

**STATEMENT OF JORDAN BARAB
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U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES**

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Madam Chairman, Members of the Subcommittee,

Thank you for this opportunity to discuss the Occupational Safety and Health Administration's (OSHA) Enhanced Enforcement Program (EEP) and to respond to the concerns expressed by the Department of Labor's Office of Inspector General (OIG) in a report entitled "Employers with Reported Fatalities Were Not Always Properly Identified and Inspected Under OSHA's Enhanced Enforcement Program" (March 31, 2009). As you know, I have recently assumed the positions of Deputy Assistant Secretary of Labor for Occupational Safety and Health and Acting Assistant Secretary.

Until the Assistant Secretary is confirmed by the Senate, the Secretary has asked me to help provide the leadership, utilize the resources, and establish policies that enable OSHA's employees to do their jobs. I am very proud to join this organization. President Obama and Secretary of Labor Hilda Solis have both publicly expressed their desire that OSHA be more vigorous in protecting the Nation's workers. OSHA employs some of the most dedicated and hardest working employees in the federal government, and under the leadership of Secretary Solis they are inspired and eager to do their jobs of protecting the

American workforce. I intend to begin the process of leading this agency in achieving that goal.

Because of the brevity of my tenure at OSHA, I have had limited time to fully review and analyze the OIG's report. OSHA responded preliminarily to the OIG in a Memorandum of March 30, 2009, and is in the process of thoroughly reviewing the report in order to determine the best ways to address each recommendation. OSHA shares the concerns raised in the report, and believes that properly identifying employers who should be subject to EEP is essential. Similarly, it is not acceptable to fail to follow through with inspections or enhanced settlement agreements with employers OSHA has placed in the EEP.

As background, OSHA's targeted inspection efforts consist primarily of a Site Specific Targeting system that focuses on establishments with high injury and illness rates and both Local and National Emphasis Programs (LEPs and NEPs). The emphasis programs focus on industries with high injury, illness, or fatality rates, or on hazards such as lead, silica, or amputations. The Enhanced Enforcement Program was designed as a supplement to these programs to focus enforcement efforts on recalcitrant employers. OSHA is exploring ways to reinvigorate the EEP, and the OIG report provides a starting point for our efforts to do this in the most effective way.

The authors of the Occupational Safety and Health Act (OSH Act) 39 years ago were far-sighted in providing enough flexibility in the law for the agency to innovate as it

encounters tough enforcement cases. The EEP was initiated in September 2003 to help OSHA focus its resources on those employers who are indifferent to their obligations under the OSH Act, concentrating limited enforcement assets on those employers who not only failed to meet their obligations under the OSH Act, but who also appeared unlikely to decide on their own to improve working conditions at their workplaces. OSHA had discovered that a number of employers continued to expose workers to very serious dangers even after receiving OSHA citations for worker exposure to hazards that caused serious injuries and fatalities. Such was the case at the McWane facilities as reported by the New York Times and Frontline in 2003. Employers like McWayne had multiple worksites where related hazards existed and OSHA's existing targeting system did not provide a mechanism to enforce the OSH Act at these additional establishments.

In 2008, the EEP was amended in response to OSHA staff concerns that the program was not consistently accomplishing its purpose to focus on recalcitrant employers. A history filter for a serious violation related to a fatality was added to eliminate numerous small employers who should not have been added to the program as originally envisioned. In this situation, the employer must have, within the prior three years, a history of violations similar to the EEP violation. However, it soon became clear that additional program modifications would be needed to better direct resources and that more stringent follow-up inspection criteria needed to be added to the program. As such, OSHA began revisions in March of 2008, and was in the process of developing these revisions prior to the OIG evaluation.

Under the current EEP, it is standard protocol for OSHA to mail an information copy of all citations under the EEP to the employer's national headquarters if there is more than one worksite, thus ensuring that national headquarters is aware of safety and health problems at the local establishment. An employer identified as being a recalcitrant employer can also be targeted for additional enforcement action as follows:

- OSHA can conduct enhanced follow-up inspections to ensure not only that the violations that had been cited were corrected, but also to check on whether the employer is addressing other similar hazards throughout its facilities. One way this occurs is to identify establishments on the current Site-Specific Targeting (SST) lists belonging to employers that are enhanced enforcement targets. These establishments will receive a higher inspection priority by being placed in the SST's current inspection cycle.
- OSHA and its attorneys can negotiate to include more stringent provisions in settlements of EEP citations than those it might insist on otherwise.
- Finally, under section 11(b) of the OSH Act, DOL attorneys can, if necessary, obtain enforcement orders, and then seek to hold employers in contempt of those orders if the employers continue to fail to abate hazards or implement other provisions in citations, settlements, or orders of the Occupational Safety and Health Review Commission and Federal courts. Potential sanctions for contempt include daily penalties and other fines, incarceration of an individual company

officer who flouts the court's order, as well as any other sanction that the court deems necessary to secure compliance.

Obviously, in order for the EEP to be effective, OSHA Area, Regional, and National Offices must accurately identify which employers are in need of enhanced enforcement and then apply its enhanced enforcement tools to these recalcitrant employers. The OIG report pointed out that this has not always occurred.

OSHA is already hard at work; revisions to the EEP were underway prior to the OIG report. Furthermore, consistent with the report's recommendations, the agency has established the EEP Revision Task Force. This task force, comprised of personnel from the Directorate of Enforcement Programs as well as Regional Administrators, their Deputies, and Departmental attorneys, is designing a new program, which we are preliminarily renaming the Severe Violators Inspection Program (SVIP), so that we will be able to identify and inspect recalcitrant employers more effectively. The SVIP will be a comprehensive revision of the existing EEP, focusing more on large companies and less on small businesses. Although the details are still being worked out, the new program will ensure that recalcitrant employers not meeting their obligations under the OSH Act are targeted for additional enforcement action.

Some changes under consideration for the program include mandatory – not recommended – follow-up inspections, more inspections of other establishments of an identified company, and additional enhanced settlement provisions. The new program

will include a more intensive examination of an employer's history for systemic problems that would trigger additional mandatory inspections. OSHA believes that this new program will address each of the six OIG recommendations. OSHA is happy to share the revised Directive implementing the new program with the subcommittee once it is publicly released.

Finally, the new program will undergo continual review by field and headquarters staff in order to make ongoing improvements. Again, we will be happy to keep you apprised of the progress of this process.

I want to emphasize that while the OIG report identified serious problems with the EEP, the EEP process also made OSHA more aware of criminal violations. While a direct correlation between the EEP and the number of OSHA criminal referrals to DOJ has not yet been established, the EEP process increased awareness of criminal violations, and more awareness led to more referrals. Referrals of potentially criminal willful violations to the Department of Justice (DOJ) for prosecution increased from six per year (1993-2003) to 12 cases in FY 2008. This is the most serious sanction available under the OSH Act and can result in incarceration for an employer. Among the issues I will be looking at are whether OSHA is referring the proper number of such cases to DOJ and how we can work better with DOJ to prosecute these cases.

Although the EEP is an important component of OSHA's overall compliance strategy, it is not the only enforcement tool that we utilize. OSHA relies primarily on its LEPs and

NEPs, and the Site Specific Targeting Program for the vast majority of its enforcement work. According to OSHA's Integrated Management Information System (IMIS), Federal and State OSHA programs conduct approximately 90,000 inspections each year. Federal OSHA cited almost 89,000 violations in FY 2008. Over 80% of these violations were classified as willful, serious or repeat. Over 120 inspections resulted in penalties totaling more than \$100,000.

Currently there are NEPs focusing on the hazards of combustible dust, amputations, lead, shipbreaking, crystalline silica, and trenching/excavations. We are also finalizing an NEP focusing on flavoring chemicals (diacetyl). In addition, OSHA has more than 140 Regional/Local Emphasis programs around the country.

OSHA's most comprehensive inspection program is the Site-Specific Targeting Plan (SST), which targets workplaces that have 40 or more employees and have reported the highest injury/illness rates. The targeting lists are updated every year to reflect the most recent data. Virtually all SST inspections are comprehensive visits in which the agency's compliance officers examine all aspects of the workplace's operations as well as the effectiveness of its safety and health efforts.

Madam Chairman, Secretary Solis has emphasized that strong, vigorous enforcement of the OSH Act is among her top priorities. OSHA will be adding inspectors to fulfill its responsibilities under the American Recovery and Reinvestment Act of 2009, and the President is requesting increased funding for OSHA in the 2010 budget.

In the meantime, we need to better utilize the resources that we already have. In order to direct more of OSHA's existing resources into enforcement and to provide time to address concerns in an upcoming GAO Report on the efficacy of OSHA's Voluntary Protection Program, I have informed the field staff that we will suspend the previous administration's practice of establishing goals for new Voluntary Protection Program sites and Alliances.

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Madam Chairman, thank you once again for giving me the opportunity to appear today. OSHA will let the Subcommittee know when we have completed the design of the new enforcement program. No matter how well-intentioned or well-designed, if an enforcement policy is not implemented well it is a source of frustration—for workers, for Members of this Subcommittee, and for the American taxpayer. Not only are we committed to designing policies that protect workers, we are also committed to doing our utmost to implement those policies successfully.

Thank you and I'd be happy to answer any questions.