

**TESTIMONY OF RONALD W. TAYLOR
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HEARING ON IMPROVING WORKPLACE SAFETY:**

**“STRENGTHENING OSHA ENFORCEMENT
OF MULTI-SITE EMPLOYERS”**

**April 23, 2008 - 10:30 a.m., Rm. 2175
Rayburn House Office Building**

Good Morning Chairman Woolsey, Ranking Minority Member Wilson, Members of the Subcommittee, Witnesses and Guests. My name is Ronald Taylor. I am an attorney with the law firm of Venable, LLP and I am here to comment on an important workplace safety issue, strengthening OSHA’s enforcement as it pertains to employers that operate at more than one site.

At Venable, my practice is concentrated in the area of labor and employment, and a significant component of my work pertains to representing employers in the area of occupational safety and health. I help them to interpret standards and laws and to understand their obligations under those standards and laws. When appropriate, I defend them against citations issued by the federal Occupational Safety Health Act (Act) and its state plan counterparts. I have handled enforcement actions in virtually every state, as well as in the territories of Puerto Rico and the Virgin Islands, and thus have had the opportunity to interact with many of the employees of OSHA and the many state plans who are dedicated to ensuring that every working man and woman in the United States has safe and healthy employment. I am also past management co-Chair of the American Bar Association’s Occupational Safety and Health Law Committee.

Although any views that I express here today are mine alone, and do not reflect those of my firm, my partners, or any of my clients, I am hopeful that my comments here today may in some small way help advance the goal of workplace safety, which is a goal that I believe all of us present today share. I thank the Subcommittee for the opportunity to contribute to that objective.

The Occupational Safety and Health Act of 1970 was the first comprehensive effort by Congress to address job safety and health. Testimony presented to Congress at the time revealed that an estimated 14,500 workers were killed each year as a result of workplace accidents. And the trend with respect to workplace safety was disturbing: The number of disabling injuries in 1970 was significantly higher than it was in 1958.¹

Against this backdrop, Congress enacted the Act with the express, salutary purpose of ensuring that every working man and woman had a safe and healthy workplace. Toward this goal, the common law duty of employers to provide reasonably safe workplaces essentially was codified and incorporated into the Act as the general duty of all employers to provide workplaces free from recognized hazards of a serious nature. Beyond this general duty, the Act authorized the Secretary of Labor to promulgate standards to effect the Act's goal of obtaining workplace safety and required employers to comply with those standards.

The specific responsibility for attaining the goal of the Act was vested in a new agency within the Department of Labor, the Occupational Safety and Health Administration. OSHA was broadly empowered to inspect employer work sites and to

¹ See *Report of the Senate Committee on Labor and Public Welfare*, S. Rep. No. 91-1282 (91st Congress, 2d Session) at 1-5 (October 7, 1970).

issue citations and propose monetary penalties for failing to comply with applicable safety and health standards. Although the citation/penalty enforcement mechanism is primarily civil in nature, Congress also established criminal penalties for certain violations. For example, employers who lie or misrepresent facts to compliance officers may be subject to criminal penalties, and employers whose willful failure to comply with the requirements of the Act may be subject to criminal penalties.²

While the Act clearly established penalty mechanisms for enforcing OSHA standards, Congress also expressed its desire to encourage employers voluntarily to reduce hazards and improve safety plans.³ Indeed, Congress considered evidence that employer safety consciousness and the voluntary use of safety measures mattered to workplace safety: data from the National Safety Council (NSC) showed that employers who voluntarily paid attention to safety—even in the absence of any comprehensive legislation—had substantially less disabling injuries than those employers that did not.⁴

There is little doubt that increased employer and employee awareness of safety and the presence of OSHA have dramatically, and beneficially, affected workplace safety. Today, workplace fatalities are down by nearly two-thirds from their pre-OSHA levels. As a point of reference, Professors Thomas Kniesner and John Leeth, after studying NSC and Bureau of Labor Statistics (BLS) data, observed that as of 1993, statistically “the chance of injury in an accident at home... is greater than the chance of

² 29 U.S.C. § 666(g),(e).

³ 29 U.S.C. § 651(b).

⁴ See M. Rothstein, Occupational Safety and Health Law, § 2, at p.5 (1998), citing M. Gross, OSHA: Much Ado About Something, 3 Loy. L.J. 247, 249 (1972).

dying in an accident at work.”⁵ While I would agree that all interested parties—employers, workers, and OSHA—should continue to look for ways to reduce the number of workplace accidents further, the dual effect of voluntary employer compliance and OSHA enforcement under the Act in reducing workplace fatalities and injuries cannot be overlooked or understated. I am pleased to say that the employers with whom I work, and I believe those with which my colleagues on the ABA Occupational Safety and Health Law Committee work, share this commitment to workplace safety and to reducing to zero the number of workplace injuries and illnesses, irrespective of OSHA’s enforcement of the Act. They recognize that workplace safety is both right and good business.

It is probably fair to say that the nature of employment and the workforce today, in 2008, is different than the landscape that existed in 1970 when the Act was passed. Any suggestion, however, that OSHA lacks the ability or the tools to enforce its standards against employers with multiple facilities or worksites is, however, incorrect.

First, although injury and fatality statistics reflect occasional upward ticks, in general, fewer serious and fatal injuries are occurring today than at times in the past.⁶ The decline in workplace injuries and deaths increases are, I believe, the result of a number of factors working together, including the self-interest and better awareness of employers and employees as well as the enforcement efforts of OSHA. These efforts,

⁵ T. Kniesher and J. Leeth, *Abolishing OSHA*, Regulation: The Cato Review of Business & Government (Vol. 18, No. 4, Fall 1995) available at <http://www.cato.org/pubs/regulation/reg18v4e.html>.

⁶ See, e.g., *Census of Fatal Occupational Injuries* (CFOI) (revised), available at <http://www.bls.gov/iif/oshcfoi1.htm>.

both voluntary efforts and enforcement, are true to the intent of Congress reflected in the Act.

In this regard, OSHA has demonstrated its willingness to adapt to a changing employment landscape and has developed tools that enable it effectively to police – or motivate toward compliance - employers not simply at single work sites, but at multiple sites. Some of those tools are: willful citations, repeat citations, OSHA’s Instance-by-Instance Citation Policy, and OSHA’s Enhanced Enforcement Program (EEP).⁷

Willful Citations: The Act authorizes OSHA to issue willful citations to employers who demonstrate, in general terms, a voluntary, intentional disregard for or plain indifference to their obligation under the Act to comply with the general duty or specific standards. In addition to substantially increased penalties, which typically start at the \$25,000.00 level for serious willful violations, the Act authorizes OSHA to pursue criminal penalties when a willful violation of a standard results in the death of an employee.⁸ The issuance of willful citations is not limited to single sites. In fact, an employer’s pattern of violations at multiple sites may be indicative of the disregard or indifference required to support a willful violation.

Repeat and Failure to Abate Citations: Even without consideration of the possibility of willful citations, the Act currently includes impetus for even well-

⁷ On an industry and hazard-centric basis, OSHA also has a number of local and national emphasis programs designed to react to hazards incident to a particular industry or operation.

⁸ In addition to criminal prosecution under the Act, employers may be subject to criminal prosecution under state law. Such prosecutions are not limited to situations involving willful violations and fatalities.

intentioned employers to assure that their response to violations is effective company-wide. Thus, the Act authorizes OSHA to issue repeat citations to employers that fail to or ineffectively abate violations. Penalties for repeat violations may be up to 10 times greater than non-repeat violations, and penalties for failing to correct may be up to \$7,000 for each day the violation remains unfixed. OSHA has extensively issued repeat citations to employers operating at multiple locations. The effect of its actions has been to drive employers to adopt effective company-wide abatement measures for violations arising out of the inspection of a single location.

Willful Egregious or Instance by Instance Citation Policy: In appropriate cases, OSHA has alleged a separate violation and proposed a separate penalty for each instance of non-compliance with its standards. For example, in 2005, OSHA issued a record fine of more than \$21 million against BP Products North America, Inc., a subsidiary of British Petroleum, after citing the company for 301 willful violations of worker-safety laws. When this enforcement approach is used, it sends an unmistakable message to the employer issued the citations, but also provides a deterrent to any employer that might perceive itself similarly situated. The issuance of such citations occurs when the violation is willful and often when there has been a worker fatality or a large number of injuries or illnesses, but the application is not limited to fatality and catastrophe cases. Thus, OSHA's policy directive states that such penalties may be used where employer has an extensive history of prior violations, where the employer has intentionally disregarded safety and health responsibilities, where the employer's conduct reflects bad faith in the discharge of its duties under the Act and where the employer has committed such a number of violations as to undermine the effectiveness of any safety

and health program the employer may have in place.⁹ The threat of and the use of such citations assists OSHA in carrying out its mission without regard to multisite employers.

Enhanced Enforcement Program (EEP): In March 2003, former Assistant Secretary for OSHA John Henshaw announced a new program, entitled “Enhanced Enforcement Program for Employers Who Are Indifferent to Their Obligations under the OSHA Act.” The purpose of the EEP is to target those employers who ignore their obligation to provide a safe and healthful workplace. Revisions to the EEP published in January 2008 refocus the Program’s enforcement emphasis on those employers that have a history of violations with OSHA and its state plan counterparts. OSHA’s EEP provides for follow-up inspections of the worksite at issue to assure abatement, inspections of other worksites, steps to ensure increased company awareness of OSHA enforcement activities, increased settlement requirements, and the use of consent degrees providing for immediate federal court enforcement.¹⁰ OSHA has made extensive use of its EEP. According to data released by OSHA, through December 31, 2007, OSHA had enforced 2,185 EEP cases.¹¹

I believe that, taken as a whole, the existing statutory framework affords OSHA the tools it needs to enforce its standards not simply at single employment sites, but at multiple worksites of an employer. And, as noted, OSHA has demonstrated its ability to effectively use its tools in creative ways. A broader picture emerges from the

⁹ See CPL 02-00-080.

¹⁰ OSHA CPL 02-00-145.

¹¹ Statements by Donald Shahoulb at the ABA OSH Law Committee Midwinter Meeting (March 2008).

enforcement statistics for fiscal year 2007 that were recently released by OSHA.¹² Here are a few highlights of these statistics:

- In fiscal year 2007, OSHA conducted more than 39,000 inspections.
- Total violations of OSHA's standards and regulations were 88,846, a 6 percent increase from 2006.
- The agency cited 67,176 serious violations, a 9 percent increase from the previous year and a more than 12 percent increase over the past four years.
- The number of cited repeat violations also rose from 2,551 in 2006 to 2,714 in 2007.

These statistics—together with the previously mentioned statistics showing dramatic declines in workplace injuries and deaths—offer strong evidence that OSHA's enforcement programs are working across single and multiple worksites. In short, the existing statutory framework has given OSHA the tools it needs to identify serious safety and health hazards, to address recalcitrant employers, and to efficiently use its resources, with more than single site employers.

In addition to the enforcement tools to which I have already alluded, and consistent with the congressional desire contained in the Act, OSHA has also tried to work to create incentives for employers voluntarily to obtain compliance. To this end, OSHA's voluntary compliance programs invite employers to collaborate with OSHA in order to foster safer and better working conditions. Examples of OSHA's voluntary

¹² *OSHA records another successful enforcement year in FY 2007*, OSHA National News Release 07-1948-NAT (Dec. 28, 2007). For a more detailed statistical analysis of OSHA's recent enforcement efforts, see *OSHA Enforcement: Striving for Safe and Healthy Workplaces*, Directorate Of Enforcement Programs, OSHA (2007), available at http://www.osha.gov/dep/enforcement/enforcement_results_07.html.

compliance programs include, the Voluntary Protection Program (established in 1982), its Strategic Partnership Program (established in 1998), and its Alliance Program (established in 2002). In its March 2004 report to this Committee, the GAO reported that OSHA's voluntary compliance strategies showed some promising results.¹³ I recently had the pleasure to hear a representative of the Arizona state plan's consultation and training section describe articulately and passionately the many positive safety results occurring in that state as a result of its consultation and training efforts.

It is my belief that the dual approach of balancing voluntary compliance with enforcement provides the best hope for assuring worker safety and health. Promoting better understanding and cooperation will lead to the attainment of a greater level of protection than can be expected to result simply from increased or new forms of punishment. Increased reliance on strict enforcement alone is not likely to result in truly effective safety programs. Rather, efforts to make OSHA standards clearer are likely to result in greater improvement in the area of safety across all sites. This is because, too often, compliance issues arise not as a result of a desire to flaunt safety rules, but from a lack of understanding of the obligations imposed due to inartful drafting. Too often a rule does not say what OSHA means, and disputes arise because OSHA seeks to enforce a rule different than the one it wrote. This is unfair to all concerned, and undercuts the effectiveness of enforcement. As at least one commentator has observed, "Merely cranking out more standards (even assuming that's feasible) and issuing more citations (or more egregious penalties, or however one defines 'stronger' enforcement) isn't

¹³ See GAO-04-378.

necessarily desirable or more effective from a worker safety and health perspective."¹⁴ In short, more vigorous enforcement of poorly drafted, unclear rules will not improve safety. OSHA should be given the resources to clarify ambiguous rules and to continue its efforts at education. I do not suggest that this should come at the expense of appropriate enforcement: rather, the goal for the agency is to find the proper balance between carrots and sticks.

I am privileged to represent employers that care deeply about the safety and health of their workers, and that work to ensure all of their workplaces are safe. They favor strong and fair enforcement against those employers who, unlike them, take lightly the obligation to protect their workers. I believe that my experience with employers is typical of those attorneys who do what I do.

This concludes my remarks. Thank you for allowing me this opportunity to speak today. I welcome any questions you may have.

¹⁴ Comments of Frank White, reported in Industrial Safety and Hygiene News Ezine, Vol. 7, No. 4 (Feb. 15, 2008).