

BREAKING THE CYCLE:

NEW APPROACHES TO ESTABLISHING NATIONAL WORKPLACE SAFETY AND HEALTH POLICY

On the eve of this especially historic national election, and before transition teams for the victorious presidential candidate assemble and begin the work of considering new policy initiatives and searching for new top-level federal government appointees, ORC Worldwide¹ again offers a quadrennial perspective on aspects of workplace safety and health that are ripe for consideration by both the new administration and the broader safety and health community.²

Introduction

“Change” is the slogan that both presidential candidates have adopted to express their respective visions of what the new administration will bring to Washington and the nation. When one of them takes the oath of office on January 20, 2009, the new administration will face a host of pressing short and long-term national and international priorities, including the global economic crisis and the underlying vulnerability of US home mortgages, the conflicts in Iraq and Afghanistan and the continued threat of international terrorism, a swelling budget deficit and national debt, the pressing need for health care reform, the imperative to develop an energy policy that addresses the twin issues of reducing reliance on fossil fuels and developing viable renewable energy sources, the need to work with the global community to mitigate the impact of climate change, and more.

In this setting, occupational safety and health challenges are unlikely to be front and center on the national stage. On the other hand, it is also becoming apparent that irrespective of which party wins the White House, the impetus for “change” in national workplace safety

¹ For nearly 38 years, ORC Worldwide has helped the world’s leading corporations achieve and sustain workplace safety and health excellence through benchmarking and sharing best practices in areas such as management systems and performance metrics, and creating new strategies and opportunities to improve safety and health performance. ORC is also an industry voice on national and global safety and health policy issues. Currently, more than 140 leading global corporations in more than 20 industry sectors are members of ORC’s Occupational Safety and Health Groups. The activities these Groups are based on the premise that providing safe and healthful working conditions is the mutual concern of employers, workers and government agencies and that cooperation and collaboration among these key stakeholders is essential to finding solutions to safety and health issues.

² Four years ago, ORC’s pre-election paper focused attention on the “dramatic growth in global [safety and health] initiatives . . . that are influencing and will continue to influence the practice of occupational safety and health in American business” and the significant impact of “global governmental and non-governmental institutions and initiatives as the new major drivers of occupational safety and health policy for much of U.S. business both here and abroad.” These trends have indeed been realized and will continue to expand.

and health policies, programs and practices has been building and is likely to accelerate in the next few years. In this paper, ORC would like to add its voice to those calling for change, but with a focus on a different set of issues than have traditionally been the subjects of national debates over workplace safety and health. The nature of the change ORC advocates has more to do with altering the basic framework for determining safety and health policy at the national level, based on the belief that this historic period of transition offers a unique opportunity for everyone in the safety and health community to reevaluate and restructure the way in which we engage in the national effort to reduce workplace injuries and illnesses.

The Current Debate Over Change in National Workplace Safety and Health Policy

Up to this point, the consideration of changing the direction of national safety and health policy has largely focused on the kinds of issues that have in some form or other been debated for the last two decades – more enforcement or more voluntary programs, higher civil and criminal penalties, more safety and health standards, coverage of more workers, the accuracy of injury and illness recordkeeping and other familiar themes that are directed towards “fixing OSHA” or making the agency more effective in achieving its mission.

The principal catalyst for changing this current embodiment of national safety and health policy has been the 110th Congress, where the House and Senate committees with jurisdiction over workplace safety and health have been active both in their oversight of the policy direction of the Occupational Safety and Health Administration (OSHA) and in the consideration of various statutory amendments to the Occupational Safety and Health Act of 1970 (Act).³ There is every reason to expect the new Congress to step up these efforts. Of course, the ability of Congress to actually produce tangible change, especially involving the statute itself, will depend not only on whether Senator Obama or Senator McCain wins the election but factors such as the extent of the Democratic gains in the House and Senate, the types and breadth of the changes sought and the extent to which the Democratic majority seeks bipartisan support.

It is important to note that there are also significant countervailing forces that make the kinds of changes being discussed far from inevitable. As pointed out above, the nation is faced with arguably unprecedented challenges that make it unlikely for workplace safety and health to be a high national priority. In addition, the budgetary implications of most of those priorities make it virtually certain that funding for national workplace safety and health programs will, at best, remain at its perennially insufficient level. Just as important, there is far from universal agreement that changes in current national safety and health policy are necessary or desirable. Key industry representatives and many in the broader safety and health community appear to be either relatively indifferent toward change in national safety and health policy direction or opposed to change that might present unwelcome business or professional burdens and challenges. For example, in the most recent annual national survey of a broad cross-section of safety and health professionals conducted by *Industrial Safety and Hygiene News*, only 21 percent of respondents said they would like to see the new OSHA team increase standards-setting activity in 2009, 26 percent wanted increased enforcement

³ Evidence of Congress’ determination to make major changes in safety and health policy can be seen in its recent actions with respect to mine safety and health in the wake of tragic events in that industry.

and 55 percent wanted OSHA to be more cooperative and consultative. Only 18 percent viewed OSHA compliance as one of their organization's most difficult 2009 safety and health objectives compared, for example, to 42 percent who thought developing leading metrics was one of the most difficult objectives.

Change That Fits the Times - Opportunities for New Directions

ORC is optimistic that this election has the potential to bring a greater level of change than we have seen in nearly a generation to the ways Washington approaches the challenges facing our nation. In this time of unprecedented national and global challenges, we in the safety and health community should all search for new ways of thinking about how to advance worker safety and health over the long term and how to increase the likelihood of finding common ground on important issues. We are frankly weary of the culture of confrontation that perennially pervades the debates over workplace safety and health policy, that leads to political stalemate and that has alienated much of the safety and health community, as the survey results above suggest. ORC strongly advocates taking advantage of what promises to be a new beginning to rethink how national workplace safety and health policy is developed and implemented and to devise new strategies and approaches that could help to break the longstanding gridlock on progress in many key areas.

ORC is proposing some potential new frameworks for addressing at least some of the key "traditional" topics of discussion, but the underlying objective of our proposals is even more fundamental: to move toward breaking the cycle of confrontation, mistrust and stalemate that have long characterized many of the national policy debates over workplace safety and health. ORC believes that significant and lasting progress is most likely to occur only if the stakeholders in the safety and health community insist on creating a new more collaborative infrastructure and developing new systemic approaches to addressing national safety and health policy issues. This may, indeed, be a once in a generation opportunity for everyone in the safety and health community to reevaluate some of our long-held assumptions, frameworks, policies and practices, as well as our respective roles, in the national effort to reduce workplace injuries and illnesses.

To reiterate, these recommendations are not intended to suggest a formula for "fixing OSHA," i.e., for addressing how to improve the agency's statutory framework or how to shift its substantive priorities or its resources to improve its overall effectiveness. As indicated above, those issues will be played out in Congress and other forums. Rather, ORC is recommending a series of steps to reshape how national safety and health policy is developed, with OSHA playing a key role, but other stakeholders taking greater "ownership" of that process. This is fundamentally a series of recommendations for improving the coordination, cooperation and level of engagement among the broad range of stakeholders all of whom have an important role in developing or delivering safety and health interventions to workers.

What are the stakes of continuing on our traditional contentious path? The most important is that the US is frankly falling behind other regions of the world, most notably the EU, but increasingly parts of the Asia Pacific region, in adopting safety and health policies, strategies

and practices that have the potential to provide improved levels of worker protection. One example is the risk-based approach to worker protection described in more detail below. Another is a more updated set of chemical exposure limits. At least in part, this is due to our collective inability over the years to forge new consensus approaches to improving workplace safety and health policy at the national level. If we as a nation truly want to live up to the promise of the Act “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions,” we need to find new ways to make progress.

ORC’s Recommendations

ORC has the following recommendations for a new administration in the form of stakeholder and public dialogues, forums and processes that we believe could begin to form a foundation for significantly improving worker safety and health over the next decade. As mentioned above, these recommendations are to a significant extent a departure from the long-established models of national decision-making and will require new levels of openness and cooperation on the part of everyone in the safety and health community. To have a realistic chance of success, the consideration, development and implementation of these recommendations would not only require the full participation of, at a minimum, key industry and labor representative, but would also require strong leadership and commitment from senior level officials from the new administration, preferably with the support and even involvement of congressional committee staff. To best assure success, other key stakeholder groups, including the academic community and representatives from the safety and health professional organizations, including occupational physicians and nurses, as well as members of the safety and health bar, should also participate fully.

1. Conduct a structured, facilitated “national dialogue” to develop specific strategies and an action plan for promoting, incentivizing and assuring the adoption by all US employers of systems-based approaches to assessing and reducing safety and health risks.

The almost 40 year old Act has been remarkably durable in its breadth, adaptability and overall effectiveness as a framework for protecting workers. However, for the 21st Century workplace, it has become in several significant ways an outdated model for protecting today’s workers from occupational safety and health hazards. At the time of its enactment and in the early years of its implementation, when there were many well-known hazards in the fixed industrial establishments that were the predominant places of employment in the US, and when the safety and health profession was not fully matured, the Act’s mandate for the federal government to adopt minimum issue-specific specification standards covering a broad range of hazards and to hold employers accountable for strict compliance with each of them was a logical regime. This was especially true when it was assumed that OSHA would have the capacity to “keep up” with updating existing standards and developing additional standards for new hazards.

But today, virtually all of the key conditions and assumptions that were the underpinnings of the Act have changed dramatically and a different sort of framework for worker safety is

called for. The shift to the service economy is well-known, with its enormously varied workplaces and workforces for which many of the now thirty or forty year old OSHA standards were never intended or suited. Even the “industrial” workplace is no longer the static environment it once was, replaced by a nimble, frequently shifting workplace with new technologies, new products, rapidly changing production methods and a workforce with a complex set of employment relationships, all to meet the competitive demands of the global marketplace. Around the world, both developed and developing regions and nations have adopted approaches to worker safety and health far more suited to the new world of work, ones that recognize the virtual impossibility of keeping up with workplace changes and developing hazard-specific standards at a sufficient pace, but instead that requires employers to implement an ongoing program of risk identification, risk assessment and risk reduction and control. Some basic hazard-specific standards are surely appropriate, but the overarching obligation of the employer is to evaluate all workplace risks and address them appropriately using competent safety and health professional resources.

Going forward, ORC believes that this is the most viable approach to assuring workplace safety and health improvements in tomorrow’s varied work environments. And it is the approach to safety that business is overwhelming adopting worldwide. That is one of the reasons that the responses of the safety and health professionals in the most recent *ISHN* survey reveal a level of disengagement from OSHA and its traditional enforcement and rulemaking functions. Compliance with OSHA rules is viewed as secondary to the more relevant and critical function of reducing risks under company management systems.

There has been much discussion over the past decade about the desirability of establishing a regulation requiring employers to implement and maintain a safety and health management system that would focus on risk reduction. That topic will almost surely be one of the issues the new administration will address over the next few years. However, ORC believes that there is a wide array of policies, programs and activities that could be undertaken by the new administration, in coordination with business, labor and the safety and health profession, to promote and incentivize the adoption of management systems that focus on identification, assessment, prioritization and control of all significant workplace risks. These range from enhancing OSHA’s website to provide a wider variety of tools and resources for the implementation of risk-based management systems, to updating the agency’s 1989 Safety and Health Program Guidelines to incorporate updated information about managing risks from sources such as the ANSI Z10 consensus standard, to considering the revival of a modified Cooperative Compliance Program in accordance with the reviewing court’s admonitions. Ideally, in order to make the most effective use of its scarce resources, OSHA would adopt an integrated approach to the reduction of high-priority risks, whereby there would be a coordinated effort among all of OSHA’s key functional areas, including the development of standards and technical guidance, the targeting of enforcement activities, the deployment of consultation and training resources and the encouragement of voluntary programs.

ORC’s recommendation is to engage in a structured, facilitated “national dialogue” process of review that would develop consensus recommendations for a comprehensive national strategy to promote and incentivize the adoption of a risk-based approach in every US

workplace. In ORC's experience, there is one essential precondition for asking the safety and health community to invest considerable time and effort in such an activity. Namely, the new administration must commit to full participation in the process. This means that senior officials at both the career and political levels of OSHA must be willing to be fully engaged in the discussions and action plan formulation, although we acknowledge that an "up front" commitment by the administration to adopt the results of such a process is unrealistic.

Two possible precedents for such a dialogue could be used as models. The first is the one that was used two decades ago to address what at the time was perceived as a crisis in injury and illness recordkeeping practices. Under the auspices of the non-partisan Keystone Center, known for its facilitation of stakeholder dialogues on a wide range of often-controversial public policy issues, a broad group of safety and health leaders from diverse perspectives arrived at a series of recommendations, most of which, over time, were adopted by the government. The second possible model is that used by the National Institute for Occupational Safety and Health (NIOSH) in the mid-1990s to establish its first National Occupational Research Agenda (NORA). This process entailed convening a series of working meetings where a broad representation of occupational safety and health stakeholders involved in or benefiting from safety and health research offered their recommendations for research priorities. This open, iterative process was extremely successful in helping NIOSH for the first time develop an ongoing national research agenda that enjoyed the wide support of most of the safety and health community. In both cases, the full participation of senior agency leadership and a commitment to act on the results were essential aspects of a successful outcome.

2. Engage in public process for conducting a comprehensive multidisciplinary expert evaluation of the stagnated OSHA standards-setting system and for developing specific recommendations for workable legislative and administrative improvements and effective alternatives

One of the fundamental responsibilities of the Secretary of Labor under the Act has been the promulgation of occupational safety and health standards to protect workers from hazardous working conditions. In spite of a few landmark successes in regulating safety and health hazards, there is virtual unanimity that by almost any measure and for a wide variety of complex reasons, the overall record of updating outdated standards and promulgating new standards to address emerging hazards has been one of failure. In the foregoing discussion, ORC argues for a framework that would ultimately reduce reliance on the Act's hazard by hazard standards-setting regime. However, even if successful, that shift will undoubtedly be an incremental process and in any case will never eliminate the need for new and updated safety and health standards in critical targeted areas.

Although the conclusion that the standards-setting process has not been successful is nearly universal, there is no unanimity around possible approaches to "fixing" the problems that have resulted in its failure. Most observers do agree that the Act's standards-setting provisions themselves cannot be identified as the central culprit, although interpretations of those provisions by the courts, particularly with respect to evidentiary requirements necessary to support key elements of standards, certainly require substantial investment of

time and resources. Many critics point to the accretion of administratively imposed requirements over the years as adding to the time and burden involved. Still others focus on OSHA's limited resources and an alleged failure of agency leadership to making standards-setting a high priority relative to other activities. Although there have been a number of studies of the rulemaking process over the years, none can be pointed to as definitive or as offering comprehensive systemic proposals for improvement. The truth is that to ORC's knowledge, nobody has come forward with a plausible solution.

ORC believes that this is a systemic issue that can no longer be ignored – there is at least some prospect that events of the past year involving such incidents as tainted consumer products and the current economic crisis could usher in a new era of what some have called “re-regulation”. In addition, the recent penchant of congressional committees considering safety and health regulatory issues to engage in standards-writing on specific hazards as an expression of their own frustration with the regulatory process is not, in ORC's view, an appropriate solution.

Now is the time for everyone in the safety and health community to become involved in a thorough and open review of the standards-setting process, with a candid and in-depth evaluation of the many contributing causes to its failures as well as a public vetting of potential approaches for improving the process. ORC believes that this type of review can best be initiated through the appointment by the new administration of a multidisciplinary expert panel, perhaps under the auspices of the National Academy of Sciences, comprised of specialists in safety and health, administrative law, public policy, relevant sciences and others. Such a panel should solicit extensive public input in its examination of both statutory and administrative solutions, as well as other possible alternatives; it should also consider ways to address especially pressing issues, such as updating OSHA's permissible exposure limits. Once an analysis of the problems and possible solutions has been conducted, the new administration should solicit input from the broader safety and health community in follow-up public forums to assess what short and long-term actions might be most feasible and effective in addressing this seemingly intractable problem, followed by the development of an action plan. As with the previous recommendation, active involvement by the new administration is critical to the success of such a process.

3. Establish open and transparent institutional mechanisms and forums for stakeholders to participate in the development of key national safety and health policy initiatives as well as in the prioritization of such initiatives.

We are rapidly moving into a new age of organizational accountability, transparency and openness. In the corporate world, the advent of the Sarbanes-Oxley legislation in 2002 formally cemented one version of these concepts into many business systems. The events of the past few months related to the global economic crisis will only reinforce and accelerate the trend toward greater business accountability and transparency. The modern business movements toward corporate social responsibility, sustainability, product stewardship and supply chain management are parallel developments that support and sustain those trends.

ORC believes it is time to bring those same attributes to government institutions. Simply stated, we need to finally create more participatory and transparent processes for bringing safety and health policy development into the sunshine. ORC strongly believes there should be collaborative forums and procedures where multi-stakeholder discussions about important safety and health policy issues can occur early in the developmental process and where consensus-building is encouraged. We would include several important activities under the rubric of “policy”, including the development and periodic review of the agency’s regulatory agenda, the consideration of OSHA’s strategic plans, the development of compliance directives and technical bulletins and the early drafting of standards and guidance documents.

Candidly, OSHA has been a stumbling block over the years to a spirit of cooperation and collective consideration of major policy initiatives. Even in an era where transparency and accountability are ascendant and when OSHA and other agencies are supposedly trying to be more “customer friendly,” OSHA has generally been doggedly reluctant to bring stakeholders in at an early stage of the policy-development process to provide informal input, let alone to contribute as “partners” in the policy development process.⁴ A more open and transparent agency will, in the long run, be better able to be more responsive and effective in its ultimate mission.

Precedent for one form of participatory process can be found in the early days of the Clinton administration when the Assistant Secretary of Labor for OSHA and his Policy Director conducted public forums to help OSHA prioritize its regulatory agenda and recommend which issues should be addressed by either standards or guidelines. This is exactly the kind of process that a new administration could profitably conduct. As noted above, ORC recommends that the new administration go even further and establish processes for early public input into a broad variety of important policy areas. ORC notes that there is one well-established forum that could be used far more effectively to at least partially serve as a vehicle to obtain greater public input and involvement in the policy-making process. The National Advisory Committee on Occupational Safety and Health (NACOSH), whose charter it is to advise and make recommendations on “matters relating to the administration of the Act” has been chronically underused over the years and should be reconstituted to play more robust policy-development role.⁵ The 2007 OMB Bulletin for Agency Good Guidance Practices that promotes public review of significant agency guidance documents is another approach to promoting greater public involvement in agency decision making.

⁴ ORC is mindful of the potential tension in certain situations between the desire to foster active stakeholder input into important policy initiatives and the need to consider both the requirements of the Federal Advisory Committee Act and the need to protect certain candid pre-decisional communications as part of the deliberative process. In general, feasible and legal options are available that would strike the appropriate balance.

⁵ A potential model at the state level is what ORC regards as the most robust participatory process for OSH rulemaking and procedures development in the country. California’s Division of Occupational Safety and Health (Cal/OSHA) has a long history of valuing and encouraging public input via advisory committee meetings, websites, and even conference calls. It is a key component of their operational model, and includes a diverse advisory committee that meets bi-monthly to review and discuss the Agency’s overall operations. One important consequence of Cal/OSHA’s process is increased stakeholder acceptance of the work product, and a corresponding reduction in the number of legal challenges.

Summary and Conclusion

In its work with leading global corporations, ORC has come to appreciate how difficult it is for an organization to undertake the kind of “culture change” that is necessary to achieve lasting superior safety and health performance. What we are suggesting here is no less than a long-term culture change in the framework for considering, developing and implementing national occupational safety and health policy. ORC believes it is important to undertake this effort because we are convinced that it is the way in which future generations of US workers can best be assured the “safe and healthful working conditions” that the Act promised nearly forty years ago.

We also know that the one essential element in achieving culture change is leadership. It will require the commitment of leaders in business, labor, government and all in the safety and health community to break the cycle and create lasting change. ORC will be actively engaged with other stakeholders in attempting to generate support for these recommendations for a more collaborative infrastructure and new systemic approaches to addressing national safety and health policy issues. We will actively work with the new administration as it is formed in the coming month to encourage consideration of these proposals.