



**EVALUATION OF OSHA'S
HANDLING OF IMMIGRANT FATALITIES
IN THE WORKPLACE**

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

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ABBREVIATIONS AND ACRONYMS

AFL-CIO	American Federation of Labor-Congress of Industrial Organizations
ALJ	Administrative Law Judge
BLS	Bureau of Labor Statistics
BOI	Bureau of Investigations
CSHO	Compliance Safety and Health Officer
CY	Calendar Year
DOL	Department of Labor
ETA	Employment and Training Administration
FY	Fiscal Year
FTE	Full Time Equivalents
LEP	Local Emphasis Program
NYCOSH	New York Committee for Occupational Safety and Health
OIG	Office of Inspector General
OSH Act	Occupational Safety and Health Act of 1970
OSHA	Occupational Safety and Health Administration

EXECUTIVE SUMMARY

INTRODUCTION

At the request of Senator Charles E. Schumer of New York, we conducted an evaluation of the Occupational Safety and Health Administration's (OSHA) handling of immigrant deaths in the workplace. Specifically, Senator Schumer asked that the evaluation answer the following questions.

1. How does OSHA examine immigrant workplace deaths?
2. What resources does OSHA allocate to investigating these deaths?
3. What resources does OSHA use to enforce violations of workplace rules in industries that primarily employ immigrants?
4. How can OSHA prevent more immigrant workplace deaths from occurring?

RESULTS

1. How Does OSHA Examine Immigrant Workplace Deaths?

OSHA's inspection priorities, reporting requirements, and fatality investigations do not distinguish between immigrant¹ and non-immigrant workers. Federal regulations require that all employers report workplace fatalities to OSHA within 8 hours. Employers are not required to report whether the fatality involves an immigrant or non-English-speaking employee. If the fatality involves both an employee and a work-related exposure, OSHA will investigate the events and determine whether violations of OSHA's safety and health standards contributed to the accident. According to OSHA management, the Agency does employ strategies to address immigrant-related issues during fatality investigations. However, many of the Compliance Safety and Health Officers (CSHOs) we interviewed noted that when a fatality involves non-English-speaking employees, language barriers created problems.

¹ We interpreted "immigrant" to refer to non-English speakers; however, we used the term foreign-born workers when discussing Bureau of Labor Statistics (BLS) data, because that is how BLS categorizes its data.

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

Prior to our study, OSHA was not tracking immigrant versus non-immigrant fatalities. In addition, OSHA did not budget separate resources for investigating immigrant fatalities. Therefore, OSHA was unable to provide the data needed to determine resources allocated to immigrant fatalities. During the course of our evaluation, OSHA issued a memorandum that explained procedures for collecting data about workers' ethnicity and language capabilities. According to OSHA, this data will be used to help the agency determine whether there is a link between language/cultural barriers and employee fatalities, and use this information to better target resources.

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

Because OSHA does not specifically target industries that primarily employ immigrants, it was unable to provide the information needed to determine the resources allocated to those industries. According to the Bureau of Labor Statistics (BLS), the largest number of fatalities to foreign-born workers occurs in construction, where OSHA conducts the majority of its inspections. The second highest industry for foreign-born worker fatalities is retail trade. According to BLS, retail trades have one of the highest rates of workplace fatalities due to workplace violence. However, with very limited exceptions, the local authorities, not OSHA, investigate workplace fatalities caused by violence, regardless of whether they involve immigrants.

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

While OSHA has begun a number of initiatives, including forming a special executive task force to assess the agency's ongoing Hispanic outreach efforts, aimed at preventing immigrant workplace fatalities, we identified three areas – training, outreach, and penalties – where more can be done.

Training employees to perform their jobs correctly and safely is an important part of preventing workplace fatalities. OSHA's regulations contain training provisions that require employers to provide an appropriate amount and type of training for employees based on the job the employee is performing. However, OSHA's training provisions do not address the different languages and literacy levels of immigrant workers.

Further, we found that OSHA is not consistently evaluating its outreach efforts and has not developed a comprehensive strategy for reaching all non-English-speaking employees, including undocumented immigrants. OSHA has begun translating documents into different languages, primarily Spanish. According to OSHA, although regional offices translate documents based on their knowledge of their regions' needs, OSHA does not have a systematic process for determining which languages and what literacy levels documents need to be translated into.

Finally, we are concerned that current penalty options available to OSHA may not serve as an effective deterrent to employers who have a willful disregard for employees' safety and health. Our concern is based on our examination of (1) recent workplace fatalities resulting from safety violations of OSHA regulations, (2) results of a prior OIG audit regarding egregious cases, (3) California's implementation of the OSH Act, and (4) the low number of cases referred to and prosecuted by the U.S. Attorney's Office.

RECOMMENDATIONS

As a result of our evaluation, we make the following recommendations to improve OSHA's handling of immigrant workplace fatality investigations and help prevent workplace fatalities.

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.
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.
3. Ensure that outreach efforts to immigrants are consistently evaluated to determine which are most effective.
4. Develop a comprehensive strategy to reach all immigrants, including undocumented immigrants. In that regard, we suggest that OSHA analyze the data that CSHO's have collected since April 2002, on immigrant fatalities and catastrophes to help identify specific issues that need to be addressed.
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 CSHO's 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.
6. Evaluate the effectiveness of penalties in deterring 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.

AGENCY RESPONSE AND OIG CONCLUSION

In response to OIG's official draft report, OSHA generally agreed with our findings and recommendations. As a result of corrective actions planned or already taken by OSHA, we consider the first five recommendations to be resolved. These recommendations will be closed pending OIG's receipt and review of appropriate documentation of corrective actions as specified in the report. OSHA's response to recommendation 6 stated OSHA would consider the recommendation after discussing it with other federal agencies and stakeholders. OIG will postpone making a decision regarding resolution of the recommendation until OSHA reports back to the OIG on its deliberations with other federal agencies and stakeholders and its conclusions about the OIG recommendation.

We have incorporated excerpts from OSHA's response in the Recommendations section of this report. OSHA made additional comments on the report's findings. We have incorporated some of these comments into the report. OSHA's complete response is included as an Appendix.

BACKGROUND

The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) was created in 1970 to carry out the Occupational Safety and Health Act (OSH Act), which declared a national policy of ensuring safe and healthful working conditions for employees. Either Federal or state governments administer the OSH Act, which covers more than 100 million working men and women and their 6-½ million employers.

Section 18 of the OSH Act encourages states to develop and operate their own job safety and health programs. OSHA approves and monitors state plans and provides up to 50 percent of an approved plan's operating costs. For OSHA to approve a state's plan, the state must set and enforce job safety and health standards that are at least as effective as comparable Federal standards. Federal OSHA administers the OSH Act in states that do not have a state plan. Currently, 23 states and jurisdictions are operating complete state plans (covering both the private sector and state and local government employees), and three states cover public employees only.

OSHA develops and enforces workplace safety and health standards, educates employers and employees about workplace hazards, and conducts inspections of employers to assess compliance with applicable safety and health standards.

OSHA has stated it is focusing on three strategies to carry out its mission: 1) strong, fair, and effective enforcement; 2) outreach, education, and compliance assistance; and 3) partnerships and voluntary programs. The agency also provides consultation, training and information services for employers and employees.

According to OSHA, there is evidence of significant improvements in safety and health conditions in America since implementation of the OSH Act: workplace fatalities have been cut in half, and occupational injury and illness rates declined by 40 percent. At the same time, U.S. employment has nearly doubled from 56 million workers at 3.5 million worksites to 111 million workers at 7 million sites. In the last decade, the overall injury/illness incidence rate dropped by 31 percent, and the number of fatal workplace injuries declined from 6,588 in 1994 to 5,900 in 2001. However, according to the Bureau of Labor Statistics (BLS), the number of immigrant workers killed on the job in the United States reached a record high in 2000.

In July 2001, *Newsday* published a series of articles profiling immigrant fatalities in the workplace.² The articles stated that between 1994 and 1999, over 500 immigrant fatalities in New York State were attributed to work-related incidents, with more than 4,200 work-related immigrant fatalities occurring nationally. *Newsday* alleged that OSHA did not devote sufficient resources to investigate worker deaths in low-wage and non-union industries, and that at least 874 immigrant worker deaths nationwide during a 6-year period were never reviewed by OSHA inspectors, including 202 incidents in New York State.

² Thomas Maier, "Series: Death on the Job," *Newsday*, 22-26 July 2001.

The articles referenced BLS data. In tracking fatality information, BLS uses the term “foreign-born” workers, using country of origin information obtained from death certificates. “Foreign-born” workers include all those who were born in other countries. BLS does not track whether the deceased was in the country legally, how long the immigrant had been in the United States, or if he/she was a non-English speaker.

On several occasions, the Secretary of Labor has expressed her concern over the increase in immigrant work-related fatalities, and her commitment to reducing fatalities, injuries, and illnesses among immigrant workers. For example, in a February 2003 speech, the Secretary announced her request of a \$13 million increase for OSHA, targeting some of that money to improve safety protections for Hispanic workers, who are experiencing higher-than-average fatality and injury rates. In August 2001, the Secretary requested that OSHA establish a Hispanic Task Force to evaluate the effectiveness of its programs, assess workplace needs, solicit input from stakeholders and adopt programs to address emerging issues related to Hispanic/Latino and immigrant workers. In response, OSHA developed a Task Force that is composed of national and regional OSHA staff. It meets regularly to determine what additional activities are needed to improve the training, education and information used to reach Hispanic/Latino workers, their families, and their employers, and improve the safety and health of their workplaces.

Information on the Hispanic Task Force, as well as additional examples of outreach and training, are outlined in OSHA’s report to the Senate Appropriations Committee entitled *Workplace Fatalities and Injuries Among Hispanic/Latino and Immigrant Workers* (September 16, 2002). In addition, OSHA is working with the National Institute for Occupational Safety and Health, the Mexican Consulates in a variety of cities, as well as community and faith-based organizations. OSHA is also pursuing strategic partnerships and alliances with Hispanic/Latino groups, such as the Hispanic Chamber of Commerce.

PURPOSE, SCOPE AND METHODOLOGY

PURPOSE

The purpose of our evaluation was to address the specific questions raised by Senator Schumer, relative to immigrant fatalities in the workplace, as follows:

1. How does OSHA examine immigrant workplace deaths?
2. What resources does OSHA allocate to investigating these deaths?
3. What resources does OSHA use to enforce violations of workplace rules in industries that primarily employ immigrants?
4. How can OSHA prevent more immigrant workplace deaths from occurring?

SCOPE AND METHODOLOGY

As part of our evaluation, we interviewed Federal OSHA headquarters' staff and OSHA field staff in New York, Florida, and Texas. We also interviewed California's Division of Occupational Safety and Health's headquarters and field staff. California is a state-plan state. We selected New York, Florida, Texas, and California, because, according to BLS data, these states had the highest number of foreign-born occupational fatalities in 2000: New York (91), Florida (91), Texas (115), and California (195). We conducted phone interviews with OSHA Regional Directors, Area Directors and Compliance Safety and Health Officers (CSHOs) in each of these states.

Also, we conducted fieldwork in New York City, where we interviewed staff from community groups such as the New York Committee for Occupational Safety and Health; the Union of Needletrades, Industrial and Textile Employees; the New York Department of Buildings; the Building Trades Employees Association; the Employment Standards Administration's Wage and Hour Division; and OSHA. We were not able to review OSHA case files in New York because the Manhattan office's case files were destroyed in the World Trade Center attacks on September 11, 2001.

In addition to interviews, we reviewed numerous documents, including the OSH Act of 1970 and pertinent regulations, OSHA budget justifications, OSHA manuals and directives, state statutes, and other pertinent material.

We reviewed BLS data on fatal occupational injuries of foreign-born workers from 1994 to 2000. The data were categorized by state and industry. We also examined OSHA

budget information from FY 1999 to 2003 and fatality and enforcement statistics covering 1997 to 2001. The OSHA statistics we reviewed included the number of programmed, unprogrammed, and fatality inspections by region and by state. BLS collects demographic data and the circumstances of the fatal event, but does not report the names of deceased workers. Therefore, we were unable to compare the BLS data concerning fatal occupational injuries of foreign-born workers with OSHA fatality investigation data to identify which fatalities OSHA did not investigate and why.

We conducted our evaluation in accordance with the *Quality Standards for Inspections* published by the President's Council on Integrity and Efficiency.

RESULTS

1. How Does OSHA Examine Immigrant Workplace Deaths?

The OSH Act treats all employees equally. We found that OSHA's inspection priorities, reporting requirements, and fatality investigations do not distinguish between immigrant and non-immigrant workers. However, according to OSHA, the Agency does employ strategies to address immigrant-related issues, such as language barriers, when investigating a workplace fatality.

A. Inspections

OSHA inspections of a worksite may be either programmed or unprogrammed. Programmed, or planned, inspections are those that are conducted based on objective or neutral criteria such as number of deaths, injury and illness rates, or employee exposure to toxic substances. Unprogrammed inspections are those conducted in response to alleged hazardous working conditions at a specific worksite, such as reports of imminent dangers, fatalities/catastrophes, complaints and referrals.

Based on the nature of an alleged hazard, unprogrammed inspections are normally conducted prior to programmed inspections. According to OSHA, the agency prioritizes its inspections in the following order:

1. reports of imminent dangers,
2. fatalities or accidents serious enough to send three or more workers to the hospital,
3. employee complaints and referrals from other government agencies, and
4. targeted inspections (see Finding C).

While employee complaints are considered a high priority, OSHA representatives and community groups both noted that immigrants, particularly undocumented immigrants, are unlikely to complain about workplace hazards. Immigrants' reluctance to complain may be attributed to fear of being deported, fear of the government, or a lack of knowledge about OSHA.

B. Reporting Requirements

Federal regulations require all employers to report the death of any employee from a work-related incident within 8 hours. Regulations do not require employers to inform OSHA whether the victim is an immigrant or a non-English speaker when reporting a fatality. Community groups we interviewed expressed concern that the current monetary penalty for failure to report a workplace death to OSHA is not a sufficient deterrent for some employers. If an employer willfully fails to report a workplace death, OSHA can fine the employer up to \$70,000. Many of the CSHOs we interviewed stated that the penalties for not reporting a fatality are strong enough, and that the problem is not that employers knowingly fail to report, but that many employers are not aware that they are required to report.

Community groups in New York also expressed concern that OSHA does not have formal agreements with hospitals and medical examiners for reporting workplace fatalities. However, many of the CSHOs we interviewed described strong relationships with the local authorities. Through Emergency Medical Technicians, local police, or police scanners, OSHA often learns about workplace fatalities before an employer has an opportunity to report the incident. In addition, on February 1, 2002, OSHA issued a memorandum to its Regional Administrators instructing them to direct their Area Directors to contact Federal, state, and local law enforcement and health authorities, requesting that these agencies and groups assist OSHA in obtaining information on non-English-speaking worker fatalities that might not otherwise be reported to OSHA.

C. Fatality Investigations

For OSHA to investigate a workplace fatality, the incident must involve the death of an employee and a work-related exposure. For example, OSHA will only investigate a traffic accident or a homicide if it involves workplace hazards. The highway patrol or the local police usually serve as the primary investigators for those fatalities. OSHA also does not investigate if the fatality involves a person who is self-employed or an independent contractor.

Once a workplace fatality is reported, a CSHO, preferably with expertise in the industry involved in the accident, is selected by the Area Director to conduct the inspection as quickly as possible. In Fiscal Year (FY) 1999, OSHA established a performance goal of initiating fatality and catastrophe investigations within 1 working day of notification. As Figure 1 shows, OSHA has moved closer to meeting that performance goal each year. We recognize that meeting this

Percentage of Fatality & Catastrophe Investigations Initiated Within One Working Day of Notification (unaudited)

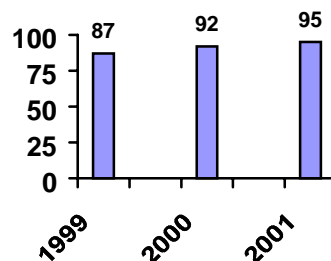


Figure 1

performance goal often depends on available resources in OSHA's Area Offices, and the amount of travel time required in getting to the accident scene.

The *Newsday* articles alleged that OSHA did not devote sufficient resources to investigating worker deaths in low-wage and non-union industries, and that at least 874 immigrant worker deaths nationwide during a 6-year period were never reviewed by OSHA inspectors, including 202 incidents in New York State. Because BLS does not collect employee names when tallying fatal occupational injuries, we were unable to compare BLS data on workplace fatalities to foreign-born workers with OSHA's data on fatality investigations to identify the cases referred to in the *Newsday* articles as never reviewed. Therefore, we did not verify the data contained in the *Newsday* articles. However, OSHA was able to provide information on 10 of the 14 immigrant fatalities specifically mentioned in the articles. OSHA was not able to research four of the deaths mentioned because the articles did not provide dates of the accidents, accident descriptions, and the employers or facilities where the accidents occurred.

Of the 10 fatalities that OSHA was able to research, OSHA investigated 5. Of the five deaths that OSHA did not investigate, four involved workplace violence and one involved an individual who was self-employed. None were investigated by OSHA because OSHA does not investigate a workplace death unless it involves an employee and a work-related hazard. In congressional testimony, the author of the *Newsday* articles noted that, "one of every three immigrants killed on the job died as a result of homicide or some other form of workplace violence. . . ."³

If a fatality does involve a workplace hazard and an employee, OSHA's policy is to investigate the events in an effort to determine whether violations of OSHA safety and health standards contributed to the death. When an investigator finds that an employer has violated one of OSHA's standards or the General Duty Clause of the OSH Act (5(a)(i)), OSHA procedures state that a citation shall be issued. Each citation is in writing and includes a description of the violation, including a reference to the OSH Act, standard, rule, regulation or order alleged to be violated. The citation also stipulates a reasonable time for abatement of the violation.

Many CSHOs we interviewed about fatality investigations stated that language barriers do create problems in communicating with non-English speakers. We found that the Area Offices we contacted employ some bilingual staff and try to recruit bilingual CSHOs when they have vacancies. They also arrange for translation services in the event a bilingual employee is not available or translation assistance is needed for a language in which no one in the office is fluent. However, fatality investigations frequently involve technical terms that are not easily translated, especially by someone who is not familiar with OSHA regulations.

³ Testimony of Thomas Maier, Reporter for *Newsday*, before the Committee on Health, Education, Labor and Pensions, February 27, 2002.

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

We found that OSHA did not track immigrant/non-immigrant status when investigating fatalities. Therefore, OSHA was unable to provide the information needed to determine what investigations involved immigrants over a specified period of time and what resources were allocated to those investigations.

During the course of our evaluation, OSHA issued a memorandum to its Regional Administrators, subject—“Interim Procedure for Fatality and Catastrophe Investigations.” In this April 26, 2002, memorandum, OSHA instructs CSHOs to complete a special form when a fatality or catastrophe involves an immigrant worker and/or Hispanic worker and/or a language barrier. The form includes questions such as “How well did the victim speak English?” and “What was the primary language of the supervisor(s) at the worksite?” OSHA believes that capturing this information will enable it to examine trends and risk factors to better target the agency’s resources. This information will also enable OSHA to calculate exactly how many fatality investigations involved an immigrant worker.

While we were unable to determine what resources OSHA allocates to investigating immigrant deaths because the required information was not tracked, we were able to obtain information on OSHA’s overall budget allocation and staffing.

A. OSHA Budget Dedicated to Federal Enforcement Activities

OSHA’s investigations are funded through the “Federal Enforcement” portion of the agency’s budget, which funds all of OSHA’s enforcement activities. While OSHA has discretion to determine which strategies to use and the level of resources to allocate to its programs, the OSH Act places emphasis on setting and enforcing standards as a means to bring about a workplace free from safety and health hazards. Standards development, enforcement, cooperative programs, and compliance assistance are the tools used by OSHA to fulfill its mission.

Federal enforcement activity reflects the compliance authority vested in OSHA by the Congress through the enforcement of Federal workplace standards under the OSH Act. Compliance is obtained, in part, by the physical inspection of plants and facilities, encouraging cooperation between employers and employees to ensure safe and healthy workplaces, and OSHA’s compliance assistance programs.

OSHA’s allocation of resources is shown in Figure 2. Of the \$443 million budgeted for OSHA in FY 2002, approximately 37 percent (approximately \$162 million) went to Federal enforcement activities; about 20 percent (approximately \$90 million) went to state program activities (OSHA funds up to half the cost of state-operated safety and health programs); and about 4 percent (approximately \$16 million) went to standards setting. Federal compliance assistance, state consultation grants and training grants combined for about 27 percent (approximately \$121 million) of the budget.

**Allocation of
OSHA Budget Activities
FY 2002 (unaudited)**

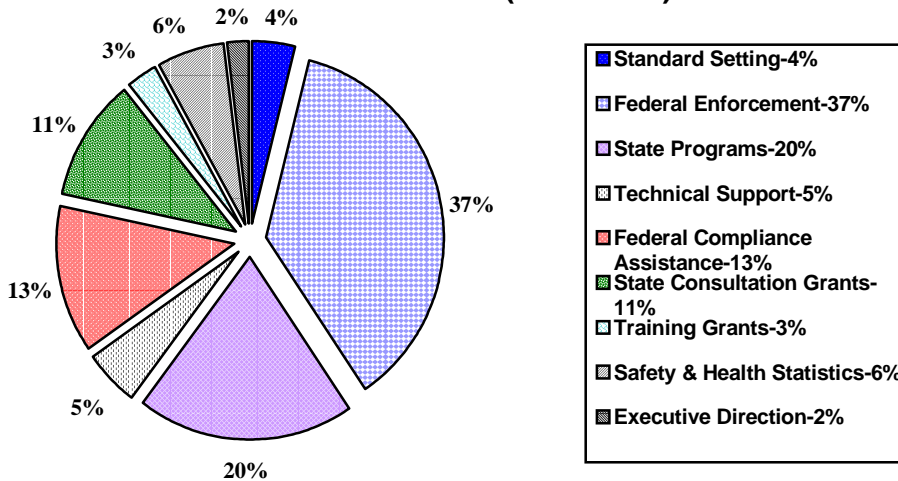


Figure 2

B. OSHA Budget Versus FTEs

Funding for OSHA’s Federal enforcement activity has steadily increased over the past 5 years, from a low of approximately \$128.8 million in FY 1998 to a high of \$161.9 million in FY 2002. During this same period, Full Time Equivalents (FTEs) dedicated to OSHA Federal enforcement steadily increased, from a low of 1,603 in FY 1998 to a high of 1,683 in FY 2001, but have declined over the last 2 years.

In FY 2002, OSHA’s appropriation for Federal enforcement activities increased from \$151.8 million to \$161.9 million, and an FTE reduction of 38. Fiscal Year 2003’s appropriation for Federal enforcement is \$164 million, with an additional reduction of 33 FTEs (see Figure 3).

**OSHA's Funding for Federal Enforcement Activities
versus FTEs in Federal Enforcement (unaudited)**

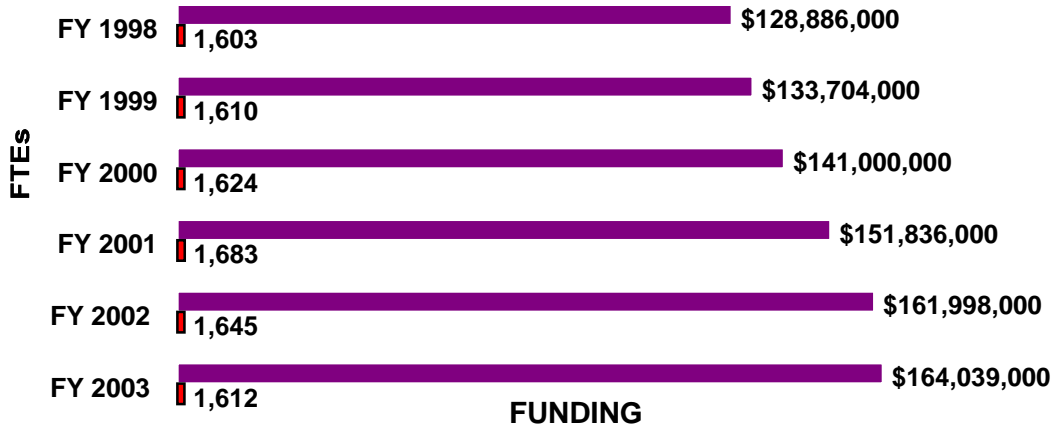


Figure 3

C. Inspections

In *Death On the Job: The Toll on Neglect, 10th Edition* (April 2001), the AFL-CIO calculated that at OSHA's FY 2001 staffing levels, it would take OSHA 109 years to inspect each workplace under its jurisdiction one time.

OSHA statistics reveal that between 1997-2001, OSHA averaged 35,529 inspections (programmed and unprogrammed) per year (see Figure 4). We were unable to determine which of these inspections involved employers who hire immigrant workers or non-English-speaking employees, since OSHA is not required to collect such information.

**Federal OSHA Inspections
1997 - 2001 (unaudited)**

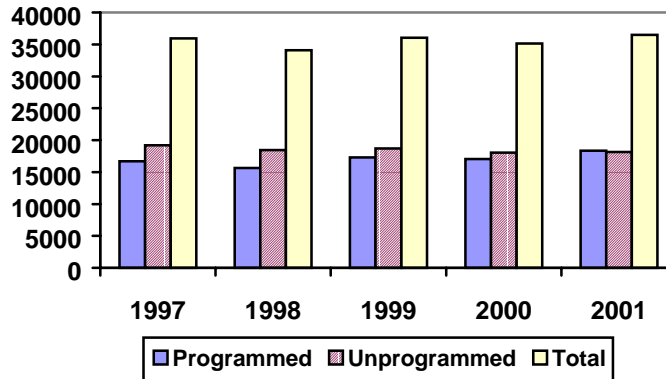


Figure 4

Summary

At the time of our evaluation, OSHA was not tracking immigrant fatalities. In addition, OSHA does not budget separate resources for investigating fatalities involving immigrants. As a result, OSHA was unable to provide the information needed to determine what resources it expends investigating these deaths. However, in April 2002, OSHA modified its OSHA-170 form (used to collect detailed information about fatalities) to include several questions relating to ethnicity and language capabilities. OSHA believes this information will enable it to better target the agency's resources in an effort to prevent future injuries and fatalities involving immigrants. This information will also enable OSHA to calculate how many fatalities involve immigrants.

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

Because OSHA categorizes industries by lost work day injury and illness rates or experience, and not by characteristics of employees, we were unable to identify what resources OSHA allocates to enforcing violations of workplace rules in industries that primarily employ immigrants. Therefore, we could not determine whether those specific resources were inadequate or mismanaged. OSHA’s policy is to target “high-hazard” industries—those with the highest number of accidents, injuries and fatalities. According to BLS, the highest number of fatalities to foreign-born workers occurs in construction, which is where OSHA conducts the majority of its inspections.

OSHA has two methods for targeting inspections: one method for general industry and maritime, and another for construction. For targeting general industries, OSHA uses BLS’ annual illness/injury survey to identify the most dangerous industries. OSHA then surveys over 80,000 general industry employers in the most hazardous industries in order to identify specific workplaces with higher than average lost workday injury and illness rates. The high injury worksites are then targeted for inspections. For construction targeting, OSHA relies on the F.W. Dodge Report to develop a list of construction projects to inspect. However, the Dodge report does not provide adequate information on smaller construction worksites. The start and completion dates are often unreliable for small construction sites. OSHA relies on Local Emphasis Programs (LEPs) to target smaller and high-hazard industries. LEPs allow area offices to target industries based on local knowledge. They usually focus on either a specific industry, such as the garment industry, or a specific hazard, such as conditions that may result in falls.

Figures 5 and 6 compare BLS data on fatal occupational injuries to foreign-born workers by industry, and OSHA’s programmed inspections by industry.⁴

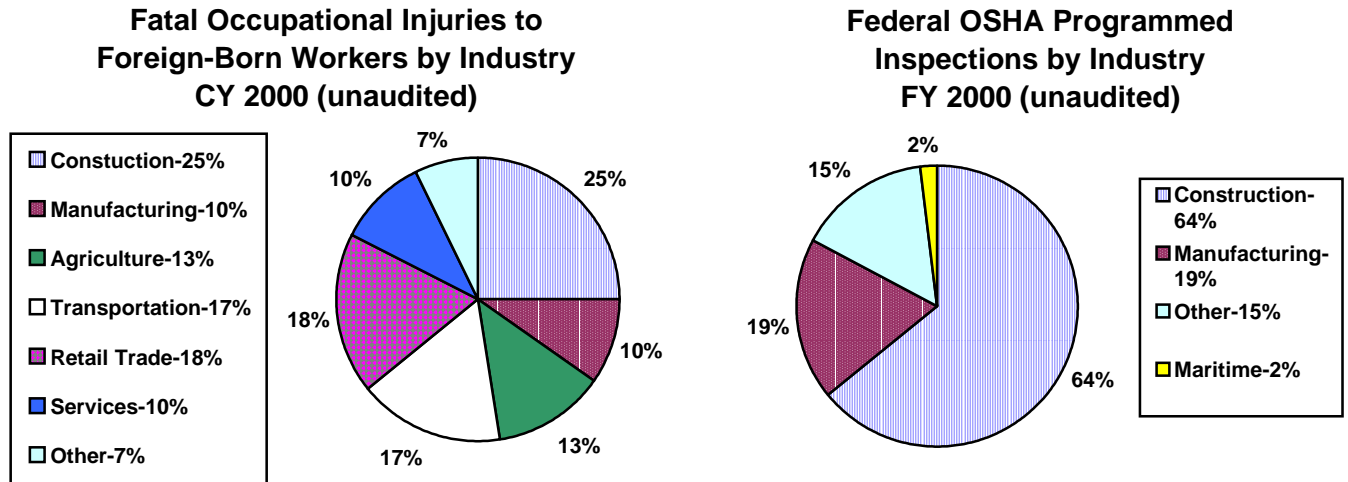


Figure 5

Figure 6

According to BLS, the largest number of fatalities of foreign-born workers occurs in the construction industry, where OSHA conducts the majority of its inspections. The second highest industry for fatalities to foreign-born workers is retail trade. OSHA considers some retail trade industries low-hazard, including automotive dealers, apparel and accessory stores, and restaurants. To be considered low-hazard, the industry must have an average lost workday case injury rate at or below 75 percent of the comparable private sector average for a 3-year designated measurement period. Consistent with Appropriation Committee Report requirements, low-hazard industries are exempt from certain record-keeping requirements (although they still have to report fatalities) and are not targeted for programmed safety inspections.

Although retail establishments have low illness and injury rates, according to BLS they have one of the highest rates of workplace fatalities due to workplace violence. While OSHA has not promulgated a safety standard for workplace violence, it has emphasized workplace violence prevention programs through adoption of the agency’s voluntary guidelines.⁵ The agency also has interpreted workplace violence issues to fall under the General Duty Clause, Section 5(a)(1) of the OSH Act. The clause does not require employers to assume the role of law enforcement authorities, but the employer is required to maintain a workplace free of recognized hazards likely to cause death or serious physical harm, providing there is a feasible means of abatement. However, with very limited exceptions, the local authorities, not OSHA, investigate workplace fatalities caused by violence, regardless of whether they involve immigrants.

⁴ The BLS data represent a calendar year, while the OSHA data are calculated by fiscal year.

⁵ Voluntary guidelines have been issued for the most violence-prone industries: taxi and livery drivers, late-night retail establishments, health care and social service workers, and community workers.

Summary

OSHA's policy is to target industries based on lost work day injury and illness rates, and not by employee characteristics. Therefore, we were unable to determine what resources OSHA allocates towards enforcing workplace violations in industries that primarily employ immigrants. However, by comparing BLS data on workplace fatalities to foreign-born workers with OSHA's inspection data, we were able to determine that OSHA conducts the majority of its inspections in the construction industry, where, according to BLS, the highest number of foreign-born worker fatalities occurs.

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

An important aspect of preventing workplace fatalities is safety training for employees. OSHA's regulations contain required training provisions for employers. However, OSHA's training provisions do not address the different languages and literacy levels of workers.

On September 16, 2002, OSHA issued a report to the U.S. Senate Appropriations Committee entitled *Workplace Fatalities and Injuries Among Hispanic/Latino and Immigrant Worker*. In the report, OSHA discussed the limitations of OSHA and BLS fatality statistics and provided information on its compliance assistance, outreach, training, and new initiatives in an effort to assist employers and workers from many different backgrounds to implement workplace safety and health management systems. However, OSHA has not evaluated its outreach efforts or translated all essential OSHA documents into several different languages.

A. Training Provisions in OSHA Regulations

During our interviews with CSHOs, we asked for suggestions on how employers could make their workplaces safer for immigrants and non-English-speaking workers. A majority of those interviewed stated that employers need to provide better training for employees.

Currently, OSHA's regulations vary in their consideration of immigrant workers' language and literacy skills in establishing training provisions. In fact, OSHA's Bloodborne Pathogen standard is the only provision that requires that "material appropriate in content and vocabulary to educational level, literacy, and language of employees shall be used" in training employees (29 CFR 1910.1030(g)(2)(vi)). In contrast, the standards covering safety training and education for the construction industry (29 CFR 1926.21) do not require employers to consider employees' literacy levels or language skills.

According to OSHA, the Agency has long interpreted the employer's requirement to provide employee training to mean providing training in a manner that employees understand.

B. Outreach

As noted in Result 2, OSHA implemented interim procedures to track immigrant fatalities in order to determine whether there is a link between language/cultural barriers and employee fatalities. This information should also assist OSHA in targeting its outreach efforts. In order to have effective outreach, OSHA must know the audience they are trying to reach. Immigrant populations vary greatly in their education levels and trust of government officials.

As previously noted, OSHA currently has numerous new compliance assistance efforts under way to assist immigrant workers. For example, OSHA has formed a special executive task force to assess the agency's ongoing Hispanic outreach efforts and determine what further activities are needed. The task force was instrumental in the creation of a Spanish-language website and a national clearinghouse for training programs in Spanish. According to OSHA, on Worker Memorial Day of 2003, OSHA released two public service announcements to over 650 Spanish radio stations. Outreach is also being done in individual regions. For example, in New Jersey, OSHA works with the Puerto Rican Congress by attending its annual conference and providing information about OSHA.

In addition to its current efforts, OSHA can do more, such as identifying and partnering with community groups that serve immigrant workers. For example, the OSHA regulations give employees and employees' representatives the right to request an inspection if they believe that a violation of safety and health standards or an imminent danger exists. OSHA's Region 2, which includes New York, interprets the term "representative of employees" in 29 CFR 1903.11 to include community groups such as the New York Committee for Occupational Safety and Health (NYCOSH). This allows NYCOSH to file a complaint and request an inspection on behalf of an employee.

As noted in Result 2., in April 2002, OSHA instructed CSHOs to complete a special form when a fatality or catastrophe involves an immigrant worker and/or Hispanic worker and/or a language barrier. OSHA could use this information to help identify specific issues and immigrant communities that need to be addressed.

Additionally, OSHA should expand its coordination with other agencies within the Department of Labor and the Federal Government to reach immigrants, regardless of their legal status. For example, OSHA has a Memorandum of Understanding with the Employment Standards Administration's Wage and Hour Division, which enforces the Fair Labor Standards Act. As part of its enforcement activities, Wage and Hour inspects sweatshops. Wage and Hour inspectors receive training from OSHA in order to recognize safety and health violations and make referrals to OSHA if a violation is serious. OSHA should explore similar partnerships with the Employment and Training Administration (ETA). For example, ETA could provide information about OSHA and its standards in various languages at its One-Stop Centers, and/or distribute information through its Migrant and Seasonal Farmworker Program. OSHA could also partner with the Department of Education to provide information about OSHA through its Adult and Family Literacy programs in an effort to inform the immigrant community about OSHA's mission.

OSHA has begun translating documents into different languages, primarily Spanish. According to OSHA, although regional offices translate documents based on their knowledge of their regions' needs, OSHA does not have a systematic process for determining which languages and what literacy levels documents need to be translated into. As mentioned earlier, OSHA has been collecting information on immigrant

fatalities and catastrophes since April 2002. We believe this information could help OSHA identify what languages and which literacy levels documents need to be translated into.

C. Penalties

As part of our efforts to determine how OSHA can prevent more immigrant workplace deaths from occurring, we found that OSHA needs to evaluate existing deterrents for willful violations of safety and health standards. The OSH Act provides both civil and criminal penalties. According to OSHA, the penalty structure of the Act is intended to deter employers from violating safety and health rules in their workplaces. These deterrents are directed to all employers with potential for OSHA inspections. In addition to civil penalties, the OSH Act also permits criminal prosecution of employers who willfully violate OSHA standards when that violation results in the death of an employee.

Penalties need to be severe enough to serve as an effective deterrent. Based on our examination of fatalities resulting from OSHA safety violations, the results of a prior OIG audit regarding egregious cases, California's implementation of the OSH Act, and the low number of cases referred by OSHA and prosecuted by the U.S. Attorney's Office, we are concerned that enforcement efforts do not seem to serve as an effective deterrent to those employers who have a complete disregard for employees' safety and health.

Civil Penalties

Under the OSH Act, OSHA can assess monetary penalties for OSHA violations. Violations are categorized as either serious or other-than-serious based on the severity of the violation or a repeated violation. Both serious and other-than-serious violations carry a maximum penalty of \$7,000. A willful violation or a repeated violation potentially carries a much higher penalty, with a minimum of \$5,000 and a maximum of \$70,000. According to OSHA, a willful violation exists where the evidence shows either an intentional disregard for the requirements of the Act or plain indifference to employee safety. Where the penalty for a willful violation falls within this range depends on whether the violation is serious or other-than-serious.

The gravity of the violation is the primary consideration in calculating the basic penalty. Once the basic penalty is established, OSHA can adjust penalties based on the size of the company, the good faith of the employer, and the employer's history of violations. Up to a 60 percent reduction is permitted for company size; up to 25 percent for good faith; and up to 10 percent for history. In FY 2001, OSHA conducted 1,080 fatality inspections, with an average penalty of \$7,988 per inspection. Of the 2,794 citations issued for those inspections, 46 (1.5 percent) were for willful violations, with an average penalty of \$37,896.

Beginning in 1986, OSHA instituted a policy to more vigorously pursue those employers who flagrantly violate occupational safety and health standards or regulations. In a limited number of cases, informally referred to as "egregious" cases, OSHA uses its

existing penalty calculation guidelines. However, rather than grouping or combining violations for penalty purposes, as is standard practice for non-egregious cases, each instance of noncompliance is considered separately. By considering each violation separately, OSHA significantly increases the total amount of penalties. A 1992 OIG audit⁶ examined substantial reductions in OSHA's proposed egregious case penalties. The OIG found that OSHA did reduce proposed penalties during settlement negotiations with employers. However, in exchange for reduced penalties, employers frequently agreed to take abatement actions beyond the violations discovered.

If an employer chooses not to settle with OSHA, it can contest the citation, abatement date, and proposed penalties to the Occupational Safety and Health Review Commission (OSHRC), an independent agency established under the OSH Act, which utilizes Administrative Law Judges (ALJs) to hold hearings on these contests and issue appropriate orders. Either party can further appeal the ALJ's decision to the OSHRC. The OSHRC has the authority to affirm, modify or vacate OSHA's citations or proposed penalties. In its 1992 audit, the OIG found that, when OSHA's egregious cases were appealed, ALJs reduced 57 percent of the willful citations to serious or other than serious, and vacated another 36 percent of willful violations. In other words, in egregious cases, ALJs only affirmed 6 percent of the willful violations cited by OSHA. We did not review the current percentage of penalties vacated, modified or affirmed by the OSHRC as part of this evaluation.

Criminal Penalties

Section 17(e) of the OSH Act provides criminal penalties for an employer who is convicted of having willfully violated an OSHA standard, rule, or order when that violation causes the death of an employee. Only employers who willfully violate OSHA standards can be prosecuted under Section 17(e). OSHA must prove that the employer knew about the violation and did not make any reasonable effort to correct it, resulting in the death of an employee. Section 17(e) does not provide criminal penalties for employers whose willful violations result in serious physical harm to an employee, nor does it provide the ability to seek restitution from violators.

When originally passed, the OSH Act called for a \$10,000 fine, imprisonment up to 6 months, or both. The Sentencing Reform Act of 1984 raised the fine for misdemeanors resulting in death to \$250,000 for an individual and \$500,000 for an organization. The maximum prison sentence remains at 6 months. In 1991 and 1992, the Department of Labor's Inspector General testified before Congress in support of increasing OSHA's criminal penalties. In 1994, the Secretary of Labor testified in support of changing the charge under Section 17(e) from a misdemeanor to a felony, and expanding 17(e) to cover "serious bodily injury."⁷

⁶ *Review of How OSHA Settled and Followed Up on Its Egregious Cases*, Report No. 05-92-008-10-001 (May 31, 1992)

⁷ Statement of Robert B. Reich before the Committee on Labor and Human Resources, United States Senate, February 9, 1994.

Two recent cases involving immigrant fatalities in New York City, as well as information on state-plan state criminal penalties for willful violations, illustrate the potential shortcomings of Section 17(e).

(a) *Recent New York Cases*

- (i)** The first incident occurred on April 30, 2001. While demolishing a building, a steel beam crushed a worker when a cement floor partially collapsed. In March 2001, OSHA inspected the demolition site and cited the general contractor for not having a written engineer's survey. In April, OSHA held an informal conference with the general contractor and the subcontractor who was hired to complete the demolition after the first OSHA inspection. OSHA explained the violation and the means of abatement to both parties. Later that month, the general contractor, based on information provided by the subcontractor, informed OSHA that the survey was conducted. However, OSHA learned later that the subcontractor never conducted the survey. According to OSHA, if he had conducted the survey, the subcontractor would have known that the equipment being used significantly exceeded the weight capacity of the floor. With this knowledge, he could have prevented the accident.

The employer was charged under Section 17(e) of the OSH Act (29 U.S.C. 666(e)). The subcontractor pled guilty to willfully violating OSHA standards resulting in the death of an employee. He agreed to settle his OSHA violations for \$100,000. On June 12, 2002, he was sentenced to 4 months in jail and 1 year of supervised release. The judge could not order restitution under Section 17(e) of the OSH Act. To receive any financial compensation, the family will have to sue the employer in civil court. It should also be noted that if the employee had not died, but was seriously injured, the employer could not have been prosecuted under the OSH Act even though his actions would have been just as egregious. OSHA defines "serious physical harm" as "an impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute."

- (ii)** The second incident occurred on November 23, 1999. Fourteen day laborers fell three stories into a basement when the floor they were working on collapsed. One worker died by drowning in cement. OSHA determined that the collapse was caused by improper construction practices. The owner of the construction company had a series of building accidents and collapses in the same area.

Instead of prosecuting the employer under Section 17(e) of the OSH Act, the U.S. Attorney's Office prosecuted the employer for false statements made during a 1996 OSHA inspection. By prosecuting the employer for false

statements (18 U.S.C. 1001) instead of for willfully violating OSHA standards resulting in the death of an employee (OSH Act Section 17(e)), the U.S. Attorney had the flexibility to request restitution. Under a plea agreement, the employer was ordered to pay \$1,000,000 in restitution to the victims of the collapse and \$100,000 to settle OSHA violations, and was sentenced to 3 years of probation.

(b) *State-Plan States*

State-plan states develop and operate their own occupational safety and health programs. In order to operate its own plan, a state must show that its job safety and health program is at least as effective as OSHA's. Of the 23 state-plan states, eight (Arizona, California, Iowa, Michigan, Puerto Rico, Tennessee, Utah, and Vermont) established penalties greater than the 6-month sentences prescribed by the Federal OSH Act.

For example, California increased prison sentences under the California Labor Code in 1999. Under California Labor Law section 6425(a), an employer convicted of a misdemeanor can face a county jail term not to exceed 1 year, a fine not to exceed \$100,000, or both. If convicted of a felony, an employer can face 16 months or 2 to 3 years in a state prison, a fine of \$250,000, or both. If the defendant is a corporation, the fine imposed can be up to \$1.5 million (California Labor Code Section 6424). In California, an employer can be prosecuted for both a willful violation that causes the death of an employee, as in the OSH Act, and for a willful violation that results in permanent or prolonged impairment. California law also differs from the Federal statute with regard to who can be prosecuted. Under California law, not only can an employer be prosecuted, but also an individual who has direction, management, control or custody of a place of employment or employee. Since the OSH Act only permits prosecution of the "employer," if an employee works for a corporation, the corporation is considered the employer. Additionally, prosecution under the California Labor Code does not preclude prosecution under the state manslaughter statute.

California's Occupational Safety and Health Administration has referred approximately 60 cases to prosecutors for review annually, and approximately 20–25 criminal complaints have been filed when the charge was a misdemeanor. Despite this level of activity, California decided to try to increase the deterrent effect by allowing prosecutors to charge an employer with a felony.

Based on data provided to us by OSHA, the OSHA referred 6 cases to U.S. Attorney's Offices in CY 2000, and 12 cases in CY 2001. Of the six cases OSHA referred in CY 2000, the U.S. Attorney's Office is pursuing five and still examining one. Of the 12 cases OSHA referred in CY 2001, the U.S. Attorney's Office is still examining 6, rejected 2, and moved forward on 4.

As part of the Secretary of Labor's 1994 congressional testimony concerning criminal penalties for willful violations of OSHA standards, the Department supported a provision that would expand the definition of "employer" to include individuals who have the power to bring about compliance with the OSH Act, including the power to remove an employee from exposure to a hazard.

Summary

Training employees to perform their jobs correctly and safely is an important part of preventing workplace fatalities. For the most part, OSHA's training provisions do not address the different languages and literacy levels of immigrant workers.

While OSHA has begun a number of initiatives aimed at preventing immigrant workplace fatalities, OSHA is not consistently evaluating its outreach efforts, and has not developed a comprehensive strategy for reaching all non-English-speaking employees, including undocumented immigrants.

Finally, we are concerned that current penalty options available to OSHA may not serve as an effective deterrent to employers who have a willful disregard for employees' safety and health.

RECOMMENDATIONS

In answering Senator Schumer's question – how can OSHA prevent more workplace immigrant fatalities from occurring? – we developed several recommendations involving training, outreach and penalties. We recommend OSHA:

1. Ensure that its 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's Response

“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.”

OIG's Conclusion

We concur with OSHA's proposed corrective actions and consider this recommendation to be resolved. This recommendation will be closed pending receipt and review of documentation showing the status of the agency's progress in recruiting multi-lingual employees, as well as the use of various translation tools.

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's Response

“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."

OIG's Conclusion

Based on OSHA's response, we conclude that OSHA has presented an alternative that will satisfy the intent of the recommendation. Accordingly, we consider this recommendation to be resolved. This recommendation will be closed pending receipt and review of information documenting what actions OSHA has taken to ensure that employers are using effective methods to provide training to their employees on how to perform their work tasks safely.

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

OSHA's Response

"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."

OIG's Conclusion

We concur with OSHA's proposed corrective action and consider this recommendation to be resolved. This recommendation will be closed pending

receipt and review of documentation on the results of evaluations the agency has conducted on the effectiveness of OSHA's outreach efforts 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's Response

Recommendation 4: *“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.”*

OIG's Conclusion

As a result of corrective actions planned or already taken by OSHA, we consider this recommendation to be resolved. This recommendation will be closed pending receipt and review of documentation summarizing the results of the analysis of data collected and reported by CSHOs (the OSHA 170) on immigrant fatalities/catastrophes since April 2002, as well as what steps the agency has taken to expand its efforts to further enhance its comprehensive strategy to reach all workers with limited English proficiency.

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's Response

“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.”

OIG's Conclusion

We concur with OSHA's proposed corrective actions and consider this recommendation to be resolved. This recommendation will be closed pending receipt and review of documentation reporting the status of OSHA's progress in translating agency documents into other languages.

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 Federal 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's Response

“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."

OIG's Conclusion

OSHA stated it would consider this recommendation after discussions with other federal agencies and stakeholders as to the impact of changes to the criminal penalty provisions of the OSH Act. We think this input will be valuable as OSHA further considers the recommendation.

The OIG will postpone making a decision regarding resolution of the recommendation until OSHA reports back to the OIG on its deliberations with other federal agencies and stakeholders and its conclusions about the OIG recommendation.

GLOSSARY

Catastrophe	Accident resulting in inpatient hospitalization of three or more workers.
F.W. Dodge Report	List of publicly bid construction projects compiled by the McGraw-Hill Construction Information Group.
Imminent Danger	Any condition or practice in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the OSH Act.
Local Emphasis Program	Inspection programs that target specific industries or hazards.
State-Plan State	A state or jurisdiction that develops and operates its own job safety and health program. OSHA approves and monitors state plans and provides up to 50 percent of the funding.

APPENDIX

OSHA's Response

Outten-mills


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.