

INSPECTION AND ENFORCEMENT STRATEGIES AT THE U.S. DEPARTMENT OF LABOR

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I. INTRODUCTION

The subject of this Essay is inspection and enforcement strategies in labor and employment law, with particular focus on the Occupational Safety and Health Administration (OSHA). I approach the subject from two somewhat different perspectives, having been a private practitioner representing clients being investigated and prosecuted by OSHA, and having also served as Solicitor of Labor, with OSHA as one of my clients and with responsibility myself for prosecuting OSHA cases.

OSHA and the Mine Safety and Health Administration (MSHA) are both agencies within the Labor Department represented by the Solicitor's Office in rulemaking and litigation. Other Labor Department agencies include the Wage and Hour Division, which enforces the minimum wage and overtime laws, and the Employee Benefits Security Administration, which is responsible for the Employment Retirement Income Security Act (ERISA). These and all the other agencies in the Labor Department are represented by the Solicitor's Office.

Although all of these agencies are housed in a single cabinet department and report to one cabinet secretary, there is considerable variety in how they discharge their investigative and enforcement responsibilities. A good example is what could be called the "intensity" of workplace

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inspections by MSHA and OSHA; these two inspection regimes are in a sense opposites of one another, with the distinctive character of each presenting certain challenges to enforcement by the agency.

MSHA is required by statute to inspect every underground mine four times per year.¹ Presumably such frequent inspection causes some increased compliance with the law. But it also presents certain challenges to the agency: When a dangerous condition at a mine causes serious injury or death, MSHA will have been there recently. When it was there, what did it find? If it did not find the hazard, why not? If it did find the hazard, what did it do to address it and was that enough? For MSHA to identify a violation in a post-accident investigation, is for the agency to raise the possibility that it erred. That sort of admission can be difficult, and in this sense the high “intensity” of MSHA inspections can be among the challenges that confront that agency.

In the case of OSHA, one of its greatest challenges is the opposite of MSHA’s—whereas MSHA inspects every underground mine four times a year, OSHA estimates it would take it 167 years to inspect every worksite just once.² This makes it critical that OSHA choose its inspections well, so that it is going to places that are hazardous, and where the hazards are of a type the government is positioned to address.

II. MAXIMIZING ENFORCEMENT RESOURCES

The issue of targeting inspections is part of a broader question that was of particular interest to me as Solicitor: How to maximize scarce enforcement resources? Let me suggest a few guideposts.

First, one enforcement priority should be assuring that the enforcement process itself is working. Call it clearing the arteries. It is for this reason that the government should prosecute aggressively those who disdain the rule of law and the legal process itself. If there are not severe consequences for improperly disregarding orders of OSHA and orders of the court, all other enforcement efforts are diminished. It is for this reason that as Solicitor—with the help of career lawyers in Chicago and Washington, D.C.—I instituted a policy of increased use of section 11(b) of the Occupational Safety and Health Act (OSH Act).³ That section permits a final order of the Occupational Safety and Health Review Commission to be entered as an order of a federal court of appeals. Once this essentially ministerial step is taken, a company that violates the order is subject not

1. 30 U.S.C. § 813(a) (2000).

2. Secretary of Labor Elaine Chao, Speech to the Voluntary Protection Program Participants Association (Aug. 27, 2001), *available at* http://www.dol.gov/_sec/media/speeches/20010827_VPPA.htm.

3. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2000).

only to possible prosecution under the OSH Act, but to contempt of court proceedings in the court of appeals as well. In the relatively few instances where 11(b) contempt procedures have been used in the past, appreciable fines have been levied by the courts, sometimes far in excess of the fines authorized for violation of the OSH Act itself. It was in light of this that we directed increased use of section 11(b).

A *second* and related enforcement priority in a world of limited resources is ensuring that auxiliary means of achieving compliance are open, functioning, and respected. Shortly after I became Solicitor, the Mine Safety and Health Review Commission (MSH Review Commission) issued a decision highly critical of the Department of Labor's handling of an MSHA whistleblower case, in which it had taken the Solicitor's Office and MSHA more than eighteen months to seek temporary reinstatement of the complainant.⁴ When those who make good faith safety and health complaints are subject to retaliation, it erodes an important source of government information on potential violations of the law. The government, in turn, is forced to place greater reliance on less reliable sources, such as the random inspection schemes addressed below.

For this reason, shortly after the MSH Review Commission issued the decision in the disciplinary proceeding, MSHA Administrator Dave Lauriski and I established timetables and a monitoring system for the processing of whistleblower complaints, which resulted in considerably more expeditious handling of whistleblower complaints in MSHA. For similar reasons, I supported the career lawyers in the New York regional solicitor's office in seeking the first-ever preliminary injunction reinstating an employee in a wage-hour retaliation case.⁵

III. TARGETING INSPECTIONS

A *third* means of maximizing enforcement resources is, of course, to target inspections wisely. As Solicitor, I viewed the inspections performed by OSHA and the other enforcement agencies in the Department as laying the groundwork for my office's own efforts; it is principally through agency inspections that cases are found and developed, and for that reason I considered it important for the Solicitor's Office to give feedback on areas where inspection systems could be improved to meet enforcement priorities and to yield stronger, more significant cases. This is an area in which the agencies within the Labor Department—perhaps OSHA more than most—have room to improve.

OSHA conducts inspections on two bases: complaint driven, and so-

4. Disciplinary Proceeding, No. D 2000-1; 24 FMSHRC 28 (Fed. Mine Safety & Health Review Comm'n Jan. 31, 2002).

5. Bob Port, *Sweatshop Backs Down*, DAILY NEWS (N.Y.), Aug. 26, 2002, at 22.

called “programmed” inspections. Complaint-driven inspections result, of course, from specific reports of hazardous conditions. Programmed inspections result from neutral administrative inspection schemes that target companies for inspection based on characteristics such as their industry, location, and reported injury rate.

Since 1998, OSHA’s principal inspection plan has been its Site-Specific Targeting (SST) Plan. The plan uses data about injury rates at specific worksites to target them for inspection—each year: a group of *industries* is selected for SST inspection, and then the *worksites* within those industries with the highest reported rate of injury are scheduled for inspection.

The premise of SST is sensible—make the most hazardous worksites the focus of inspection efforts. In this respect, SST is a significant departure from prior inspection programs—and, potentially, a significant improvement. Other inspection programs rely on injury data at the industry level, but do not have the site-specific injury data that SST employs. Accordingly, these other inspection regimes randomly target worksites for inspection within the targeted industry.

SST has been in place long enough to be reviewed and assessed, and the data indicates that it has not been as effective an enforcement tool as should be expected. This became clear to me as Solicitor, when I compared what I called the “success” rate of SST inspections with the success rates of other inspection programs. What I mean by “success” is the number of citations per inspection—particularly, limited to serious and willful violations involving dangerous conditions. The success rate of SST inspections is not materially different than for other programmed inspection plans. The data indicates that SST is steering OSHA toward workplaces with high reported injury rates, but not necessarily workplaces where those injury rates result from violations of the law.

The General Accounting Office (GAO) reached the same conclusion regarding SST in a report in November, 2002. “The SST program is limited in its ability to effectively identify hazardous worksites,” the GAO reported.⁶ The report went on to say:

[O]ur review of [OSHA’s database] as well as interviews with area office directors indicate that these [poor] outcomes could result from faulty information that caused OSHA to send inspectors to worksites that were either not hazardous or that had

6. UNITES STATES GENERAL ACCOUNTING OFFICE, WORKPLACE SAFETY AND HEALTH, OSHA CAN STRENGTHEN ENFORCEMENT THROUGH IMPROVED PROGRAM MANAGEMENT 10 (2002) [hereinafter GAO REPORT].

hazards that were outside of OSHA's control.⁷

And:

[F]or about 17 percent of worksites on the SST list, inspectors found no violations. In another 14 percent, inspectors found no serious violations.

....

[O]fficials from OSHA's regional and area offices . . . expressed concern about the ability of the SST program to reach those worksites with hazards that inspectors can address. Over half stated that the program did not identify a sufficient number of employers with serious violations to warrant their participation. For example, at one local office, we were told that 35 percent of worksites on the list were not cited for a violation.⁸

Now let me acknowledge, as an aside, that there are other ways to view this matter. For instance, OSHA inspections may be viewed as a sort of house-call for troubled employers: federally funded corporate consulting intended less to effect compliance with the law and more to help employers find ways to address hazards regardless of whether those hazards violate federal law. Call this approach, "We're the government and we're here to help." Under this view, it does not matter whether violations are found on an OSHA inspection, as long as there has been a chance for the government to reach out and touch an employer.

Another (perhaps related) view is that inspection itself is a form of enforcement, in the sense that it is an imposition of government power that causes a company to change its practices even though the law does not require that it do so. The most notable example of this approach is a 1998 OSHA program called the "Cooperative Compliance Program." Under the program, employers with high reported injury rates were told they had been selected for onerous comprehensive "wall-to-wall" inspections. But, they were advised, we will greatly reduce the likelihood of inspection—and any inspections that do occur will be relatively benign—if you agree to do a series of things currently not required by federal law. Under this program, which was invalidated by the D.C. Circuit, OSHA's inspection authority was openly used as a form of coercion to prompt employers to do things that, at the time, OSHA did not have the authority to require.⁹

7. *Id.* at 12.

8. *Id.*

9. *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 208–09 (D.C. Cir.

The third view of the purpose of inspections—which is my view, the most common view, and the view that coincides with the Fourth Amendment—is that they are for investigative and enforcement purposes only. OSHA has separate consultation and compliance assistance programs to show employers how to improve workplace safety. But when it comes uninvited to private property, the government has a right of access only when it has probable cause to believe that a violation of a law enforceable by that agency has occurred. In administrative inspection schemes, probable cause is defined somewhat loosely—but the justification for government entry remains the search for a prosecutable violation of the law.

As the GAO Report reflects, one reason OSHA's SST inspection program has not been particularly successful is that it targets inspections without regard to whether the injuries at the worksite result from violations of legal requirements that OSHA enforces.¹⁰ Yet the data that OSHA accumulates through its SST inspections should enable it to identify the particular employers that not only have high injury rates, but also have a high number of injuries attributable to serious legal violations. OSHA is in a position to take steps to ensure that it inspects these companies more and, by the same token, that it inspects less frequently those employers that are not found to be violating the law.

OSHA made some progress in this direction in 2003 with an "Enhanced Enforcement Program."¹¹ Under that program, when one facility of a company has a particularly serious incident—such as a fatality coupled with a high gravity serious violation related to the death, or three or more high gravity serious violations that are repeat or willful—OSHA may in that event schedule other facilities of the same company for inspection. This is a step in the right direction. But OSHA should continue to look for ways to better target its resources, so that it is inspecting employers who violate the law more, and is spending less time inspecting those who comply with the law. This is the sensible way to marshal scarce government enforcement resources. It also is more respectful of Fourth Amendment rights.

1999).

10. GAO REPORT, *supra* note 6, at 16.

11. Press Release, Occupational Safety & Health Administration, Labor Secretary Announces Plans to Enhance Enforcement for Employers Who Defy Safety and Health Regulations (Mar. 11, 2003) available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=10125.

In 2004 OSHA sought public comment on how effectively SST is accomplishing its goals and ways that it might be improved. 69 Fed. Reg. 25445 (May 6, 2004). At the time this essay went to press, no changes appear to have been made to the program in response to comments.

IV. THE INTERPLAY BETWEEN THE GOVERNMENT, EMPLOYERS, AND EMPLOYEES IN ACHIEVING COMPLIANCE

The government does not have the sole—or even primary—role in furthering occupational safety and health or compliance with the employments laws generally. Others with those responsibilities include employers and employees, individually and collectively through their labor unions. I will conclude with some observations on the interplay of government, employers, and employees in furthering legal compliance.

Specialists speak of labor law and employment law as distinct things—labor law is about the right to organize; collective bargaining; economic weapons (strikes and lockouts); and other matters regulated by the National Labor Relations Act. Employment law comprises pretty much everything else, including discrimination law, wage and hour law, and occupational safety and health.

In the real world, of course, these things are not distinct. Unions are among the most effective advocates for workplace safety. In unionized workplaces on a daily basis, unions play an important role in identifying and addressing occupational hazards. When necessary—and at times when not necessary—unions contact OSHA to complain and trigger inspections. So, the question arises, as the government sets its inspection and enforcement priorities, what consideration should be given the fact of union representation at a worksite? The following is not intended to be conclusive, but rather is offered as food for thought and to initiate discussion.

In a recent article, I observed that federal employment law takes three different approaches to regulating unionized workplaces.¹² The first can be called the “deferential” approach. An example is Section 3(o) of the Fair Labor Standards Act (FLSA), which permits a company and union to bargain over the compensability of time that employees spend changing clothes or washing at the beginning and end of a shift.¹³ In a non-union workplace, that time sometimes has to be compensated. In a unionized workplace, however, whether to compensate the time is subject to negotiation.

There are other instances where the law takes a deferential approach toward union agreements. The FLSA’s overtime requirements exempt employees under collective bargaining agreements that guarantee they will not work more than 1040 hours in a twenty-six week period.¹⁴ And OSHA

12. Eugene Scalia, *Regulation of Unionized Workplaces*, 2 PERSP. ON WORK 17 (2004); see also Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL’Y 489 (2001).

13. 29 U.S.C. § 203.3(o) (2000).

14. 29 U.S.C. § 207(b)(1) (2000).

regulations provide that if a worker's termination for certain types of whistle-blowing can be arbitrated under a collective-bargaining agreement, then the agency may defer to the arbitration proceeding and not bring its own whistleblower case.¹⁵

In at least one instance, though, the law takes a quite different approach toward union-negotiated agreements—what can be called the “skeptical” approach. In *Alexander v. Gardner-Denver, Co.* in 1974, the Supreme Court ruled that collective bargaining agreements cannot compel binding arbitration of discrimination claims under Title VII of the Civil Rights Act.¹⁶ The Court has extended this rule to other statutory claims, including federal wage-hour claims. By contrast, the Court has also ruled that, individually, employees *can* enter binding pre-dispute agreements to arbitrate statutory claims.¹⁷ The way the law stands in most federal circuits, then, an individual employee's agreement to arbitrate a statutory claim is enforceable, but if employees agree collectively through their union to binding arbitration of statutory claims, that is non-enforceable. In this instance, the union agreement is treated more skeptically than the individual agreement.

The third approach toward union-negotiated arrangements can be called the “neutral” approach. This treats terms negotiated with unions the same as terms established by other means: they do not get deference, but nor are they treated skeptically. This is the most common approach in the law. So, for instance, while the FLSA gives some deference to company-union agreements regarding the compensability of clothes-changing time, union and non-union workplaces are treated the same for other preparatory activities at work, such as sharpening tools or inspecting equipment.

This neutral approach toward union-negotiated agreements was in the background of the Supreme Court's decision in *US Airways, Inc. v. Barnett*.¹⁸ Plaintiff Barnett sought to be placed in a light-duty position as an accommodation for his bad back.¹⁹ Other, more senior workers had a prior claim to the position under the company's seniority system; the question was whether a “reasonable accommodation” under the Americans with Disabilities Act (ADA) can require deviating from a seniority system.²⁰ The Supreme Court ruled that ordinarily seniority systems do not yield to the ADA's reasonable accommodation obligation.²¹ If the employer has allowed exceptions to its seniority system in the past for

15. 29 C.F.R. § 1978.112 (2003).

16. 415 U.S. 36, 55 (1974).

17. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

18. 535 U.S. 391 (2002).

19. *Id.* at 394.

20. *Id.* at 395–96.

21. *Id.* at 403–06.

other reasons, however, an exception for purposes of the ADA may be required too.²²

The seniority system in *Barnett* was company-imposed. The AFL-CIO filed an *amicus* brief urging the Court to recognize that union-negotiated seniority systems are due more deference under the ADA than company-imposed systems.²³ The Court did not draw that distinction, although Justice O'Connor hinted at it in a concurring opinion.²⁴

V. CONCLUSION AND SUGGESTIONS FOR FURTHER DISCUSSION

A case can be made for each of the three approaches outlined above. I admit to some sympathy for the deferential approach, which recognizes the regulatory regime established by the National Labor Relations Act as, to some extent, an alternative *means* of achieving much the same thing as laws directly regulating the employment relationship, such as the OSH Act, the wage-hour laws, and the Family and Medical Leave Act. The laws protecting the right to organize and bargain are intended to empower employees to improve wages, benefits, and workplace safety *for themselves*; when employees effectively collaborate to that end, the deferential approach says, the need for intervention of federal law is some degree less than in workplaces where workers have not organized. That being the case, the deferential approach asks, why not give some deference to unions if they choose to negotiate terms and conditions slightly different than those provided by federal law?

The case for the neutral approach is just that—the approach is neutral, applying the law equally to union and non-union companies. This avoids the competitive advantage that unionized companies might have over non-union firms if they could use the deferential approach to contract around costly employment rules. From the employee's perspective, the neutral approach guarantees unionized employees the same statutory entitlements as non-union workers. They cannot be pressured to bargain-away statutory rights that, for non-union workers, are non-negotiable.

Finally, the skeptical approach recognizes that unions sometimes sacrifice individual rights for collective benefits. When a statute gives a right to an individual, this approach says, co-workers should not be able to bargain that right away for their own benefit.

In offering these thoughts, it is not my intent to make a conclusive case for the deferential approach toward regulating unionized workplaces, or any of the other approaches. What I would suggest, however, is that this

22. *Id.* at 405–06.

23. Brief of Amici Curiae American Federation of Labor and Congress of Industrial Organizations, USAirways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250).

24. *Barnett*, 535 U.S. at 408.

area appears ripe for research, discussion, and debate. In that discussion and debate, I would suggest, the following are among the relevant questions:

- *Do Congress, the courts, and federal regulatory agencies currently have a coherent system for selecting among the deferential, skeptical, and neutral approaches when drafting, interpreting, and enforcing laws that regulate the terms and conditions of employment?*
- *What are the pros and cons of the different approaches? Are there identifiable circumstances in which one or another of the approaches is particularly appropriate?*
- *If use of the deferential approach were increased, what would be the effect on union organization rates and on the terms and conditions of unionized workers' employment?*
- *If some increased use of the deferential approach is appropriate, what form should that deference take: Full exemption of unionized companies from certain requirements? Exemption when a provision of a collective-bargaining agreement conflicts with otherwise applicable law? Exemption only when expressly provided for in the agreement? More a procedural than substantive exemption, that is, increased deference by investigative agencies, federal prosecutors, and the courts to dispute-resolution mechanisms provided in collective-bargaining agreements?*

Whatever the answers to these questions, by considering and debating them we will improve our understanding of the best means to deploy government inspection and enforcement resources to achieve compliance with the law.