Testimony of

David G. Sarvadi

Before the

U.S. House of Representatives

Subcommittee on Workforce Protections

Hearing on

" Workplace Safety: Why do Millions of Workers Remain Without OSHA Coverage?"

10:30 a.m., Room 2175

Rayburn House Office Building

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Good morning. Mr. Chairman, Members of the Committee, and invited guests, thank you for the opportunity to participate in this important proceeding.

My name is David Sarvadi. I am an attorney with the Washington, D.C., law firm of Keller and Heckman LLP, and I am here to comment on H.R. 2049, the Protecting America's Workers Act. I also have some suggestions to improve the bill. At Keller and Heckman LLP, we represent and assist employers in meeting their obligations under a variety of federal and state laws, as well as international treaties and the laws of Canada, Europe, and many countries of the Far East. In particular, we help clients maintain progressive health and safety programs intended to protect their employees in their workplaces, as well as to comply with national and international health and safety laws and standards. The Occupational Safety and Health Act is the primary focus of our compliance assistance here in the U.S.

I am appearing in this hearing on my own behalf, and any views expressed herein should not be attributed to my firm, my partners, or any other entities, including any of our clients. I am here solely as a person with a long standing interest in the topic of occupational safety and

health, having practiced industrial hygiene and occupational health and safety law now for more than 35 years.

The two provisions that we are discussing today are the issue of whether the Occupational Safety and Health Act should be amended to modify the definition of the word, employer, to remove the exemption of state entities and their political subdivisions, as well as to extend coverage of the OSH Act to federal employees. The second question is whether the provision in the statute prohibiting the Secretary of Labor (SOL) from regulating workplace conditions where another federal agency has established regulations or standards applicable to those workplaces should be amended to require the Secretary to affirmatively determine that the protection provided is "at least as effective as" that provided by the OSH Act. In both cases, I believe the proposals are misdirected and therefore could be improved. Let me explain why.

In 1968, when Congress was considering the proposal to regulate workplace safety and health at the federal level, there was some attention paid to the question of whether federal agency safety and health programs were up to snuff. Congressional proposals included provisions to make federal programs "models" including comprehensive safety and health programs, adequate, to provide "safe and healthful workplaces and conditions of employment, *consistent with the standards set under section 6*," and to keep records of occupational injuries and illnesses and to report them to the Secretary. In the end, these provisions were adopted, but there was no provision calling for inspections of federal agencies or for providing for enforcement through some system of penalties. What the proposal would do is, in effect, adopt a penalty system for federal agencies.

I do not believe that this should be necessary. Federal agencies have extensive programs and are required to comply with OSHA regulations by executive order. Having federal agencies paying penalties to the Treasury for OSHA violations would simply reduce the resources available for compliance. It is a non sequitor.

With regard to states and political subdivisions, the Congress recognized limitations on its power to regulate internal state operations, including those related to the relationships between public employees and their state and local government employers. While not mandating compliance with OSHA standards, the legislation required those states that would operate a state plan of OSHA enforcement would have to simultaneously adopt a program of compliance and enforcement for state agencies and their political subdivisions. In doing so, Congress also appropriated money to be paid to those states who would take over the new programs.

Much has been made of the argument that because the OSH Act does not cover states as employers that their employees are not protected. I do not believe that is entirely true. Of the 25 or so states that do not have state plans, a number of them have mandatory compliance requirements enacted under state law, while others require compliance with OSHA standards through executive order.

Two things need to be remembered in deciding the public policy of attempting to impose federal OSHA requirements on the states. The first is that compliance with OSHA standards does not assure safety. Surely, many of OSHA's standards address physical changes in the workplace that prevent employees from being injured, such as machine guards and electrical design standards. But many accidents occur not when normal operations are occurring but during service, maintenance, and other non-routine operations. In those circumstances, the

protective devices that are normally used may have to be removed to accomplish the task at hand. I do not believe it is possible to write regulations to address what are essentially infrequent occurrences. So what is necessary is for people to be trained in the kinds of hazards that they encounter on the job, to recognize them, and to take steps to prevent them. In some ways, this is more a problem of education than enforcement. Perhaps the current Administration's approach of outreach and education should be expanded and funding increased to address this perceived deficiency.

Second, it is not clear that Congress has the authority to apply OSHA standards to the states by mandate. The Supreme Court has gone back and forth on the subject of regulation of workplace conditions between states and its employees. The question of the authority of Congress under the Commerce Clause to impose employment conditions on states has been debated in Supreme Court cases without clear resolution.

Rather than engender a debate over the esoteric constitutional issue, I personally believe that it would be better to have Congress encourage states to comply by tying grants and other funds to state compliance programs. Similarly, it makes little sense to have a scheme in place in which scarce local government resources are used to pay federal penalties with the idea that public employers need a stick to force them into compliance. Most private employers comply with OSHA regulations because they are good citizens. I would hope that Congress believes our state and local governments do not need to be coerced into doing what is right for their employees. Similarly, I do not believe that an enforcement system involving penalties paid to the federal government makes good sense.

Preemption

The proposal before us would require OSHA to determine affirmatively that a regulation adopted by another agency is at least as effective as compliance with the OSHA provisions at issue. That, in and of itself, does not seem offensive, except that it will impose a requirement on the Agency that will detract from its primary mission. Preemption is intended to preclude overlapping, redundant, or conflicting regulation by different arms of the federal government.

In the proposal by requiring OSHA to review and make a determination that another agency's decisions provide equivalent protection, Congress is suggesting that OSHA has greater expertise on these topics than the agencies charged with their full-time regulation. As the Supreme Court acknowledged in the OSHA case of *Martin, Secretary of Labor v. Occupational Safety and Health Review Commission (OSHRC)*, 59 U.S.L.W. 4197, 111 S. Ct. 1171 (1991) (CF&I Steel), when OSHA develops a standard, it develops an expertise in the subject matter, both in the rulemaking process and in the enforcement context. That expertise entitles OSHA and other regulatory agencies to deference when interpreting the regulations they adopt.

Similarly, if OSHA under the proposed language were to reject the balancing and judgments adopted by the sister agency on a subject about which they are acknowledged to have superior expertise, it would be substituting its lesser informed judgment for that of the agency charged by Congress with implementing the totality of the public policies addressed in the enabling legislation. In other words, the bill would allow OSHA to substitute its judgment over that of a more experienced and knowledgeable government organization.

A few examples might suffice. Under current regulations of the Department of Transportation (DOT) a number of different regulatory programs address public health and safety. Among them are the programs addressing transportation of hazardous materials,

operation of motor vehicles over interstate highways, pipeline safety, and, of course, aviation safety. One example related to me of an OSHA regulation that reflects a lack of complete understanding of the technology regulated by DOT. Under OSHA regulations, the wheels of trucks that are being serviced by powered industrial trucks like for lifts must be "chocked" to prevent the trucks from rolling away from the dock. Under DOT rules, chocks are not required if the trailer is equipped with "spring brakes" that lock in place when air is removed from the braking system. Having to chock a truck takes time, and it is not clear that it is a necessary improvement from a safety perspective over the brake system DOT has approved. Under the present system, OSHA is theoretically precluded from enforcing its rule. This means a significant savings of time, especially where there are large numbers of trucks moving in and out of a distribution center, and in DOT's judgment without a cost in safety. Whether OSHA's rule improves safety is not clear.

The change in the statute will add another layer of bureaucracy to an already burdened system. Making OSHA perform an affirmative determination, then subjecting it to challenge and judicial review may seem like a good idea from an administrative law perspective, but it implies that the initial determination by OSHA's sister agency is suspect. For employers, it creates greater uncertainty and confusion, which is the opposite of what any changes in the law should seek to achieve. Moreover, it increases complexity in an area that everyone already admits is ponderous and working badly, if at all. That is the rulemaking process.

The current language of section 4(b)(1) is clear enough. The courts have fleshed out the Congressional mandate in a workable way, wherein the agency whose regulation would displace OSHA's must address the hazard OSHA's standard would address. Having done so, it is not a question of efficacy. Properly so, it seems to me, the present arrangement presumes that the

preemptive agency has considered and appropriately allocated the competing priorities that its enabling statute and the OSH act articulate. In this way, the full intent of Congress is acknowledged and implemented by the agency specifically charged with balancing these competing interests. The Supreme Court in the case of Chevron U.S.A. Inc. v. Echazabal, 122 S.Ct. 2045 (2002) noted that compliance with all laws is mandated, and that agencies are expected to make "the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to administrative leeway. . . ." The provision contemplated will put OSHA – with less experience and knowledge on a topic -- in the position of second-guessing the other agencies' decisions. It hardly seems an appropriate and efficient use of limited government resources.

Conclusion

The proposals sound plausible on their surface but the reality is that they distract public attention from important work that remains to be done. Federal employees and those in states with approved state plans are already covered by OSHA requirements, and a number of the remaining states do so by state statute. Having OSHA oversight should be unnecessary and duplicative, and there is no justification for expansion of OSHA jurisdiction where states on their own are following OSHA's rules. The better approach would be for Congress to use its funding power to provide states with the incentive and the wherewithal to upgrade their public employee safety and health programs.

Regarding preemption, the present system is working, and there is nothing to fix. Congress made the correct choice in 1969 when it recognized that some agencies with specific expertise in individual industries or activities are better equipped than OSHA to understand and

implement safety programs. The provision would simply increase bureaucracy and inefficiency and is not a proposal designed to lead to better government programs.