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OCCUPATIONAL SAFETY AND HEALTH AS A CASE STUDY

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Legislative Intent

The stated purpose of the Occupational Safety and Health Act reads as follows:

> "To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the act; by assisting and encouraging the states in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes."

Behind this well-stated intent, however, are a variety of other intentions. One intent was to create a federal presence in matters of safety in the workplace and to displace the individual state programs with a massive federalized program.

The program was sold to politicians on the basis that the state programs were inadequate. Organized labor strongly supported this legislation. It may not have been their stated intent, however it did create another government-mandated opportunity for labor unions to gain additional power and an additional voice in normal labor-management relations.

Administrative Interpretation

Administrative, of course, pertains to the executive office with authority to manage the affairs as created by the government. Interpretation is the act of explaining the meaning or significance of the act. Herein lies much of the difficulty with the current OSHA program. Interpretation also means explanation or translation. In my opinion, the translation of the intent of the act into meaningful and effective programs still leaves much to be desired.

The problem begins with the fact that rules and regulations promulgated by OSHA consume in excess of 675 pages of fine print in the Federal Register. The necessary directives to the various regional offices, inspectors, and others, consume volumes of printed material far in excess of the regulations themselves.

As an example, OSHA recently published some new regulations for guarding and shielding farm machinery. The pocket-size booklet issued to explain the interpretation of these regulations is considerably longer than the regulations themselves. It is difficult for me to understand why rules and regulations could not be written simply enough in the first instance and thus eliminate the necessity for such lengthy interpretations.

It appears that both the act and the regulations, issued to make it operational, were enacted and promulgated in haste. With so many items open to interpretation, all those affected by the act must now turn to the courts to clear up errors of omission and commission. This exposes society and the consumer, who ultimately pays the cost, to a long, drawn-out, and costly process. It seems unfortunate that the economic resources that must be dissipated in costly court battles could not have gone directly into accident prevention and a geniune pay-back for safety.

Further insight into the question of legislative intent and administrative interpretation may be gained by a brief review of the act itself, and some of the history that led to development of the "Occupational Safety and Health Act of 1970."

> "Sec. (2) The congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> "(b) The congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several states and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources—
>
> > "(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
> >
> > "(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

"(3) by authorizing the secretary of labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the act;

"(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

"(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

"(6) by exploring ways to discover latent diseases, establishing casual connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

"(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

"(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

"(9) by providing for the development and promulgation of occupational safety and health standards;

"(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

"(11) by encouraging the states to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the states to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this act, to improve the

administration and enforcement of state occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

"(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this act and accurately describe the nature of the occupational safety and health problem;

"(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment."

Federal interest in occupational safety and health dates back to 1910, when President Taft successfully asked congress to enact legislation to halt the disease caused by making matches with phosphorous. President Johnson however, was the first chief executive to propose comprehensive federal legislation in the area.

The Johnson proposal, developed by a White House task force—largely behind closed doors and with little or no consultation with private industry, state governments, and even organized labor—was first introduced as legislation on January 24, 1968. And, as I read the legislative history of what happened prior to December 29, 1970, when OSHA was finally enacted, it is fortunate for all that the original proposal was not fully adopted.

The Williams-Steiger Act — better known as the Occupational Safety and Health Act — covers all businesses engaged in interstate commerce. This, therefore, includes some four million establishments and an estimated 60 million workers. Exceptions include mines, railroads and atomic energy, which already have separately mandated safety programs at the federal level.

Many have argued for additional exceptions. Currently, efforts are underway to reduce the burden on small businesses by allowing for OSHA consultation-type inspections. A first inspection without fine for those workplaces with fewer than 10 employees is also being sought, but thus far these have not been enacted into law.

The OSHA Act was responsible for the creation of three new federal agencies: The Occupational Safety and Health Administration within the U.S. Department of Labor; the National Institute of Occupational Safety and Health in the Department of Health, Education, and Welfare; and the Occupational Safety and Health Review Commission, an independent agency of the executive branch.

The functions of each of these three agencies are precisely defined in the statute and in implementing orders and regulations. Each has a specific area of responsibility for achieving the goals of the act.

The Occupational Safety and Health Administration was given authority to promulgate standards, to conduct inspections to determine compliance with the standards, and to initiate enforcement actions whenever they believed an employer was not in compliance.

Since 1971, OSHA has conducted 159,513 compliance inspections which have resulted in 106,496 citations and total penalties of $13.7 million. Twenty-seven percent of initial inspections were in workplaces in full compliance with the standards.

The original act provides authority to the states to carry out the functions delegated to the OSHA administration through state agencies. I feel this is an innovative approach to decentralized government. The state agencies would have to demonstrate a capability to undertake a compliance program which is as effective as the federal efforts. State standards can be no weaker than federal standards. To date 26 states are at some stage in the implementation of state plans.

The National Institute of Occupational Safety and Health (NIOSH) was created to perform research and to conduct training and educational programs in occupational safety and health. NIOSH is also engaged in exploring ways to discover latent occupational diseases, establishing casual connections between diseases and work in environmental conditions, and conducting research relating to health problems.

It is also charged with providing medical criteria which will assure, insofar as practicable, that no employee will suffer diminished health, functional capacity or life expectancy as a result of his work experience. NIOSH is also responsible for educational programs on the importance and proper use of adequate safety and health equipment, and for training employers and employees in the recognition, avoidance, and prevention of unsafe and unhealthful working conditions.

The most important contribution by NIOSH is the recommendation of new occupational health standards. These are approached under a priority system in order to get at the worst problems first.

NIOSH was the agency which the B. F. Goodrich Company originally contacted about the vinyl chloride problem. I should note

that B. F. Goodrich brought this problem to the attention of NIOSH voluntarily. This willingness on the part of industry to cooperate with the federal agencies is important to the success of the OSHA program.

The third of the new federal agencies which resulted from the Occupational Safety and Health Act is the Occupational Safety and Health Review Commission. The commission is autonomous and independent. It has only one function: to adjudicate enforcement actions initiated by the Department of Labor when they are contested by employers, employees, or unions. It consists of three members appointed by the President for staggered terms of six years each.

Judges have been stationed in regional offices throughout the country. The three-member commission exercises discretionary review of the decisions of judges in much the same manner as the U.S. Supreme Court exercises its right of review over decisions of lower courts.

It is important to note that the Occupational Safety and Health Administration only proposes penalties—the review commission has sole authority for assessing penalties. A proposed penalty will never be final unless the employer shows that he wants it to be final through his failure to exercise his right to contest it.

Conclusions

The OSHA Act, in my opinion, does not represent model legislation because it leaves far too much room for administrative interpretation and, as I indicated, to be settled in the courts. It is, however, somewhat of a classic study in the debate between centralization of power and decision-making and decentralization.

It created a mammoth federal bureaucracy without fixing accountability to the taxpayer and consuming public who bear the ultimate cost of their actions. Any safety agency that reports its accomplishments in terms of the number of inspections made, and the dollar amounts of fines collected, instead of the number of lives saved, is deserving of considerable criticism and review.

We should be greatly concerned about failures to fully implement the educational aspects of the act. Nothing is perfectly safe—a perfectly safe razor won't shave your face; a perfectly safe lawnmower won't cut grass; and a perfectly safe plane won't fly. So effective safety training and education is a most essential ingredient in the control and management of exposure to potential hazards.

Since 1887, when the Interstate Commerce Commission was created, congress has established some 82 regulatory agencies, boards, bureaus, and commissions. Of these, 14 were legislated into existence in the last eight years. No major agency has ever been abolished.

They now employ between 75,000 and 100,000 regulators with budgets in excess of $2.9 billion. The Code of Federal Regulations consists of almost 60,000 pages and is growing at a rate of 10,000 pages per year. OSHA is just one agency which should be reviewed carefully.

Future case studies might compare the OSHA Act of 1970, Clean Air Amendments of 1970, and Consumer Product Safety Act of 1972. In my opinion, the first two acts are classic examples of bad legislation—what not to do. Even though I do not personally agree with the need for the Consumer Product Safety Act, and many of its provisions, it does represent a better form of legislation.