the employee understands how to do the job safely. Consider a multilingual employee population in which there are several languages spoken such as Mandarin, Spanish and Polish. Asking an employer to prepare training in each language is unreasonably burdensome. The employer could use several other options to

ensure the employees understand the training. For example, the employer could use a "train-the-trainer" program in which bilingual employees are trained as safety and health trainers. They, in turn, train the other employees using their native language. Another option is the use of translators or the use of pictograms.

OSHA appreciates the fact that conducting training in an employee's language is not the only way to accomplish the tasks. The issue is to ensure that the employee understands how to perform his/her work tasks safely. Through the Susan Harwood Grant Program, OSHA offers funds to nonprofit organizations to train workers and employers to recognize, avoid, and prevent safety and health hazards in their workplaces. Sensitive to this issue of employee understanding, some of these grantees are exploring ways to train employees utilizing pictures, music and videos rather than using specific language.

3. Ensure that outreach efforts to immigrants are consistently evaluated to determine which are most effective.

OSHA concurs with this recommendation. The agency firmly believes in evaluating its programs to determine effectiveness. These evaluations will include the effectiveness of agency outreach efforts, including those directed to workers with limited English proficiency.

4. Develop a comprehensive strategy to reach all immigrants, including undocumented immigrants. In that regard, we suggest that OSHA analyze the data that CSHOs have collected since April 2002, on immigrant fatalities and catastrophes to help identify specific issues that need to be addressed.

OSHA not only concurs with this recommendation, but believes it has already complied with it in developing a comprehensive strategy to reach workers for whom English is not necessarily a first language. OSHA has already begun outreach and training programs for all immigrant workers including the formation of Strategic Partnerships and Alliances and working with community groups, churches and advocates for immigrant workers. OSHA is also working with other federal agencies such as NIOSH and DOL agencies such as ESA. The agency has a Hispanic Task Force, Hispanic Coordinators in each of the regions, and has a National Internal Clearinghouse of materials and activities so that OSHA staff can share ideas and resources. The agency intends to expand these efforts on all these fronts consistent with the agency's own Strategic Management Plan strategy of improving "OSHA's intelligence gathering, analytical, targeting and performance measurement capabilities." To accomplish this, OSHA intends to use the data collected from the OSHA 170 as well as information gathered from the BLS reports.

5. Continue to translate essential current and future OSHA documents and develop a systematic process for determining which languages and what literacy levels are needed. Analyzing the information that CSHOs collect on immigrant fatalities and catastrophes (April 26, 2002 memorandum, Interim Procedures for Fatality and Catastrophe Investigations) could contribute to determining which languages are needed.

OSHA concurs with this recommendation. The agency agrees that it is important to have appropriate and accurate translations of materials for immigrant workers as demonstrated by our current efforts. OSHA has translated publications, developed safety and health training programs, formed alliances with Hispanic and Latino organizations, and partnered with community and faith-based organizations to provide safety and health training and awareness programs. In addition, OSHA is working with the Mexican government in a mutually beneficial training initiative. In return for use of OSHA's safety and health training curricula, the Mexican government is committed to translating our training materials into Spanish and providing the agency with those translations.

It should be noted, however, that some of these documents, such as OSHA regulations and standards, are very carefully worded to hold particular legal meaning. As OSHA moves forward in translating its documents into other languages, it is important that we proceed cautiously to ensure that legal meanings are not changed through the translation process. OSHA is committed to continue to translate documents as resources are available.

- 6. Evaluate the impact of its deterrence efforts on willful violations that result in death or serious physical harm. Specifically, OSHA should examine the deterrent effect of raising civil and criminal fines, increasing the criminal charges under Section 17(e) of the OSH Act from a misdemeanor to a felony, expanding Section 17(e) to cover employers whose willful violations result in serious physical harm, and allowing prosecutors to seek restitution for victims.**

OSHA is uncertain about the practicality of this recommendation. While the agency is committed to evaluating the effectiveness of its programs and has committed to doing so in its Strategic Management Plan, two cautions should be considered with regard to measuring the specific items of this recommendation. First, the number of fatalities that result from willful violations is very limited. In 2001, there were 40 such fatalities identified in Federal states; in 2002, there were 59, and in 2003, only 28. OSHA does not believe that a statistically significant evaluation of the deterrent effect would be possible from such limited information. Second, it is exceedingly difficult to actually measure the deterrent effect. It is not clear how OSHA would separate the specific deterrent effect of willful violations for one employer from that of the general deterrent effect of citations and penalties for many employers or even per industry sector.

The primary mandate of the OSH Act is to assure safe and healthful working conditions for every working man and woman. Congress provided a wide range of authorities to accomplish this mandate, only one of which is the enforcement authority. Imposition of high civil penalties and/or restitution awards would therefore not be OSHA's only means of interacting with employers. The statutory penalty scheme embodied in section 17 of the Act does not address extraordinary compensatory or punitive measures to be levied in fatality cases. However, as noted in the OIG report, OSHA can and does impose substantial monetary penalties on employers to effect deterrence, and when the gravity of

the violation is very high, the egregious enforcement policy is available to OSHA for employers who flagrantly violate OSHA standards.

Section 11(b) authorizes the Secretary of Labor to obtain court orders compelling recalcitrant employers, who have willfully and repeatedly violated the Act, to comply with final orders of the Occupational Safety and Health Review Commission. An employer who violates such an order can be found in contempt of court. Potential sanctions include the daily failure-to-abate penalties provided in the Act (including prospective daily penalties), recovery of the Secretary's costs of bringing the action, incarceration of an individual corporate officer who flouts the court's order, and any other sanction necessary to secure compliance. See *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413 (7th Cir. 1995; assessing penalty of \$1,452,000 for past contempt and \$7,000 for each day of future noncompliance.)

The New York cases cited in the OIG Report focus on the inability of families of decedents from workplace accidents, or workers suffering serious bodily injury, to receive any financial restitution under section 17 of the Act. The Report lauds a particular case where the U.S. Attorney successfully prosecuted an employer for making false statements under 18 U.S.C. 1001, rather than using section 17, to obtain \$1,000,000 in restitution for the victims of the collapse. The prosecutor's "flexibility" to request restitution in that case (and therefore the perceived more favorable result) is misleading. In criminally referred OSHA cases, if there is evidence of false or misleading statements a prosecutor is most likely to first invoke the more harsh *felony* charges and penalties of 18 U.S.C. 1001 against employers, rather than pursue the lesser *misdemeanor* fines of section 17(e). That flexibility, however, will always be contingent on the particular facts of the case.

OSHA will consider this recommendation after discussing it with other federal agencies and stakeholders as to the impact of changes to the criminal penalty provisions of the OSH Act.