Immigrant Labor and the Occupational Safety & Health Regime; Part I: A New Vision for Workplace Regulation

Jayesh Rathod

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IMMIGRANT LABOR AND THE OCCUPATIONAL SAFETY AND HEALTH REGIME

PART I: A NEW VISION FOR WORKPLACE REGULATION

JAYESH M. RATHOD

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Assistant Professor of Law, American University, Washington College of Law (WCL). J.D., Columbia University School of Law. Prior to joining the faculty at American University, the author was a Staff Attorney at CASA of Maryland, where he represented immigrant day laborers, domestic workers, and construction workers in employment and immigration law matters. This article stems from the author's experience working at CASA and from witnessing individuals and families struggling to cope with work-related injuries and fatalities.

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INTRODUCTION

Foreign-born workers in the United States, particularly those of Latino origin, experience a disproportionate number of workplace fatalities. This article is the first in a series of three articles that together form a scholarly project that unearths the causes of the recent trend in immigrant worker fatalities and injuries, and presents recommendations for reversing it. This first contribution, A New Vision for Workplace


2. This scholarly project is motivated, in part, by the relatively limited attention that legal scholars have given to occupational safety and health issues over the past decade. To be sure, considerable attention has been directed to the plight of immigrant workers in general and to the gradual erosion of labor and employment protections for undocumented workers in particular. The result of this focus has been a wealth of important and insightful scholarship. See, e.g., Anne Marie O'Donovan, Immigrant Workers and Workers'
Regulation, examines how the history, structure, and operations of the federal Occupational Safety and Health Administration (OSHA) have, at times, obscured the workplace safety concerns of immigrant workers and have left these workers with no meaningful voice in the regulatory process. The second article in the series will explore how labor and immigration laws, operating in the context of shifting economic, social, and political currents, affect the behavior of immigrant workers with respect to occupational safety and health. The final article will analyze this phenomenon from the perspective of employers who hire immigrant workers and consider the multiple forces that influence their perceptions of immigrant labor and, correspondingly, their decisions vis-à-vis workplace safety and health.

In this first article, I offer a close examination and critique of OSHA. Specifically, I argue that structural features of the workplace safety and health regime—including the rulemaking, inspection, and enforcement processes—have historically disadvantaged foreign-born workers and prevented OSHA from fulfilling its statutory mandate "to assure so far as possible [for] every working man and woman in the Nation safe and healthful working conditions." These structural limitations, when coupled with the multiple ways in which law and society have subordinated foreign-born workers, have rendered these workers particularly susceptible to workplace injuries and deaths.


3. Although relatively few authors have examined the failings of OSHA vis-à-vis the immigrant workforce, this matter has nonetheless garnered the attention of the federal government. In September 2003, following a request by Senator Charles Schumer (D-NY), the Office of the Inspector General of the Department of Labor performed an evaluation of OSHA's handling of immigrant workers' fatalities. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF LABOR, EVALUATION OF OSHA'S HANDLING OF IMMIGRANT FATALITIES IN THE WORKPLACE, REPORT NO. 21-03-023-10-001 (2003) [hereinafter OIG IMMIGRANT FATALITIES REPORT]. Although the report was issued nearly six years ago, workplace fatalities among immigrant workers continued to rise through 2006. See infra Section I. Additionally, some of the recommendations made in the report have not been implemented. See infra Section IV. That said, it is apparent that OSHA acknowledges the importance of reducing injuries and fatalities among Latino workers. Indeed, perusal of the OSHA website reveals the agency's demonstrated effort to reach out to Spanish-speaking employers and workers. See, e.g., Occupational Safety & Health Admin., U.S. Dep't of Labor, OSHA Compliance Assistance: Hispanic Employers and Workers, http://www.osha.gov/dts/compliance_assistance/index_hispanic.html (last visited Aug. 30, 2009). This article argues that a deeper critique of OSHA, and a more transformative regulatory approach, is needed.

drawing particular attention to the most dangerous industries and to the plight of Latino immigrant workers, who are at greatest risk for workplace fatalities. In Section II, I explore the origins of the federal Occupational Safety and Health Act (the OSH Act), the broad mandate of OSHA, and its oversight and enforcement functions. Following this discussion, in Section III of this article, I describe how the history, structure, and operations of OSHA present inherent limitations, which impede OSHA's ability to execute its mandate vis-à-vis immigrant workers.

In view of the deficiencies in the existing regulatory regime, I close this article with a set of regulatory imperatives to guide OSHA's future work with respect to immigrant workers. By embracing principles of transparency, cooperative regulation, and antisubordination, OSHA can more effectively address the needs of immigrant workers and still remain true to the agency's *raison d'être*. These regulatory imperatives, which translate into specific policy recommendations, serve a broader set of purposes: shedding light upon the plight of immigrant workers, reclaiming the agency of workers and their advocates, and bringing an end to the legacy of invisibility and marginalization of immigrant workers in the occupational safety and health regime. These imperatives provide a framework for other agencies that have failed to adequately protect or otherwise address the concerns of a historically disadvantaged constituency.

5. See *infra* Section IV for a fuller description of these regulatory imperatives.
Francisco Alejandro Garcia left his home in the state of Tabasco, Mexico, in search of better economic opportunities in the United States. He made his way to Martinsville, Virginia, where he obtained employment with the National Service Company, a company that had contracted to perform cleaning services for the Knauss Snack Food Company. Francisco was paid nine dollars per hour to perform the difficult work of washing large industrial machines at the Knauss factory. On Friday, March 17, 2006, Francisco, at the age of nineteen, died after falling into a processing machine. At the time, he was spraying the blades of the machine as they rotated; either Francisco slipped, or the hose got caught in the blades and pulled him in. National Service Company was charged with a “serious” violation and fined $7,000 for the conditions that led to Francisco’s death. Francisco’s remains were shipped back to Mexico at an estimated cost of $6,800.

6. Note that the data provided by the Bureau of Labor Statistics (BLS), a subdivision of the Department of Labor, does not distinguish between foreign-born workers who are lawfully present in the United States and those who are not. As discussed more fully infra, immigration status can have a significant impact on a given worker’s experience vis-à-vis the occupational safety and health regime. Indeed, many of the structural limitations described in Section III, infra, are heightened with respect to undocumented workers.

Also, although the terms “immigrant worker” and “foreign-born worker” are used somewhat interchangeably throughout this article, a connotative distinction does exist. “Immigrant worker” connotes a recent arrival to the United States, often with a limited immigration status or no immigration status at all. “Foreign-born worker,” however, suggests a wide range of individuals across different professions and necessarily includes naturalized U.S. citizens. Again, the BLS’s data does not differentiate between these subgroups in the foreign-born workforce.

Finally, the data presented herein, in both aggregate and industry-specific forms, must be viewed in the context of economic trends in particular industries and in the nation at large. Preliminary BLS data for 2008, just released as this article was going to press, reflect a decline in workplace fatalities across all demographic groups. See Press Release, U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, National Census of Fatal Occupational Injuries in 2008, at 5 (Aug. 20, 2009) [hereinafter BLS Press Release, 2008 Fatalities], available at http://www.bls.gov/news.release/pdf/cfoi.pdf. It appears that the drop in fatalities is related to the general decrease in economic activity nationwide. Not surprisingly, construction-related fatalities have declined significantly, given that industry’s difficulties in the current economic downturn; other industries, such as farming, have continued to experience increased fatalities. Id. at 1. Increases in fatalities for certain occupations could also be attributable, in part, to a short-term jump in demand for a particular product or type of labor. As explored further in this article, aspects of OSHA’s structure and operations must also be considered when assessing injury and fatality trends among immigrant workers.

7. Body Will Be Shipped to Mexico: Garcia’s Employer to Pay Costs, MARTINSVILLE
The story of Francisco Alejandro Garcia is one of thousands of similar stories that have emerged in recent years detailing workplace injuries and fatalities among immigrants in the United States. These stories, which originate in various states and implicate different industries, together display a disturbing pattern. In the agricultural fields of central California, immigrant farm workers with limited access to water have succumbed to heatstroke and dehydration; during the summer of 2008, at least six farm worker fatalities in California were linked to heat-related causes. In New York City and other metropolitan centers, particularly those with strong housing markets, spikes in construction work have come at a significant cost to immigrant laborers in the form of debilitating injuries, many of which go unreported.

These news reports regarding workplace fatalities and injuries among immigrants are supported by the data collected by the U.S. government and other sources. These data suggest that workplace injuries and deaths among foreign-born workers in the United States have reached new heights. Over the last several years, data from the federal Bureau of Labor


10. The Bureau of Labor Statistics (BLS) is the most comprehensive source of statistics about workplace injuries and fatalities. The functions of the BLS related to fatality, injury, and illness data stem from the OSH Act, which calls for the Secretary of Labor to “develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics.” 29 U.S.C. § 673 (2006).

The BLS obtains its data regarding nonfatal injuries and illnesses by surveying nearly 300,000 representative workplaces. The BLS's data is necessarily incomplete because many employers simply are not surveyed and the agency relies upon voluntary reporting for those it does survey. Many immigrant workers are employed in relatively unregulated industries and by smaller employers, making the reporting of workplace injuries and deaths even more unlikely. See HIDDEN TRAGEDY, supra note 9, at 6 (describing fundamental limitations in the Survey of Occupational Injuries and Illnesses).
Statistics (BLS) have shown a gradual increase in the percentage of immigrant worker fatalities among overall workplace fatalities.\(^{11}\) In 1992, foreign-born workers accounted for 10.2% of all workplace fatalities; by 2006, this proportion had increased to 17.9%.\(^{12}\) While percentage of foreign-born worker fatalities dropped slightly to 17.8% in 2007, the data still reflect an overall trend of increased fatalities among foreign-born workers from 1992 to 2007.\(^{13}\)

Mirroring a general trend in foreign-born worker fatalities, work-related fatalities involving Latinos in the United States have steadily increased in recent years. According to the BLS, in 2005, fatal work injuries among foreign-born Latino workers increased by nearly 5% over the previous year, reaching 625 fatalities.\(^{14}\) Among the 1046 foreign-born worker fatalities in 2006,\(^{15}\) 667 (or 11% of the total fatalities) involved foreign-born Latino workers.\(^{16}\) In absolute numbers, both of these figures were the highest ever recorded by the BLS for the time that these data have been kept.\(^{17}\) While initial data suggest the numbers dropped slightly in 2007 to 607 fatalities among foreign-born Latino workers out of 959 total deaths for foreign-born workers, the data still reflect an overall upward trend.\(^{18}\) Indeed, Latino immigrants have comprised the majority of workplace fatalities among foreign-born workers in recent years.

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12. Foreign-Born Worker Fatalities, supra note 11, at 3 (a comparison of the data shows that, in 1992, 635 of the 6217 total fatalities involved foreign-born workers, whereas in 2006, 1046 of the 5840 total workplace fatalities involved foreign-born workers).

13. Compare Census of Fatal Occupational Injuries Charts, supra note 11, at 1, 11, with Foreign-Born Worker Fatalities, supra note 11, at 3. The total number and proportion of foreign-born worker fatalities decreased slightly from 1046 and 17.9% in 2006 to 1009 and 17.8% in 2007. Id. Nevertheless, the data from 1992 to 2007 reflect an overall upward trend of fatalities among foreign-born workers. Foreign-Born Worker Fatalities, supra note 11, at 3.


15. Foreign-Born Worker Fatalities, supra note 11, at 3.


According to recent studies, Latino men "have the greatest overall relative risk of fatal occupational injury of any gender, race or ethnic group." The risk of dying on the job is "22 percent higher for Latino men than the relative risk for all men."\(^{19}\) When data regarding occupational fatalities for foreign-born workers are disaggregated, "the most significant factor for these workers' relative fatality risk appears to be their region of origin."\(^{20}\)

The data reported in the last few years are only one component of a much longer trend. Between 1992 and 2002, for example, workplace fatalities among foreign-born workers increased by 46.3\%.\(^{21}\) While troubling, that statistic obscures the even greater increase among Latino immigrant workers, who comprise approximately half of the foreign-born workforce;\(^{22}\) fatalities among foreign-born Latino workers more than doubled during that same period, increasing by approximately 110\%.\(^{23}\) Yet during the same period, the overall number of workplace fatalities decreased from 6217 in 1992 to 5534 in 2002.\(^{24}\) The broad narrative propagated by OSHA is that fatalities are declining overall and the workplace is getting safer.\(^{25}\) This narrative ignores the fact that fatalities among foreign-born workers have generally been on the rise in recent years.

With respect to nonfatal workplace injuries and illnesses, the data suggest a similar increase in injuries among foreign-born workers. Regrettably, the BLS does not report data that reveal the exact numbers of injuries and illnesses suffered by foreign-born workers. The data regarding injuries among "Hispanic or Latino" workers, while certainly not a perfect substitute, reflect a marked increase in certain industries. For example, in 2003, in construction and extractive occupations, OSHA recorded 26,910 nonfatal occupational injuries and illnesses among Hispanic or Latino workers.\(^{26}\) By 2006, this number had increased to 34,170 incidents, or an


\(^{20}\) Id. at 4.

\(^{21}\) See FOREIGN-BORN WORKER FATALITIES, supra note 11, at 3.

\(^{22}\) IMMIGRANT WORKERS AT RISK, supra note 19, at 1. Approximately 22\% of foreign-born workers in the United States are of Asian ancestry. Id.

\(^{23}\) CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, supra note 11, at 10. In absolute numbers, the fatalities increased from 275 in 1992 to 578 in 2002. Id.

\(^{24}\) Id. at 1.

\(^{25}\) See, e.g., BLS Press Release, 2007 Fatalities, supra note 1, at 1, 5, 10 ("[T]he rate of fatal injury for U.S. workers in 2007 was . . . the lowest annual fatality rate ever reported by the fatality census").

\(^{26}\) U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, TABLE: NUMBER OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES INVOLVING DAYS AWAY FROM WORK, 2003-2006 [hereinafter NONFATAL OCCUPATIONAL INJURIES 2003-2006] (on file with author). As the title of the table suggests, this figure captures only those incidents that led
increase of nearly 27%.\textsuperscript{27}

Although similar trends are not immediately apparent for all immigrant-heavy industries, data classified by the “nature of the injury [or] illness” reflect significant increases for Hispanic or Latino workers for certain categories. For example, between 2003 and 2006, “cuts, lacerations, and punctures” among Hispanic or Latino workers increased by 16%.\textsuperscript{28} The number of “heat burns” has increased slightly, as have “[a]mputations,” “[m]ultiple injuries,” and “[s]oreness and pain.”\textsuperscript{29}

Two other perspectives on the data provide insight into the nature of the injuries and illnesses experienced by foreign-born workers: the part of the body affected and the nature of the exposure. Between 2003 and 2006, Latino workers experienced a 22% rise in nonfatal injuries to the head and 37% rise in nonfatal injuries to the neck. Regarding the nature of the event or exposure, contact with objects or equipment increased by 12% between 2003 and 2006; injuries related to being struck by an object increased by 7%.\textsuperscript{30} The most noticeable increase in nonfatal workplace injuries derived from assaults and violent acts. In 2003, OSHA reported 1810 assaults or violent acts against Latino or Hispanic workers. This number jumped to 2750 in 2006, an increase of 52% over a three-year period.\textsuperscript{31}

The rise in fatalities and injuries among foreign-born workers is not attributable solely to an increased proportion of foreign-born employees in the workforce. Although the proportion of foreign-born workers in the overall workforce has gradually increased in recent years, the percentage of fatalities suffered by that population has grown at a higher rate.\textsuperscript{32} For
example, although the share of foreign-born employment increased by 22% between 1996 and 2000, the share of fatal occupational injuries for this same population increased by 43%.  

The Department of Labor and OSHA have not been blind to these trends in work-related fatalities and injuries among immigrants. In August 2001, Secretary of Labor Elaine Chao called for the establishment of a Hispanic Task Force, which was charged with examining how effectively OSHA interfaced with Latino workers in all aspects of the agency's operations. Similarly, in its most recent strategic plan, OSHA acknowledged diversification of the overall workforce and the unique safety and health challenges faced by immigrant workers. The plan calls for innovations in enforcement, training, and education in response to the changing workforce. Although these efforts are laudable, the trends evidenced by the data call for much more fundamental reforms.

A. The Most Dangerous Industries and Occupations for Immigrants

Apart from region of origin, other important determinants of risk for


34. Press Release, Occupational Safety & Health Admin., U.S. Dep't of Labor, Fact Sheet: OSHA Programs to Help Hispanic Workers (2001) [hereinafter OSHA Programs to Help Hispanic Workers] (on file with author).


36. See id. at § 3. While OSHA's comprehensive list of strategic challenges acknowledges the need to focus on immigrant workers, none of the overarching performance goals or areas of emphasis in the plan focus on immigrants. In fact, the descriptions of the strategic goals reference immigrants only once, when the agency calls, in the most general terms, for the identification of "new opportunities . . . to significantly improve workplace safety and health" for immigrant workers. Id.

37. See infra Section IV.

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occupational fatalities and injuries are occupation and, relatedly, the industry in which the worker is employed. In 2007, workplace fatalities were among the highest in the construction industry (1204 fatalities); transportation and warehousing (890); agriculture, forestry, fishing and hunting (585); manufacturing (400); and retail trade (348). 38 In 2007, the fatality rate was greatest in agriculture, forestry, fishing, and hunting (27.9 per 100,000 workers); followed by mining (25.1 per 100,000 workers); transportation and warehousing (16.9 per 100,000 workers); and construction (10.5 per 100,000 workers). 39 Similar breakdowns in the fatality data were observed in 2006 40 and 2005. 41 Unsurprisingly, immigrant workers are concentrated in those industries where workplace fatalities and injuries are most prevalent. 42 Indeed, immigrant workers are more likely to be employed in construction, manufacturing, transportation,


39. CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, supra note 11, at 13.

40. In 2006, fatalities were among the highest in the construction industry (1239 fatalities); transportation and warehousing (860); agriculture, forestry, fishing, and hunting (655); manufacturing (456); and retail trade (359). 2007 FATALITIES BY INDUSTRY AND EVENT, TABLE A1, supra note 38. Although broken down by slightly different categories than those in the 2007 chart, the BLS reports that, in 2006, the highest fatality rate (calculated as the number of fatal occupational injuries per 100,000 employed workers) was in agriculture, forestry, fishing, and hunting (30.0), followed by mining/natural resources and mining (28.1/29.5); transportation and warehousing (16.8); and construction/natural resources, construction, and maintenance occupations (10.9/12.5). U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, FATALITY RATES BY INDUSTRY, OCCUPATION, AND SELECTED DEMOGRAPHIC CHARACTERISTICS (2006), available at http://www.bls.gov/iif/oshwc/cfoi/CFOIRates_2006.pdf.

41. In 2005, fatalities were among the highest, once again, in the construction industry (1192), transportation and warehousing (885), agriculture (715), retail trade (400), and manufacturing (393). 2007 FATALITIES BY INDUSTRY AND EVENT, TABLE A1, supra note 38. Although broken down by slightly different categories than those in the 2007 chart, the BLS reported that, in 2005, the highest fatality rate (calculated as the number of fatal occupational injuries per 100,000 employed workers) was in agriculture, forestry, fishing, and hunting (32.5), followed by mining (25.6); transportation and warehousing (17.7); and natural resources, construction, and maintenance occupations/construction (12.3/11.1). U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, FATALITY RATES BY INDUSTRY, OCCUPATION, AND SELECTED DEMOGRAPHIC CHARACTERISTICS (2006), available at http://www.bls.gov/iif/oshwc/cfoi/CFOI_Rates_2006.pdf.

42. Labor Force Characteristics in 2008, supra note 32, at 2. In the most recent BLS survey of the foreign-born workforce, the Department of Labor estimated that 10.4% of foreign-born workers are engaged in construction and extraction occupations; 9.3% are engaged in production occupations; 8.9% are engaged in sales and related occupations; 8.2% are engaged in building, grounds cleaning, and maintenance occupations; and 7.5% are engaged in food preparation and serving-related occupations. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, TABLE 4: EMPLOYED FOREIGN-BORN AND NATIVE-BORN PERSONS 16 YEARS AND OVER BY OCCUPATION AND SEX, 2008 ANNUAL AVERAGES (2009) [hereinafter 2009 EMPLOYEES BY OCCUPATION AND SEX], available at http://www.bls.gov/news.release/forbrn.t04.htm.
and the service industries (e.g., leisure and hospitality), as compared with the native-born population.\textsuperscript{43} In the agricultural sector, approximately 78\% of all migrant and seasonal farm workers in the United States are foreign-born.\textsuperscript{44}

The subsections that follow provide additional information about some of the most dangerous industries and immigrant representation in those industries. By way of an overview, three broad categories of incidents—transportation accidents, falls, or contacts—account for more than half of the workplace fatalities among foreign-born workers.\textsuperscript{45}

1. Construction

\textit{In January 2008, “high-rise scaffolding covered in heavy concrete collapsed at the site of Donald Trump's hotel and condo complex in Lower Manhattan. One Ukrainian immigrant worker—the father of several children—was decapitated as he plunged 42 stories to his death. Three others were injured. . . . Two months [earlier], another immigrant worker was killed when he fell 15 stories.”}\textsuperscript{46}

Fatal accidents in the construction industry range in nature from falls, such as the one at the Trump complex, to contacts with objects and equipment. Among occupational fatalities in the construction sector, the vast majority are suffered by construction trade workers, especially construction laborers, carpenters, and roofers.\textsuperscript{47} Foreign-born workers,

\textsuperscript{43} See 2009 EMPLOYEES BY OCCUPATION AND SEX, supra note 42. The percent distribution of foreign-born workers compared to native-born workers in the more dangerous industries is greater in general categories such as building and grounds, cleaning, and maintenance occupations (8.2\% to 2.9\%); natural resources, construction, and maintenance occupations (15.1\% to 9.3\%), which includes farming, fishing, and forestry (1.7\% to .5\%) and construction and extraction (10.4\% to 5.1\%); and production, transportation, and moving material occupations (16.4\% to 11.5\%). \textit{Id. See also} Pia Orrenius & Madeline Zavodny, \textit{Do Immigrants Work in Riskier Jobs?}\textsuperscript{19} (Reserve Bank of Dallas, Working Paper No. 0901, 2009) (utilizing BLS and American Community Survey data to conclude that “immigrants work in riskier jobs, as measured by injury and fatality rates, than natives”).

\textsuperscript{44} NAT’L CENTER FOR FARMWORKER HEALTH, MIGRANT AND SEASONAL FARMWORKER DEMOGRAPHICS 1 (2009), \textit{available at} http://www.ncfh.org/docs/fs-Migrant 2010Demographics.pdf.

\textsuperscript{45} IMMIGRANT WORKERS AT RISK, supra note 19, at 3. Nearly one-quarter of the fatalities among foreign-born workers were attributed to assaults and violent acts. Fatalities due to workplace violence are rarely investigated by OSHA, but rather are left to local law enforcement authorities. \textit{OIG IMMIGRANT FATALITIES REPORT}, supra note 3, at iv.

\textsuperscript{46} James, supra note 9.

\textsuperscript{47} U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CENSUS OF FATAL
especially Latino immigrant workers, are heavily represented in these occupations.  

Among all workers, the construction industry has unquestionably registered the greatest number of workplace fatalities in recent years. According to the National Census of Fatal Occupational Injuries, conducted by the BLS, fatal work injuries were highest in the private construction sector in 2005, 2006, and 2007, as compared with any other industry. Among foreign-born workers, the statistics are equally striking: the AFL-CIO has reported that between 1996 and 2001 nearly one in four fatally injured, foreign-born workers was employed in the construction industry. Data from recent years suggest that approximately 30% of workplace fatalities among Latino immigrants have occurred in construction.

The risk borne by Latino immigrant construction workers is disproportionate to their representation in the industry. In 2000, Latino construction workers made up less than 16% of the construction workforce, but suffered 23.5% of the fatalities. In that same year, Latino construction workers were nearly two times more likely to be killed by occupational injuries than their non-Latino counterparts. Recent reports


49. BLS Press Release, 2007 Fatalities, supra note 1, at 2 (“[C]onstruction continued to incur the most fatalities of any industry in the private sector, as it has for the five years since the [Census of Fatal Occupational Injuries] program began using the North American Industry Classification System (NAICS) to categorize industry.”). In 2007, there were 1178 fatalities in the private construction sector, out of a total of 5488 fatalities. Id. at 3. In 2006, there were 1239 fatalities in the private construction sector, out of a total of 5703 fatalities. REVISIONS TO THE 2006 CENSUS OF FATAL OCCUPATIONAL INJURIES, supra note 17, at 2 tbl.1. In 2005, there were 1186 fatal work injuries in the private construction sector, out of a total of 5702 fatalities. BLS Press Release, 2005 Fatalities, supra note 14, at 3 (Aug. 10, 2006), available at http://www.bls.gov/news.release/archives/cfoi_08102006.pdf.

50. IMMIGRANT WORKERS AT RISK, supra note 19, at 4.


52. Xuwen Dong & James W. Platner, Occupational Fatalities of Hispanic
confirm that this trend continues. 53

2. Agriculture, Forestry, Fishing, and Hunting

"It was a steamy 95 degrees inside the vineyard... where Maria Isabel Vasquez Jimenez was pruning a shadeless stretch of young vines. It was May 14, [2008,] the third day of work for the 17-year-old immigrant from Oaxaca, Mexico. She'd been working more than nine hours, with just one water break, when she collapsed from heat exhaustion at 3:40 p.m... An hour and a half later, when she finally arrived at an emergency room, her body temperature was 108.4 degrees. For two days her heart stopped and started, then ceased beating completely. 54

The death of Maria Isabel Vasquez Jimenez evokes a familiar narrative of immigrant agricultural workers who toil under dangerous, sometimes deadly conditions. 55 Although the everyday experiences of these workers are invisible to most, the risks and challenges they face have seeped into the public consciousness as a result of high-profile organizing and advocacy efforts, as well as attention in the media. 56

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53. Stephen Franklin, Uncertain Safety for Latino Workers, CHI. TRIB., Mar. 2, 2008, at C1 ("[F]atality rates in construction [among Latino immigrant workers] have steadily exceeded those of non-Hispanic workers... ").
55. See Heat-Related Deaths Among Crop Workers: United States, 1992-2006, 300 J. AM. MED. ASSOC. 1017, 1018 (2008) (noting that between 1992 and 2006, 423 worker deaths from exposure to environmental heat were reported in the United States, with the death rate for crop workers (.39 heat deaths per 100,000 workers) far exceeding the death rate for civilian workers (.02 heat deaths per 100,000 workers)). Id. at 1017. The report also notes: [T]he majority of [crop workers dying from heat stroke] were adults aged 20-54 years old, a population not typically considered to be at high risk for heat illnesses. In addition, the majority of these deaths were among foreign-born workers.... Crop workers might be at increased risk for heat stroke because they often wear extra clothing and personal protective equipment to protect against pesticide poisoning or green tobacco illness (transdermal nicotine poisoning).
The agricultural sector (including forestry, fishing, and hunting) has registered the highest fatality rate of any industry grouping—44.8% of all fatalities among agricultural workers occur in crop, nursery, and greenhouse production, while 40% of the fatalities occur in ranching and farming. These statistics are troubling for the foreign-born workforce, given that immigrant workers from Latin America predominate in agricultural work.

3. Manufacturing

Leonardo Cos Elias, a native of Guatemala, “began working at Packaging Concepts Ltd. in Lincoln, [Rhode Island,] a manufacturer of display cases and furniture. . . . [He] worked at a computer-numerically controlled (CNC) router, a high-speed machine that can cut metals, acrylic and wood while simultaneously engraving—or carving—intricate designs. On December 14, [2007,] Cos became trapped in the machine and lay pinned to a table while overhead routing drills bore down on him. The machine tore into his left leg and buttock. His leg, half his pelvis and his buttock were amputated.”

The gruesome injury suffered by Leonardo Cos Elias reflects the unique yet formidable risks faced by foreign-born workers in the manufacturing sector. Fatalities and injuries in the manufacturing sector are attributable to a range of causes and are scattered across many industries, and specific occupations yield particularly high fatality rates and fatality numbers. Although data regarding immigrant representation...
in specific manufacturing occupations are not available, the BLS reported a dramatic increase in foreign-born workers across the industry as a whole from 1996 to 2001.\textsuperscript{63} In recent years, a greater proportion of the foreign-born workforce has been employed in the manufacturing industry, as compared with the native-born workforce.\textsuperscript{64} Data at the state level reveal a similarly high concentration of foreign-born workers in manufacturing.\textsuperscript{65}

4. Retail Trade

"Mohammed Abdul Khaled... was working alone at an Arco AM-PM mini-mart... when someone entered the store at about 1:20 a.m. and shot him once in the torso... Khaled [a Bangladeshi immigrant] died at the scene.... The cash register was empty when police arrived."\textsuperscript{66}

Assaults against convenience store clerks such as Mohammed Abdul Khaled are commonly reported in the news media, but few understand these incidents to be within the scope of OSHA's regulatory mandate. In fact, OSHA does have the authority to regulate workplace safety risks of this nature.\textsuperscript{67} The need for intervention is underscored by data on

\begin{itemize}
  \item \textsuperscript{63}Loh & Richardson, supra note 33, at 47 ("In manufacturing, foreign-born workers' share of employment increased by 22 percent, from 13 percent in 1996 to 16 percent in 2001..."").
  \item \textsuperscript{67}OSHA's limited regulatory activity in this area has focused on preventing workplace violence. See, e.g., U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, RECOMMENDATIONS FOR WORKPLACE VIOLENCE PREVENTION PROGRAMS IN LATE-NIGHT RETAIL ESTABLISHMENTS (1998) [hereinafter RECOMMENDATIONS FOR WORKPLACE VIOLENCE PREVENTION], available at http://
workplace fatalities: in the retail trade, the largest number of fatalities occurs in convenience or grocery stores. 68 Gasoline stations and gasoline station convenience stores also register significant numbers of fatalities, as do automobile dealers and automotive parts sellers. 69 Between 2003 and 2006, the number of fatalities occurring at gasoline stations doubled. 70 Many of the fatalities in the retail trade—particularly in convenience stores and similar establishments—are attributable to violent criminal activity. In urban centers, and, increasingly, in other parts of the country, immigrant workers tend to occupy these vulnerable positions. 71

B. Gaps in Existing Occupational Safety and Health Data

""When you get hurt you shut your mouth. The only thing that could happen is that the employer gives you medicine or something. You go to the doctor and pay with your money, even though you don't have enough, right? But just to avoid complaining, to avoid losing your job,"" 72

""The reason why I think [workers] don't report [injuries or illnesses] is because they're not aware of... their rights. They don't report it also because there's a language barrier. And, because they won't get paid.... They probably feel like they have to be dying in bed in order to report it."" 73

The data culled by the BLS and independent advocacy groups, while helpful, does not provide a full picture of workplace injuries and fatalities among immigrant workers. Underreporting by both workers and employers, along with limitations in the BLS's data gathering and reporting protocols, render the existing data incomplete. Moreover, one must look beyond the broad category of "foreign-born workers" to specific

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69. Id. at 9-10.
70. OCCUPATIONAL FATALITIES 2003-2006, supra note 47, at 20.
71. See Maya Rao, Fear on the Night Shift for South Asian Immigrants at New Jersey Gas Stations, PHILA. INQUIRER, Apr. 30, 2008, at A1 ("Gas stations are frequently manned by South Asian immigrants...").
73. Id. at 18 (quoting Marianela, a 38-year-old homecare worker).
demographic characteristics—namely, age, gender, and work experience—that may influence workers' susceptibility to hazards, and, in turn, the overall trends.

1. Underreporting of Injuries and Fatalities Among Immigrant Workers

Although the statistics regarding foreign-born workers are alarming, it is likely that injury and death rates for immigrant workers are undercounted due to inhibitions on the part of workers and a lack of incentives for employers to report. With insecure immigration status, restricted ability to work, or a lack of marketable job skills, immigrant workers are less likely to report injuries or aggressively pursue the reporting and investigation of fatalities of family members or colleagues. Although many immigrant workers may be inhibited from reporting out of fear of immigration consequences or termination from their jobs, others are simply unaware of the range of protections and benefits available to non-citizens in the areas of occupational safety and health.

As for employers, some may be unaware of a reporting requirement, while others may fail to report if they find the reporting provisions of the OSH Act to be unclear. Other employers, however, may make the tactical choice not to report given the possibility that they may not be caught and the (relatively) minimal penalties if they are. In this vein, many community groups interviewed by the Office of Inspector General of the Department of Labor have opined that the penalty for willfully failing to

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74. See id. at 41 (describing a survey of seventy-five low-wage immigrant workers in the Los Angeles area, which found that 37% of those injured or ill from work did not report their injuries or illnesses to their supervisors).

75. There are several categories of visas that allow foreign nationals to perform certain types of work in the United States for a specified period of time. See U.S. Dep't of State, Temporary Workers, http://travel.state.gov/visa/temp/types/types_1271.html#1 (last visited Aug. 30, 2009) (providing an overview of the different temporary worker visas issued by the State Department).

76. See HIDDEN TRAGEDY, supra note 9, at 12 (citing various studies showing that immigrants are less likely to report workplace injuries and illnesses due to language barriers and fear of employer retaliation resulting in deportation or job termination). See also IMMIGRANT WORKERS AT RISK, supra note 19, at 7–8 (highlighting disincentives for contingent and temporary immigrant workers to report workplace injuries).

77. Immigrant workers have, in fact, been terminated for reporting injuries on the job. See, e.g., Kerry Hall, Ames Alexander & Franco Ordonez, The Cruelest Cuts: The Human Cost of Bringing Poultry to Your Table, CHARLOTTE OBSERVER, Feb. 10, 2008, at 1A.

78. See BROWN, DOMENZAIN & VILLORIA-SIEGERT, supra note 72, at 41 (reporting that while most immigrant workers were informed and aware of the specific safety hazards of their jobs, “virtually none said that the employer had legal responsibility for health and safety in the workplace,” and many thought that their immigration status rendered them ineligible for workplace protections related to health and safety).

report a workplace death—currently capped at $70,000—is simply not a strong enough incentive to report a fatality. An additional factor that likely contributes to underreporting is the employment of significant numbers of immigrant workers in the “informal” economy, where there is little training, high turnover, and a fundamental lack of accountability for employers—in short, where immigrant labor is treated as an expendable commodity.

2. Limitations of the BLS’s Data

As noted above, the data that are reported by the BLS do not provide a complete picture of the injuries and illnesses experienced by foreign-born workers in the United States. Specifically, the data available do not capture the numbers, or proportion, of non-fatal occupational injuries and illnesses that are borne by foreign-born workers. With respect to fatal injuries, OSHA did not begin to gather detailed information about immigrant worker fatalities until April 2002. And although OSHA has made advances in its fatality-related data collection and reporting over the last seven years, significant gaps in the data still exist.

80. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 6. See also 29 U.S.C. § 666(a) (2006) (setting the maximum penalty at $70,000).
82. See Lenore S. Azaroff, Charles Levenstein & David H. Wegman, Occupational Health of Southeast Asian Immigrants in a U.S. City: A Comparison of Data Sources, 93 AM. J. PUB. HEALTH 593, 593 (2003) (“The United States lacks a comprehensive occupational health surveillance system. Researchers rely on data collection systems . . . [that] fail to capture most work-related illnesses and many work-related injuries, especially those affecting low-wage, immigrant, and contingent workers.”).
84. In April 2002, OSHA modified the OSHA-170 form to include questions related to ethnicity and language of the affected workers. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 11. The OSHA-170 form is used by inspectors and compliance officers when reporting on fatalities and catastrophic injuries. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, OSHA’S FIELD OPERATIONS MANUAL 11-14 (2009) [hereinafter OSHA’S FIELD OPERATIONS MANUAL], available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf. OSHA has since created the IMMLANG Questionnaire, which is likewise used to track information related to fatalities among foreign-born workers. Id. at 11-15.
85. Pursuant to an April 26, 2002, Memorandum, OSHA compliance officers are required to complete a separate form when an immigrant worker, a Hispanic worker, or a person of limited English proficiency is involved in a fatality or other workplace catastrophe. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 8. See also Press Release, Occupational Safety & Health Admin., U.S. Dep’t of Labor, OSHA Announces Plans to Improve Identification of Hispanic, Other Immigrant Worker Fatalities (Apr. 26,
One example of such a gap is the lack of accessible information on the relative size (in terms of number of employees) of the workplace where the fatality occurred. Given the heavy representation of foreign-born workers in the informal and underground economies, many immigrants work for smaller employers, including subcontractors for larger firms, in restaurants, and in private households. This is significant, as smaller employers often lack the resources and expertise to improve safety practices. Moreover, because smaller outfits tend to have abbreviated lifecycles, they typically have less incentive to improve the safety infrastructure of their workplaces. In addition, smaller firms are typically less concerned about negative publicity or backlash from consumers.

Wider availability and dissemination of these data would provide a more nuanced picture of the issues affecting immigrant workers and would allow for more effective targeting of OSHA’s regulatory activities.

The BLS has also been criticized for fundamental flaws in its data collection and reporting mechanisms. The BLS’s annual Survey of Occupational Injuries and Illnesses (SOII) is not a comprehensive tally of injuries and illnesses. While it is designed to provide a representative sample of employers, studies undertaken in recent years have found that the SOII undercounts injuries and illnesses by anywhere from 33% to 69%. Moreover, employers have an incentive to underreport, as high injury or illness rates may trigger an inspection by OSHA. These weaknesses in the BLS’s data collection and reporting mechanisms strongly suggest that the trends in immigrant worker fatalities, injuries, and illnesses—while already troubling—may implicate an even greater number of workers than the BLS’s numbers indicate.

3. Demographics of the Immigrant Workforce That Affect Injury and Fatality Rates

Even when data sets specific to foreign-born workers are made available, these data sets must be further disaggregated to account for specific worker characteristics that may heighten vulnerability to

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2002), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=1252. Since this public pronouncement in 2002, however, OSHA has made few public declarations about the data they have collected or trends they have observed.


88. HIDDEN TRAGEDY, supra note 9, at 8.

89. Id. at 14. See also infra Sections II–III (describing OSHA’s inspections and enforcement procedures, and detailing flaws in those procedures).
workplace hazards. For example, as a general matter, inexperienced
workers typically have higher injury rates than workers who are more
familiar with their jobs and the tasks involved.90 Although there is limited
data comparing the training afforded to immigrant workers with that of
their native-born counterparts,91 a number of factors would likely
contribute to deficient training, including language barriers and employer
attitudes towards immigrant labor.92 Moreover, although the BLS’s data
do not distinguish between casual labor/day labor and longer-term
employment, some independent reports suggest high rates of injury among
immigrant day laborers.93 Unsurprisingly, adequate training is rarely
offered to these workers.94

Gender and age may also influence the patterns of fatalities and
injuries among foreign-born workers. Young male workers tend to have
very high injury rates, in part because they are given more hazardous jobs,
and in part because they tend to be less risk averse and behave more
recklessly.95 This finding is consistent with data from other areas of
scholarly inquiry, which suggest that men are more risk prone than women
in certain aspects of everyday life.96

Although demographic data regarding the foreign-born population in
the United States are often incomplete or unreliable, the BLS’s data, along
with data regarding migration patterns, suggest that the foreign-born
workforce has a higher proportion of males than females97 and leans
towards younger workers.98 As explored more fully below, this does not

90. MENDELOFF, supra note 79, at 100.
91. IMMIGRANT WORKERS AT RISK, supra note 19, at 8 (reporting a lack of training in
the “informal” economy, where immigrant workers predominate); CAL. WISH REPORT,
supra note 81, at 13 (noting that most Latino immigrant workers who enroll in university
training programs have not received even the most basic chemical safety training from their
employers).
92. See also infra Section III (describing some shortcomings of OSHA’s training
efforts).
93. ABEL VALENZUELA, JR., NIK THEODORE, EDWIN MELENDEZ & ANA LUIS
GONZALEZ, UCLA CTR. FOR THE STUDY OF URBAN POVERTY, ON THE CORNER: DAY
uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.
94. See id.
95. MENDELOFF, supra note 79, at 101.
96. See, e.g., Joni Hersch, Smoking, Seat Belts, and Other Risky Consumer Decisions:
Differences by Gender and Race, 17 MANAGERIAL & DECISION ECON. 481 (1996)
(concluding that “women choose safer products than men” and “women tend to be
employed in safer industries and in safer jobs within industries”). Hersch also explores how
race and economic status intersect with gender to influence individual behavior. This
article focuses on failures in the regulatory regime; a fuller discussion of worker choice will
be reserved for the second component of the three-part scholarly project described in the
Introduction.
98. Id.
suggest that country of origin is inconsequential to the workplace safety calculus. Rather, the more logical conclusion is that gender and age are factors that bring into relief the challenges posed by national origin.

Having considered the limitations and complications of the existing data, the statistical and anecdotal evidence still suggest a troublesome trend of occupational fatalities and injuries among foreign-born workers, especially those of Latino origin. The sections that follow explore the contributing role of OSHA as reflected in its history, structure, and operations.

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT: HISTORY, MANDATE, AND STRUCTURE

In examining the root causes of the trends in workplace fatalities and injuries among immigrants, a natural starting point is OSHA, the federal agency charged with protecting the nation’s workers. OSHA’s core responsibilities are to establish and enforce laws and regulations related to workplace safety and health. In order to better understand the roots of OSHA’s current deficiencies, it is helpful to briefly examine the history of OSHA and the OSH Act. In this section, I look at that history and then describe the basic structure and operations of the agency.

A. A Brief History of OSHA and the OSH Act

I. The “Regulation” of Workplace Safety Before OSHA

The Occupational Safety and Health Act, enacted in 1970, marked the culmination of nearly a century of organized activism related to workplace safety and health in the United States. With the arrival of the industrial revolution, and the accompanying mechanization of work that introduced new dangers to the low-wage workforce, the call for worker

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protections intensified. The growing strength of unions around the turn of the century and in the early part of the twentieth century facilitated the passage of important factory safety legislation.\textsuperscript{102}

Despite growing awareness of workplace hazards, responsibility for regulating workplace safety and health was still left to individual states. States often fell short of adequately addressing workplace hazards: many states failed to devote adequate resources to effectively combat occupational fatalities and injuries, while other states’ laws left large numbers of workers without any protection.\textsuperscript{103}

Enforcement efforts by the states were spotty and undermined by weak laws.\textsuperscript{104} Prior to the OSH Act, many state regulators perceived their role to be “to educate employers” about workplace safety matters, but not to obtain full compliance or modify the economic incentives that employers faced by imposing harsh sanctions.\textsuperscript{105} Although states did occasionally resort to criminal trials to redress workplace fatalities,\textsuperscript{106} for most workplace safety and health violations, even fines were rare.\textsuperscript{107}

2. \textit{The Push for Federal Oversight}

Activism in the late 1960s, spurred on by a series of public incidents, began to turn the tide in the regulation of workplace safety and health. Around this time, movements emerged that drew attention to specific workplace hazards, including the “black lung” phenomenon among coal miners\textsuperscript{108} and the incidence of “brown lung” disease among textile and other mill workers.\textsuperscript{109} The immediate spark for federal legislative activity

\begin{footnotes}
\item 103. \textit{JOSEPH A. PAGE & MARY-WIN O'BRIEN, BITTER WAGES: RALPH NADER'S STUDY GROUP REPORT ON DISEASE AND INJURY ON THE JOB} 70 (1973) (noting the BLS's estimate that, in 1969, “9.8 percent of the total American workers (with the exception of private household employees) fell completely outside any sort of safety protection afforded by state authority” and that twenty-eight states “left . . . agricultural workers . . . without any legal protection against work hazards”).
\item 104. Some state inspectors lacked the enforcement authority needed to immediately correct workplace hazards. In 1969, twenty-one states did not authorize inspectors to immediately shut down machinery when an imminent hazard was discovered. \textit{Id.} at 72.
\item 105. MENDELOFF, \textit{supra} note 79, at 1; PAGE & O'BRIEN, \textit{supra} note 103, at 74 (observing that states approached the enforcement of safety codes with the philosophy “that corporate lawbreakers should not be penalized, but merely warned, in order to give them the opportunity for 'voluntary compliance' with safety regulations”).
\item 106. MENDELOFF, \textit{supra} note 79, at 1.
\item 107. \textit{Id.} at 83-85.
\item 108. \textit{Id.} at 17-18.
\end{footnotes}
was a mine blast in Farmington, West Virginia, in November 1968, which killed seventy-eight miners and received national media attention.¹¹⁰ As public scrutiny of these issues increased and calls for a federal response grew stronger, the Nixon administration saw an opportunity to assuage the public’s concerns while also shoring up the support of some key constituencies, including working-class Democratic voters and organized labor.¹¹¹

As late as the mid-1960s, occupational safety and health did not figure prominently on the political agenda for organized labor.¹¹² That began to change in the late 1960s. At the 1967 AFL-CIO Convention, the organization endorsed a report on worker health and safety, entitled Protecting Eighty Million American Workers, which called for federal workplace safety protections.¹¹³ The AFL-CIO repeated its call for federal oversight in 1969, when it adopted Resolution 229 relating to the same issue.¹¹⁴ By 1970, organized labor began to prioritize a comprehensive workplace safety bill.¹¹⁵

As different versions of the legislation were introduced, unions played a prominent advocacy role.¹¹⁶ Following a period of intense negotiations, the OSH Act, also known as the Williams-Steiger Act,¹¹⁷ was signed into law by President Nixon on December 29, 1970.¹¹⁸

To provide some context for this history of OSHA: during this period of American history, immigrants comprised 4.7% of the total U.S. population.¹¹⁹ Despite these relatively modest numbers, in the late 1960s...
and early 1970s, the plight of immigrant workers nevertheless received some public attention due to the vigorous organizing activity of the United Farm Workers Organizing Committee of the AFL-CIO.\footnote{United Farm Workers, UFW Chronology, http://www.ufw.org/_page.php?menu=research&inc=_page.php?menu=research&inc=history/O1.html (last visited Aug. 30, 2009).} In fact, in the months before the OSH Act was signed, thousands of immigrant farm workers in California went on strike.\footnote{SUSAN FERRISS & RICARDO SANDOVAL, THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKER MOVEMENT 159-60 (1997).} Despite this visibility, the advocacy that led to the passage of the OSH Act—and the narratives that fueled public support for workplace safety legislation—had little connection with the foreign-born workforce.\footnote{See, e.g., COMMON BORDER, UNCOMMON PATHS: RACE AND CULTURE IN U.S.-MEXICAN RELATIONS 88–90 (Jaime E. Rodríguez O. & Kathryn Vincent eds., 1997) (discussing how the Hotel and Restaurant Workers' Union's failure to adapt to demographic changes caused by increased immigration in southern California led to an overall decline in union membership).} It is telling that in the key reports comprising the legislative history of the OSH Act, the terms “immigrant(s),” “immigrant worker(s),” and “foreign-born” are never mentioned.\footnote{See S. REP. No. 91-1282 (1970), \emph{reprinted in} 1970 U.S.C.C.A.N. 5177; H.R. REP. No. 91-1765 (1970) (Conf. Rep.), \emph{reprinted in} 1970 U.S.C.C.A.N. 5228.} 

B. Structure and Operations of OSHA

The OSH Act sets out a broad mandate for the promotion and protection of occupational safety and health. The stated purpose of the OSH Act is “to assure so far as possible [for] every working man and woman in the Nation safe and healthful working conditions.”\footnote{29 U.S.C. § 651(b) (2006). Note, however, that the OSH Act exempts certain categories of employees, including federal workers and state and federal government employees. 29 U.S.C. § 652(5) (2006). Another notable exception is the exclusion of household domestic workers from OSHA protections. 29 C.F.R. § 1975.6 (2007). This exclusion particularly affects immigrant women of color, who predominate in these occupations in many parts of the country. \emph{See DOMESTIC WORKERS UNITED & DATACENTER, HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY 2 (2006) (“99% of domestic workers in New York are foreign-born . . . [n]inety-five percent . . . are people of color, and 93% are women”), available at http://www.datacenter.org/reports/homeiswheretheworkis.pdf.}} The OSH Act includes a general duty clause, which requires every employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”\footnote{29 U.S.C. § 654(a)(1) (2006).} The OSH Act also calls for the establishment of the National Advisory Committee on Occupational Safety and Health, a twelve-member body

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122. See, e.g., COMMON BORDER, UNCOMMON PATHS: RACE AND CULTURE IN U.S.-MEXICAN RELATIONS 88–90 (Jaime E. Rodríguez O. & Kathryn Vincent eds., 1997) (discussing how the Hotel and Restaurant Workers' Union's failure to adapt to demographic changes caused by increased immigration in southern California led to an overall decline in union membership).


"composed of representatives of management, labor, occupational safety and occupational health professions, and of the public."126 The Committee serves in a general advisory role to the Secretary of Labor in her administration of the OSH Act.

1. Promulgation of Standards

One of OSHA's core responsibilities is the promulgation of regulations (commonly known as "standards") related to occupational safety and health. By the late 1960s, on the eve of the OSH Act's passage, many standards relating to workplace safety and health already existed. Some of these standards had been codified in federal law and were being enforced by the Department of Labor.127 Under § 4(b)(2) of the OSH Act, a few of these federal standards were automatically incorporated into the new regulatory structure with the adoption of the OSH Act. Another set of standards, commonly known as the "consensus" standards, were guidelines developed largely by industry representatives with some contributions, and, ultimately, assent from government and organized labor.128 Congress sought to integrate these protections into the OSHA framework by requiring the Secretary of Labor to promulgate "any national consensus standard, and any established Federal standard" within two years of the effective date of the OSH Act.129

The consensus and federal standards were promulgated by OSHA on May 29, 1971.130 Observers criticized the "hasty and wholesale adoption" of the standards, which, in some cases, contained errors, were inapplicable to health and safety matters, were vague, or had been misprinted by OSHA in its posting in the Federal Register.131 Regrettably, the disorder of these initial standards contributed to OSHA's reputation among employers for promulgating, and seeking to enforce, arbitrary or inconsequential standards.132 Ironically, while OSHA was disparaged for its haste in issuing these initial standards, in subsequent decades the agency has been criticized for excessive delays in the rulemaking process.133

Since the passage of the OSH Act and the initial adoption of

128. MENDELOFF, supra note 79, at 36.
131. MENDELOFF, supra note 79, at 39.
132. See MCGARITY & SHAPIRO, supra note 109, at 37.
133. See infra Section III.
standards, numerous regulations have been promulgated by the Secretary of Labor, who is authorized to develop permanent standards. Pursuant to § 6(b)(1) of the OSH Act, the Secretary may propose, revoke, or modify a standard whenever she “determines that a rule should be promulgated in order to serve the objectives of this Act.” Beyond these general guidelines, however, there is no established priority-setting process for OSHA regulations. The high-level administrators at OSHA are typically political appointees; therefore, the focus of the standard-setting process—and the general level of engagement on workplace safety issues—may vary depending upon the administration in power.

Individuals who are adversely affected by an OSHA standard may appeal its validity to the U.S. Court of Appeals, before which the Secretary's determinations will hold “if supported by substantial evidence” (note that although the OSH Act refers to the Secretary of Labor, within the Department of Labor, decisions on standards are delegated to the Assistant Secretary of Labor for Occupational Safety and Health, the head of OSHA). Furthermore, the OSH Act allows employees or their representatives to initiate a rulemaking proceeding by submitting a written petition to the Secretary of Labor.

OSHA standards are meant, *inter alia*, to prescribe the use of protective equipment, labels, and other safety measures, and to clarify safe levels of exposure to potentially harmful particles and chemicals. Employers have the obligation of complying with OSHA’s standards, which can only require conditions and practices “reasonably necessary or appropriate” to provide safe or healthful employment. Given this broadly worded guideline, employers have criticized the standard-setting process for an insufficient focus on costs. Indeed, there is little concrete guidance in the OSH Act regarding the appropriate weight to be given to expenses when deciding upon new standards. Employers may, however,
seek a permanent variance, or exception to compliance, from a standard if another equal or better protective method of control is found.\textsuperscript{141}

In addition to the formal standard-setting process under § 6 of the OSH Act, OSHA has a number of other regulatory “tools” in its toolbox that allow the agency to establish guidelines for workplace safety and health matters. OSHA issues interpretations, in which it clarifies the applicability of existing standards to specific factual circumstances in response to questions posed by employers or their counsel. OSHA also has the authority to issue directives, which are agency driven and provide more detailed guidance on specific standards and OSHA programs. Finally, negotiated rulemaking is a process by which industry and labor representatives convene to develop mutually agreeable “consensus” standards, which then can be approved by OSHA in a relatively expeditious manner.\textsuperscript{142}

To inform the rulemaking process, the OSH Act created the National Institute for Occupational Safety and Health (NIOSH), which was situated within the agency now known as the Department of Health and Human Services.\textsuperscript{143} The mandate of NIOSH is to conduct research and analysis upon which OSHA can base its occupational safety and health standards.\textsuperscript{144} NIOSH is also authorized to educate and train workers and members of the public on workplace safety and health issues.\textsuperscript{145}

2. Worksite Inspections and Reporting Requirements

The OSH Act details procedures for enforcing the OSH Act and its accompanying regulations through inspections, investigations, and the


\textsuperscript{143} LOFGREN, supra note 100, at 1. Prior to the passage of the OSH Act, a predecessor agency had been charged with some of the duties currently performed by NIOSH. The Bureau of Occupational Safety and Health (BOSH), housed within the then-existing Department of Health, Education, and Welfare, “suppl[ied] technical assistance to public and private groups engaged in efforts to improve levels of job health and safety.” PAGE & O’BRIEN, supra note 103, at 88. BOSH, in turn, had been preceded by the Division of Occupational Health. Id. at 90.


imposition of penalties. OSHA worksite inspections are broadly categorized as either “programmed” or “unprogrammed” inspections. Programmed inspections are planned inspections; OSHA may proactively initiate an inspection based on injury or fatality rates for a particular employer or industry. Two programs provide the architecture for OSHA’s programmed inspections: (1) the Site-Specific Targeting (SST) Program and (2) the Special Emphasis Programs, which include national, regional, and local efforts. SST relies on OSHA data from the prior year to develop a programmed inspection plan for non-construction worksites with forty or more employees that have registered high rates of injuries and illnesses. OSHA’s Special Emphasis Programs target industries and hazards that are deemed to pose a particular risk to workers in a certain locality, region, or nationwide.

Unprogrammed inspections are triggered by allegations of hazardous working conditions, as conveyed by: reports of an imminent danger, fatality, or catastrophe at the worksite; confidential worker complaints; or referrals from other government departments or agencies. OSHA prioritizes unprogrammed inspections, with its principal focus on imminent dangers. Under certain circumstances, if a worksite fatality has occurred, or if other serious violations have been found, an employer may be placed under OSHA’s Enhanced Enforcement Program (EEP). An EEP designation calls for follow-up inspections, agency engagement with company leadership, and vigorous enforcement of penalties.

146. The authority to conduct inspections, issue citations, and impose penalties derives from 29 C.F.R. § 1903.1 (2007).
147. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 5.
148. Id. See LOFGREN, supra note 100, at 2.
150. Id. The seven National Emphasis Programs currently in place focus on amputations, lead, crystalline silica, shipbreaking, trenching/excavations, petroleum refinery process safety management, and combustible dust. Id. Approximately 140 Local and Regional Emphasis Programs also have been approved by OSHA. Id.
152. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 5; OSHA’S FIELD OPERATIONS MANUAL, supra note 84, at 2-4. OSHA prioritizes inspections as follows: “(1) reports of imminent dangers, (2) fatalities or accidents serious enough to send three or more workers to the hospital, (3) employee complaints and referrals from other government agencies, and (4) targeted inspections.” OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 5.
153. Occupational Safety & Health Admin., U.S. Dep’t of Labor, Directive No. CPL
An OSHA inspection is typically conducted in three phases: (1) an opening conference; (2) the inspection (or "walkaround"), and (3) a closing conference. During the opening conference, the Compliance Safety and Health Officer meets with an employer representative and an employee representative (if available) and explains the role of OSHA, as well as the rights and responsibilities of the different parties. The inspector typically provides an overview of what will occur during the inspection. During this initial conference, the inspector may ask questions to learn more about the company and its operations. The inspector will request documentation and records related to workplace health and safety, including the OSHA 300 Form, which is used by most employers to record injuries and illnesses.

During the walkaround, the inspector will visually examine the premises, with an eye to violations of OSHA standards. The inspector may also conduct tests and privately interview employees during the inspection. The inspection concludes with a closing conference, during which the inspector presents her findings. If the inspector has found a violation, she may issue a citation at the closing conference, or soon thereafter. She may alternatively choose to conduct further inspections and testing at a later date. If the inspector issues a citation, it must be posted in the workplace and indicate the underlying violations.

The OSH Act allows both the employer and an "employee representative" to accompany the OSHA representative during all phases of the inspection.

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154. LOFGREN, supra note 100, at 2. Depending on the intended scope of the inspection, it will be either "comprehensive" or "partial." OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 3-6. A comprehensive inspection is defined as "a substantially complete and thorough inspection of all potentially hazardous areas of the establishment" whereas a "partial inspection is one whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment." Id.

155. OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 3-6.

156. Id. at 2-3. The OSHA 300 Form ("Log of Work-Related Injuries and Illnesses") is used to log incidents in workplaces with eleven or more employees. 29 C.F.R. §§ 1904.1, 1904.29 (2007). When requested by a government representative, a copy of the log must be provided within four business hours. § 1904.40. Note that smaller employers—defined as employers that had no more than ten employees at any point in time during the prior calendar year—are not required to maintain a record for injuries and illnesses for the current year. § 1904.1; PETERSON & COHEN, supra note 151, at 6.

157. LOFGREN, supra note 100, at 3. OSHA procedures require that "interviews of non-managerial employees . . . be conducted in private." OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 3-24.

158. LOFGREN, supra note 100, at 3.

159. See generally LOFGREN, supra note 100 (describing inspections of the mortuary and other workplaces where multiple tests were conducted over a period of months before citations were issued).

of a workplace inspection. The OSH Act contains statutory protections for workers who face retaliation for exercising their rights under the OSH Act.

As part of its inspection regime, OSHA has introduced the OSHA Consultation Program, which allows employers to request a free visit by an OSHA inspector without the risk of incurring fines. The program is targeted at small and mid-sized employers. OSHA works with these employers over a series of visits to correct violations of OSHA standards. A component of the consultation program is the Safety and Health Achievement Recognition Program (SHARP), an incentive-based program that similarly requires an on-site consultation and a commitment to meet certain benchmarks. Another important piece of OSHA's compliance efforts is the Voluntary Protection Program (VPP), under which employers make a formal commitment to implement systems to reduce health and safety risks in the workplace. Although some studies have demonstrated the effectiveness of these "voluntary compliance" approaches, further analysis is needed.


The OSH Act provides for civil and criminal penalties in cases where it is determined that an employer has violated the OSH Act or agency standards. Violations are categorized as "serious," "other-than-serious,"

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161. 29 U.S.C. § 657(e) (2006); LOGREN, supra note 100, at 1. In practice, some employers have chafed at the presence of an employee representative, especially when citations are discussed. See, e.g., id. at 62 (recounting a closing conference during which the employer asked that the union representative be excused for the discussion of fines).

162. 29 U.S.C. § 660(c) (2006); MENDELOFF, supra note 79, at 2. The protections include the possibility of reinstatement or back pay.


164. Id.


166. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEPT OF LABOR, OSHA FACT SHEET: VOLUNTARY PROTECTION PROGRAMS (2009), available at http://www.osha.gov/OshDoc/dataGeneralFacts/factsheet-vpp.pdf. OSHA conducts a comprehensive on-site review for new VPP participants and subsequently conducts periodic reviews. Id. In exchange for participating in the VPP, employers are removed from the list of OSHA's programmed inspection sites. Id.

or involving "imminent danger." 168 If an imminent danger is found, the Secretary of Labor is authorized to seek immediate injunctive relief. 169 OSHA may also impose monetary penalties of up to $7000 for "serious" and "other-than-serious" violations. 170 In the event of a "serious" violation—defined as one where "a substantial probability that death or serious physical harm could result" and where the employer either knew about or "with the exercise of reasonable diligence" should have known about the violation—a penalty is mandatory. 171 If a violation is found to be willful, 172 the agency may issue a fine of between $5000 and $70,000. 173 Failure to correct the violation within the period of time specified by OSHA may result in additional fines. 174

The OSH Act also allows for criminal penalties for willful violations that result in an employee's death. Under § 17(e) of the OSH Act, if an employer intentionally disregards or is plainly indifferent to safety standards (or an OSHA rule or order) and a fatal accident results, the employer may be fined up to $250,000 (for an individual employer) or $500,000 (for organizational employers) 175 and/or charged with a misdemeanor. 176

Once OSHA assesses a baseline penalty, the penalty amount may be reduced under certain circumstances. The size of the employer may allow for a 60% penalty reduction, a 35% reduction may be warranted if the employer demonstrates "good faith," and a 10% adjustment may be

168. 29 U.S.C. § 662(a) (2006) (creating penalties for violations involving imminent danger, defined as "conditions or practices . . . such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through [OSHA] enforcement procedures"); 29 U.S.C. § 666 (2006) (creating penalties for serious and non-serious violations of §§ 654–55 of OSHA); PAGE & O'BRIEN, supra note 103, at 183.
169. § 662(b).
170. § 666(b)–(c).
171. § 666(k). If a violation cannot be classified as a "serious" violation or one posing an "imminent danger," it is deemed to be a "not serious" violation. § 666(c).
172. To be cited for a willful violation, an employer must have "demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health." OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 4-28.
173. § 666(a)–(b).
174. § 666(d).
175. OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 4-31. Although the actual text of the OSH Act capped the fine amount at $10,000 for a first-time offender, the Sentencing Reform Act of 1984 increased the maximum fines for criminal OSHA violations. Compare § 666(e), with 18 U.S.C. § 3571(b)(4), (c)(4) (2006).
176. The maximum penalty is six months imprisonment or, if the violation is a repeat offense, one year. § 666(e). In contrast, the maximum penalty for willfully endangering a protected fish under the Clean Water Act is fifteen years imprisonment. Orly Lobel, Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety, 57 ADMIN L. REV. 1071, 1081–82 (2005). As described in Section III, infra, however, OSHA's criminal penalties are rarely invoked.
allowed depending on the prior history of violations at that worksite.\textsuperscript{177}

An employer may appeal an OSHA citation or penalty.\textsuperscript{178} A separate agency—the Occupational Safety and Health Review Commission (OSHRC)—was created as an appellate body to review such appeals and to serve as a check on OSHA’s enforcement efforts.\textsuperscript{179} The OSHRC may affirm, modify, or vacate the penalty imposed by OSHA.\textsuperscript{180} Employees may also request review of a decision to not issue a citation or challenge the amount of time an employer is given to correct a workplace hazard.\textsuperscript{181} A 1992 audit revealed that appeals typically led to a significant reduction in the initial citation.\textsuperscript{182}

4. Education and Training

Apart from its standard-setting and enforcement efforts, OSHA engages in a range of efforts related to training and education of workers, health and safety professionals, and advocates. OSHA has established an official training institute (the OSHA Training Institute (OTI), located in the suburbs of Chicago) for federal, state, and private-sector personnel who engage in inspection, education, and training related to occupational safety and health. OSHA has extended the OTI’s training opportunities to individuals across the country through a network of OTI Education Centers, which are local institutions designated by OSHA to offer specific training courses. OSHA seeks to reach even more individuals through a network of authorized trainers under the Outreach Training Program.\textsuperscript{183} All of these training efforts respond, in part, to the view that workplace fatalities and injuries will not be eradicated simply by promulgating ever-

\textsuperscript{177} OSHA’s Field Operations Manual, supra note 84, at 6-9; OIG Immigrant Fatalities Report, supra note 3, at 17.
\textsuperscript{178} 29 C.F.R. § 1903.17(a) (2007); LOFGREN, supra note 100, at 4 (stating that an employer may appeal “a citation, the penalty, and/or the abatement date”).
\textsuperscript{179} 29 U.S.C. § 661 (2006); LOFGREN, supra note 100, at 1; MENDELOFF, supra note 79, at 2.
\textsuperscript{180} OIG Immigrant Fatalities Report, supra note 3, at 18.
\textsuperscript{182} OIG Immigrant Fatalities Report, supra note 3, at 18. When employers appealed initial citations for “egregious” violations, the administrative law judge who reviewed the appeals downgraded 57% of those citations to “serious” or “other-than-serious” citations, and vacated 36% of them outright. \textit{Id.}
The OSH Act also requires all employers to provide a basic level of training to employees on regulations that apply to all workplaces, such as emergency and fire procedures and the use of personal protective equipment. In the construction industry, where large numbers of immigrant workers are employed, and where those workers experience high fatality and injury rates, the applicable OSHA regulations require training on specific topics. Depending on the nature of the work and the potential risks involved, different training requirements may apply.

To facilitate the education and training of workers by employers, OSHA launched the Alliance Program in 2002. Under this program, OSHA enters into formal partnerships with “employers, trade and professional groups, labor unions, government agencies and educational institutions” for training, education, and outreach to workers. Specific types of collaboration under the program include distribution of OSHA informational materials, participation in forums related to workplace safety, and development of training materials. As of July 2009, OSHA had formed more than 470 partnerships under the Alliance Program.

184. PAGE & O’BRIEN, supra note 103, at 145. Without a doubt, certain incidents are caused by errors or carelessness on the part of workers.

185. See generally OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, TRAINING REQUIREMENTS IN OSHA STANDARDS AND TRAINING GUIDELINES (1998); PETERSON & COHEN, supra note 151, at 55.

186. These topics are:
   (1) the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment; (2) proper handling practices for the use of poisons, caustics, and other harmful substances, and awareness training on personal hygiene and personal protective equipment; (3) where harmful plants or animals are present on the job site, what are the potential hazards, how to avoid injury, and acceptable first aid procedures to be used in the event of injury; (4) proper handling practices for flammable liquids, gases, or toxic materials; and (5) if workers are required to enter into confined or enclosed spaces, the nature of the hazards involved, and appropriate equipment to be used.

187. OSHA training requirements vary depending on the regulation, but take four principal forms: (1) “performance-oriented requirements,” which require employers to provide training when exposure limits for noise or contaminants are surpassed; (2) “on-site requirements,” which call for specific training, regardless of the level of exposure; (3) “periodic training requirements,” which call for recurring training related to specific hazards, such as asbestos; and (4) “one-time training requirements.” PETERSON & COHEN, supra note 151, at 56.


189. Id.

5. Delegation of Authority to States and Territories

The OSH Act allows for state governments to play a central role in the promotion of occupational safety and health and in the enforcement of workplace standards. Pursuant to § 18 of the OSH Act, OSHA may delegate primary enforcement authority to states, provided that the state enforcement does not leave workers with less protection than federal enforcement would give.¹⁹¹ In practice, these “state-plan” states must develop and operate their own occupational safety and health programs and must show that their programmatic plans are, at a minimum, “at least as effective” as the efforts of OSHA.¹⁹² The state plans must contain key components, including standard setting, enforcement (with sufficient personnel), protection of public employees, training, education, and technical assistance.¹⁹³ Where a state plan exists and has been approved, OSHA may subsidize up to 50% of the state agency’s operational costs.¹⁹⁴

Currently, twenty-four states and two U.S. territories have approved state plans under OSHA.¹⁹⁵ Of these, four cover only public-sector employees.¹⁹⁶ OSHA may decertify state plans that it deems to be ineffective, and states may likewise withdraw their plans.¹⁹⁷ Despite these provisions, “the distribution of federal OSHA and state-plan states has remained virtually static since the 1970s.”¹⁹⁸

¹⁹¹ 29 U.S.C. § 667(b)-(c) (2006). Delegating authority to the states is a multi-step process. A state that wishes to avail itself of this provision must first prepare a “developmental plan,” which describes its regulatory infrastructure and ability to monitor workplace safety and health matters, within three years’ time. Bradbury, supra note 117, at 215. OSHA may then enter into an “operational status agreement” with the state-plan state, followed by “final approval” within a year’s time. Id.
¹⁹² § 667(c)(2).
¹⁹³ § 667(c); PETERSON & COHEN, supra note 151, at 3.
¹⁹４ 29 U.S.C. §§ 672(g), 673(c) (2006); MENDELOFF, supra note 79, at 2. In practice, however, there is typically not a precise, fifty/fifty division of costs due to a range of factors, including the ability of some states to keep revenues from fines collected. See Alison D. Morantz, Has Devolution Injured American Workers? State and Federal Enforcement of Construction Safety, 25 J. L. ECON. & ORG. 183, 184 n.2 (2009).
¹⁹⁶ These jurisdictions are Connecticut, New Jersey, New York, and the Virgin Islands. Id.
¹⁹⁷ § 667(f).
¹⁹⁸ Morantz, supra note 194, at 184.
III. THE REGULATORY REGIME AND IMMIGRANT WORKERS

In the decades since the creation of OSHA and the passage of the OSH Act, OSHA has faced significant criticism. Indeed, the agency has been described as “the paradigmatic case of bureaucratic inefficiency and regulatory failure.” Most observers agree that a number of factors have frustrated the realization of OSHA’s mandate: deeply politicized regulatory behavior, inadequate resources, and a fundamentally flawed structure for regulation and enforcement. Although political power and the availability of resources have fluctuated depending on the governing administration, structural flaws have consistently beleaguered OSHA. The consequences have been low inspection rates, paltry penalties, and infrequent prosecutions, which, in turn, have failed to significantly lower workplace fatality and injury rates among the most isolated and vulnerable workers.

In this section, I will examine how the history, structure, and present-day operations of OSHA—described in Section II—have obscured the workplace safety and health concerns of immigrants.

A. OSHA’s Regulatory Agenda: Missing Voices of Immigrant Advocates

As noted above, OSHA lacks a consistent, transparent process for determining its annual priorities. Rather than relying upon arguably objective criteria, such as statistics documenting trends in illnesses and

199. Lobel, supra note 176, at 1078.
201. See generally 2008 Seminario Statement, supra note 200, at 2 (arguing that penalties are weak even when workers are killed on the job, inspections are rare, and the law as it currently stands relies largely on the good faith of the employer).
202. While this examination of OSHA’s record vis-à-vis foreign-born workers may shed light on the agency’s shortcomings with regards to a particular subset of the workforce, it also reveals limitations in OSHA’s overall approach to workplace safety regulation.
fatalities, OSHA's regulatory agenda is shaped by interest group demands, pressure from legislators and the executive branch, and information gathered by its own staff and by other agencies. As a result, the nature of OSHA's regulatory activities is highly dependent upon the demands of company and worker advocates. A natural consequence of this dynamic is that immigrant workers, who often are not equal participants in the political process or in the institutions that have leverage over that process, are unable to marshal the attention and resources of OSHA regulators.

Among the institutions that have advocated for stronger protections for workers, organized labor has played the most prominent role. Historically, unions have been vigorous advocates for greater workplace safety and health protections. Unions have criticized OSHA for, inter alia, its preoccupation with costs, its deference to employers, its meager penalties, and its inadequate staff. Unions have also criticized OSHA for delays in promulgating standards.

John Mendeloff, writing in the late 1970s, described the central role that unions play in the regulatory regime:

In some respects the OSH Act relies on unions to activate it, through worker complaints and surveillance of management, both of which are more likely to occur at unionized workplaces, where unions can use the act to gain leverage in bargaining. Yet if OSHA were totally dependent upon worker invocations, it would

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203. See, e.g., Bill Clinton, The New OSHA: Reinventing Worker Safety and Health, NAT'L PERFORMANCE REV. B-6 (1995) (describing a “priority planning process” in which OSHA solicited input from “more than 200 stakeholders in business, labor, professional associations, and State government to identify the most pressing new priorities for agency action”).


There are several ostensible reasons for unions’ support for greater safety and health protections, including, most notably, the welfare of their members and the political gains that accompany the greater protections afforded to workers. In some respects, however, OSH Act standards may actually undercut unions. Bennett and Taylor advance the hypothesis that legislative and regulatory advances, which apply to all workers, will signal to workers that they have less to gain by joining a union. Id. at 261. Additionally, the emphasis on eliminating workplace risks may create incentives to develop technology that, in turn, may displace workers and reduce union membership. MENDELOFF, supra note 79, at 75-76.

205. MENDELOFF, supra note 79, at 3-4.

largely fail to correct hazards at nonunion plants...\textsuperscript{207}

Mendeloff's assertions are supported by more recent empirical data. In at least one analysis of cases, OSHA allowed for a shorter abatement period (following workplace inspections) at unionized workplaces, as compared with nonunionized workplaces.\textsuperscript{208} One logical explanation for this is that the union presence counterbalanced any deference shown to the employer.\textsuperscript{209} Other studies have similarly demonstrated that employee complaints to OSHA are more likely to occur at unionized workplaces; it is possible that this is due in part to the added job security that unions provide.\textsuperscript{210} Unionized firms are also likely to be cited for more violations and to be required to correct violations more quickly.\textsuperscript{211}

As described above, unions played a key role in advocating for the passage of the OSH Act and quickly occupied a prominent role in advocacy on occupational safety and health matters. Indeed, authors writing in the late 1970s opined:

The organized labor movement is the Department of Labor's (and OSHA's) chief client, and the department is expected to show at least some partiality to the interests of organized labor. OSHA, established at labor's behest, is overseen by congressional committees dominated by the AFL-CIO and depends primarily upon labor backing to ward off attacks upon its authority.\textsuperscript{212}

Consistent with this view, it has been noted that those who benefited most from OSHA were "overwhelmingly blue collar workers, mostly unionized, and mostly men."\textsuperscript{213}

Apart from simply protecting their own members, unions were called upon to champion the cause of occupational safety and health for all workers. These calls reflect the position that unions began to occupy in the national consciousness vis-à-vis occupational safety and health concerns:

The unions not only have responsibility for securing safer and healthier work conditions for their own members by means of collective bargaining, but they also have the opportunity to advocate the cause of job safety and health for all workers through

\textsuperscript{207} MENDELOFF, supra note 79, at 33.
\textsuperscript{208} Id. at 45.
\textsuperscript{209} Id. at 45–46.
\textsuperscript{212} MENDELOFF, supra note 79, at 73–74.
\textsuperscript{213} Id. at 35.
legislative activity and the fostering of a widespread public awareness of the problem.\textsuperscript{214}

Since the late 1970s, however, unions have experienced a gradual decline in their relative power and have suffered a concomitant decline in their membership.\textsuperscript{215} Needless to say, as compared with the 1970s, unions now exercise less leverage over OSHA. Nevertheless, unions continue to occupy much of the space for worker safety advocates in the sphere of OSHA’s rulemaking and enforcement. This role is not simply political; nor can it be inferred only from the history of workplace safety regulation. Rather, the OSH Act has codified the role of unions through references to “employee representative” or “representative of employees.”\textsuperscript{216} The legislative history, when viewed in the context of other occupational safety and health regulations, strongly suggests that the drafters of the OSH Act equated “employee representative” with “union representative.”\textsuperscript{217}

Unions continue to take leadership roles in workplace safety efforts, and nearly every prominent national union has personnel dedicated to protecting workers from on-the-job hazards. This advocacy has become a

\textsuperscript{214.} PAGE & O’BRIEN, supra note 103, at 115–16.

\textsuperscript{215.} Thomas B. Edsall, Labor’s Divisions Widen as Membership Declines, WASH. POST, Mar. 7, 2005, at A2 (noting that while the statistical decline in union membership had begun earlier, it “had become evident by the early 1970s”). See also U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, Chart: Union Membership Has Declined over Time, http://www.bls.gov/cps/labor2006/chart3-11.pdf (last visited Aug. 30, 2009) (reflecting a gradual decline in union membership between 1983, when data on union membership was first collected by the BLS, to 2005). Notably, the data for 2008 reflected a slight increase, which has prompted some observers to suggest that the decline in union membership has “bottomed out” and that growth is likely in the future. See Peter Whoriskey, American Union Ranks Grow After “Bottoming Out,” WASH. POST, Jan. 29, 2009, at A8.

\textsuperscript{216.} 29 U.S.C. §§ 657(e), 662(d) (2006).

\textsuperscript{217.} Both the OSH Act and its legislative history underscore the right of a representative who is “authorized” by employees to accompany an OSHA inspector during a worksite inspection. § 657(e); S. REP. No. 91-1282, at 11–12 (1970). The Senate Report acknowledged that “questions may arise as to who shall be considered a duly authorized representative of employees,” but that “[t]he bill provides the Secretary of Labor with the authority to promulgate regulations for resolving this question.” S. REP. No. 91-1282, at 11 (1970). Similarly, in the Conference Report, it appears that “authorized representative” was equated with collective bargaining representative. In settling upon the language of § 657, House members emphasized that the “provision in itself does not confer authority on the Secretary to prescribe regulations with respect to representation questions in a collective bargaining context.” H. R. REP. No. 91-1765 (1970), reprinted in 1970 U.S.C.C.A.N. 5228, 5234.

This interpretation is supported by other occupational safety and health-related regulations, which specifically define the term “authorized employee representative.” Under the rules of procedure of OSHRC, “authorized employee representative” is defined as a “labor organization that has a collective bargaining relationship with the . . . employer and that represents affected employees.” 29 C.F.R. § 2200.1(g) (2007). See also 29 C.F.R. § 1904.35(b)(2)(i) (2007) (in the context of disclosure of injury and illness records, defining “authorized employee representative” as “an authorized collective bargaining agent of employees”).
defining characteristic of unions; in other words, vigilance over workplace safety, along with more tangible items such as health care coverage or pensions, are among the bundle of "benefits" that a union offers to prospective members. Unions use OSHA standards and noncompliance as a way to gain bargaining strength during organizing campaigns, and also after a collective bargaining agreement is in place. Many collective bargaining agreements call for the creation of joint committees on occupational safety and health, through which union and management representatives can raise and discuss relevant issues.\footnote{218} In these ways, unions have secured many important workplace safety and health protections for their members.\footnote{219}

Given that unions have occupied this advocacy space, the following question arises: Have unions been fully attentive to the workplace safety and health needs of foreign-born workers? During parts of the twentieth century, unions excluded certain classes of marginalized workers, including African-Americans, and, more recently, have held mixed views regarding immigrant workers.\footnote{220} Moreover, unions historically supported restrictionist immigration policies. In the early part of the twentieth century, unions supported the expansion of the Chinese Exclusion Act and the enactment of a literacy test to curtail immigration from Southern and Eastern Europe.\footnote{221} In the 1950s and 1960s, however, the AFL-CIO's position on immigration gradually began to soften. This shift was attributable to an increase in progressive voices in organized labor and to the rise of the civil rights movement, which began to trickle into the labor movement and silence some of the racist rhetoric.\footnote{222}

In the decades that followed, the views espoused by the affiliate members of the AFL-CIO on immigrant workers and immigration policy—particularly regarding undocumented immigrants—began to shift.

\footnote{218. Some observers have criticized the effectiveness of these joint committees, which are typically comprised of equal numbers of union and management representatives. These committees often do not have a clear agenda or procedure for taking action on issues of concern. PAGE & O'BRIEN, supra note 103, at 117-19.}

\footnote{219. See, e.g., Jonathan Rosen, A Labor Perspective on Workplace Violence Prevention, 20 Am. J. Preventive Med. 161, 165-66 (2001) (describing several examples of how unions have successfully lobbied for greater protections against workplace violence across a range of industries).}


\footnote{221. LEAH A. HAUS, UNIONS, IMMIGRATION, AND INTERNATIONALIZATION: NEW CHALLENGES AND CHANGING COALITIONS IN THE UNITED STATES AND FRANCE 43-56 (2002).}

\footnote{222. Id. at 69.}
The United Food and Commercial Workers Union (UFCW), which represents workers in poultry, meatpacking, and other industries, did not adopt an official position on immigration until the late 1990s, when it joined a call by the AFL-CIO for a new amnesty program.223 Since the late 1980s, the Service Employees International Union (SEIU) has taken an active, pro-immigrant stance, driven by "organizing considerations in conjunction with some skepticism about the government's ability to completely control migration."224 The United Farm Workers endorsed an amnesty proposal in the 1980s and has called for a repeal of employer sanctions laws.225

Some of the construction craft unions (commonly referred to as the "Building and Construction Trades"),226 however, continued to grasp onto the legacy of restrictionist policies. In the mid-1980s, several of the construction craft unions adopted resolutions blaming unauthorized immigration for high unemployment levels and depressed wages. Around the same time, after the passage of the Immigration Reform and Control Act and its employer sanctions provisions, the construction craft unions repeatedly urged the Immigration and Naturalization Service (INS) to visit worksites where undocumented immigrants reportedly worked.227 By the late 1990s, however, this restrictionist approach among the building and construction trades began to give way to a renewed focus on organizing all workers in a particular sector, regardless of their citizenship status.228

Over the last decade, as membership numbers have declined and the population of immigrant workers has risen, unions have continued to adopt more inclusive attitudes towards immigrant workers. Nevertheless, many unions—particularly those in the building and construction trades—struggle with organizing and outreach efforts among immigrants. The culture in some of these unions can be slow to shift. The result is that many of the immigrant workers who are most vulnerable to workplace hazards are not unionized; moreover, they lack a meaningful voice in the

223. Id. at 77. Prior to its statement in the late 1990s, the UFCW declined to take a strong position on immigration, despite having significant numbers of Latino members and chairing the AFL-CIO Immigration Committee in the mid-1990s. Id.
224. Id. at 81–87.
225. Id. at 88–89.
227. HAUS, supra note 221, at 89–90.
regulatory regime.\textsuperscript{229} One might argue that unions' efforts to strengthen workplace safety protections will improve conditions at all workplaces, regardless of whether or not immigrants are unionized. Unfortunately, this position ignores OSHA's structural and resource limitations, such as the use of selective enforcement, which may leave nonunionized and largely immigrant workplaces with less protection despite union victories.

The historical role of unions and the lack of a meaningful advocacy role for nonunion worker organizations (and other entities) is a significant and overarching limitation of the current regulatory structure. This is not to suggest that foreign-born workers who are unionized are necessarily free from workplace safety risks. The overall decline in union bargaining strength has weakened the pro-worker voice in the regulatory process, leading to gaps in standards and enforcement efforts.\textsuperscript{230} Moreover, as described below, other features of OSHA's structure beleaguer its ability to protect immigrant workers, regardless of whether they are represented by a union.

\textbf{B. Rulemaking: Delays and Coverage Gaps}

OSHA's standards have faced criticism from all sides, including employers, who have deemed some of the standards to be irrelevant.\textsuperscript{231} Two other criticisms that have been leveled against OSHA standards are that they focus too much on safety hazards, as opposed to health, and that OSHA has emphasized the use of "engineering controls," as opposed to personal protective equipment, to reduce health risks.\textsuperscript{232} For foreign-born workers, however, certain features of the standard-setting process, and of the landscape of existing standards, pose particular challenges.

\textit{1. Delays in Standard Setting and Implementation}

One limitation that has affected all workers, including immigrant

\textsuperscript{229} One might argue that community-based organizations serving immigrants, including members of the National Day Laborer Organizing Network, can occupy this role. Although many nonprofit organizations focus on the rights of immigrant workers, relatively few devote attention to occupational safety and health matters. As described in Section IV, \textit{infra}, a more prominent role for such organizations on workplace safety and health matters will inure to the benefit of immigrant workers.

\textsuperscript{230} In offering this critique of the role of unions, I do not mean to suggest that unions' efforts to organize immigrants are futile or that unions will never be adequate representatives for the workplace safety concerns for foreign-born workers. Rather, my position is that, in the current historical and political moment, unions alone cannot address the occupational safety and health concerns of immigrants. A strengthened labor movement in the future will certainly benefit all workers, including foreign-born workers.

\textsuperscript{231} MENDELOFF, \textit{supra} note 79, at 3.

\textsuperscript{232} \textit{Id.} at 36.
workers, is the very protracted pace of OSHA’s regulatory efforts. The rulemaking process is slow and unresponsive to a dynamic economy and fluid labor market. A report released in 2000 by the National Advisory Committee on Occupational Safety and Health noted that the development and promulgation of OSHA standards takes an average of ten years.\textsuperscript{233} External observers have confirmed the lengthy delays in promulgating both safety- and health-related standards.\textsuperscript{234}

One example is a regulation relating to employer payment for personal protective equipment (PPE).\textsuperscript{235} Under the proposed standard, first published in 1999, employers are to assume the cost for equipment needed to protect individual workers from safety and health risks. Low-wage workers in the informal economy are in great need of protective equipment, such as safety goggles, helmets, and gloves, to protect them from safety hazards.\textsuperscript{236} Given the increased numbers of injuries to the head and neck, particularly among Latino workers,\textsuperscript{237} the need for a standard related to PPE was likely apparent to OSHA regulators. But, because of the delays in OSHA’s rulemaking process, a final rule was not adopted until late 2007, nearly nine years after the initiation of rulemaking process.\textsuperscript{238}

As noted above, once standards are promulgated, employers or others may further delay their implementation by challenging whether there is “substantial evidence” to support the standard.\textsuperscript{239} The OSH Act allows any individual who is adversely affected by a standard to file a petition with a federal circuit court within sixty days of promulgation of the standard.\textsuperscript{240} Challenges may also be brought if OSHA fails to provide a statement of reasons supporting the standard, if the standard is unconstitutionally vague, or if there were procedural defects in the

\begin{footnotes}
\item[234] See, e.g., MCGARTY \& SHAPIRO, supra note 109, at 185–86; Sidney A. Shapiro, Reorienting OSHA: Regulatory Alternatives and Legislative Reform, 6 YALE J. ON REG. 1, 13–14 (1989).
\item[235] See Employer Payment for Personal Protective Equipment, 64 Fed. Reg. 15,402 (proposed Mar. 31, 1999). According to this initial notice in the Federal Register, the comment period was to close in July 1999. \textit{Id.} at 15,431.
\item[236] See IMMIGRANT WORKERS AT RISK, supra note 19, at 3 (noting high injury and fatality rates among the foreign-born workforce).
\item[237] \textit{See supra} Section I.
\item[239] See WALTER B. CONNOLLY JR. \& DONALD R. CROWELL II, A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT § 15.02 (American Lawyer Media, 2009); \textit{supra} note 135 and accompanying text.
\item[240] 29 U.S.C. § 655(f) (2006); CONNOLLY \& CROWELL, \textit{supra} note 239, at § 15.02.
\end{footnotes}
rulemaking process.\textsuperscript{241}

While these delays in standard setting and implementation affect all who are employed in a particular industry, the effects are exacerbated for immigrant workers. As OSHA itself acknowledged when it issued the final rule relating to employer payment for PPE, a large percentage of the nation's workers—including many immigrant workers—are not unionized, and therefore cannot rely on collective bargaining as a vehicle to obtain safety protections.\textsuperscript{242} Moreover, as noted above, OSHA lacks a system for establishing priorities in its standard-setting process. Consequently, standards are likely to advance only when political or interest group demands are brought to bear. Although many unions are cognizant of the data trends involving foreign-born workers, additional voices of immigrant worker advocates are needed in the standard-setting process. Finally, given the growing proportion of workplace fatalities and injuries among foreign-born workers (as compared with native-born workers) in several industries,\textsuperscript{243} delays in standard setting related to these industries will necessarily have a disproportionate effect on the immigrant workforce.

2. Examples of Gaps in Regulations

As described above, the BLS has documented increases in fatalities among foreign-born workers in certain industries and workplace circumstances. Despite troubling statistics relating to the risks that immigrants face on the job, gaps in regulations continue to exist. Workplace health and safety advocates, including unions, continue to advocate for stronger standards for all workers. These advocates have articulated concern about increased fatalities among Latino immigrant workers.\textsuperscript{244} Nevertheless, greater emphasis could be placed on standards that respond to data trends and that correct deficiencies having a direct effect on immigrant workers. Broadly, these deficiencies stem from: the exclusion of certain types of workers, by regulation, from the protection of the OSH Act; the absence of standards for certain occupations and industries; and agency interpretations that weaken existing standards. An example of each is provided below.

\textit{a) Exclusion by Regulation: Domestic Workers}

The OSH Act, by regulation, does not protect individuals employed to

\textsuperscript{241} \textit{CONNOLLY \& CROWELL, supra} note 239, at § 15.02.  
\textsuperscript{242} \textit{See Employer Payment for Personal Protective Equipment, 72 Fed. Reg. at 64,344.}  
\textsuperscript{243} \textit{See supra} Section I.  
\textsuperscript{244} \textit{2008 Seminario Statement, supra} note 200, at 1.
perform “ordinary domestic household tasks, such as house cleaning, cooking, and caring for children.” Immigrant women of color appear to constitute a significant portion of this workforce, although accurate nationwide statistics are not available, given the prevalence of informal employment arrangements. The few formal studies of domestic workers that have been conducted in metropolitan centers confirm the predominance of immigrant women.

These reports on domestic workers also reflect significant concerns relating to workplace health and safety. A recent study of household domestic workers in California revealed that 75% of the workers had not received any protective gear, such as masks or gloves, and that 86% had not received training on job safety or injury prevention. Heavy lifting, use of toxic chemicals, and cleaning in difficult-to-reach places are commonly required of domestic workers and render them susceptible to work-related injuries and illnesses.

As the domestic work industry continues to thrive, OSHA’s engagement with this workforce is warranted. While a repeal of the domestic worker exception may be an ultimate goal, OSHA can begin by collecting and reviewing data, perhaps in collaboration with NIOSH, and by developing non-binding guidelines to protect domestic employees from common workplace risks.

b) Absent Standards: Workplace Violence

One industry that has received relatively little attention in the OSHA standard-setting process is the retail industry, which has experienced high

245. 29 C.F.R. § 1975.6 (2007).
247. See Domestic Workers United & DataCenter, supra note 124, at 2 (reporting that 99% of domestic workers in New York City are foreign-born); Gregory Gaines, Jordan Head, Matthew Mokey, Amy Potemski, Michael Stepansky & Amy Vance, Working Conditions of Domestic Workers in Montgomery County, Maryland 21 (2006) (presenting the findings of a survey of nearly 300 domestic workers in a suburban county outside of Washington, D.C., which found that domestic workers in the county are primarily immigrants), available at http://www.montgomerycountymd.gov/content/council/pdf/REPORTS/domestic_workers.pdf; Mujeres Unidas y Activas, Day Labor Program Women’s Collective of La Raza Centro Legal & DataCenter, Behind Closed Doors: Working Conditions of California’s Domestic Workers 3 (2007) [hereinafter Behind Closed Doors] (reporting that 99% of survey respondents were born outside the U.S.), available at http://www.datacenter.org/reports/behindcloseddoors.pdf.
249. Id; Domestic Workers United & DataCenter, supra note 124, at 23.
rates of workplace fatalities due to violence.\textsuperscript{250} The BLS's statistics establish that the retail industry accounted for 26.7\% of all workplace homicides in 2006.\textsuperscript{251} In addition to these fatalities, data suggest that millions of nonfatal assaults occur each year in the retail workplace.\textsuperscript{252} Workers in the retail sales industry experience a greater total number of "violent victimizations" in the workplace than even law enforcement officers.\textsuperscript{253}

OSHA has been on notice regarding the prevalence of workplace homicides since at least 1993, when NIOSH issued an alert encouraging employers to take a number of steps to reduce the risk of violence.\textsuperscript{254} OSHA has adopted "voluntary guidelines" for several industries that experience high rates of workplace violence.\textsuperscript{255} To date, however, OSHA has not promulgated a formal standard related to workplace violence. Although the guidelines do exist, studies have demonstrated the limitations of a "voluntary compliance" approach.\textsuperscript{256} OSHA regulations in this area would put employers directly on notice as to the steps they must take to provide a more safe and secure workplace. Although the root causes of workplace violence are complex, such standards would only aid

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{250} See \textit{supra} Section I.
\item \textsuperscript{252} See \textit{Rosen}, \textit{supra} note 219, at 162 (citing a National Crime Victimization Survey, which found that, from 1992 to 1996, approximately two million nonfatal assaults occurred each year in the workplace).
\item \textsuperscript{253} \textit{Id.} at 162. Although police officers and corrections officers suffer the highest rates of nonfatal workplace violence, the next highest rate of violence was experienced by taxi drivers. \textit{Id.} at 163. Gas station employees and convenience/liquor store workers experienced high rates of violence as well (79.1 and 68.4 victims per 1000 workers, respectively). \textit{Id.}
\item \textsuperscript{254} Press Release, Nat'l Inst. of Occupational Safety & Health, Update: NIOSH Urges Immediate Action to Prevent Workplace Homicide (Oct. 25, 1993), available at http://www.cdc.gov/Niosh/updates/94-101.html. While the alert does not specifically mention foreign-born workers, it notes that between 1980 and 1989, occupational homicide rates "for both blacks and other races . . . were more than twice the rate for white workers." \textit{Id.} The alert flagged taxicab establishments, liquor stores, and gas stations as the most dangerous workplaces at that time. \textit{Id.}
\item \textsuperscript{255} OIG IMMIGRANT FATALITIES REPORT, \textit{supra} note 3, at 13. OSHA has issued voluntary guidelines for the following industries: taxi and livery drivers, late-night retail establishments, health care and social service workers, and community workers. \textit{Id.} at 13 n.5. Some of the recommended measures include improving visibility and lighting and installing physical barriers, surveillance equipment, and panic buttons. RECOMMENDATIONS FOR WORKPLACE VIOLENCE PREVENTION, \textit{supra} note 67. The guidelines for health care and social service workers were modeled on similar efforts undertaken by California's OSHA and the Department of Labor and Industries of Washington State. \textit{Rosen}, \textit{supra} note 219, at 164.
\item \textsuperscript{256} See, e.g., \textit{Rosen}, \textit{supra} note 219, at 164 (noting that research shows "few employers are implementing full [workplace violence] programs").
\end{itemize}
\end{footnotesize}
efforts to decrease fatalities and injuries among immigrant workers in these vulnerable retail occupations.

\[\text{c) Weakened Standards: Fall Protection in Construction}\]

Each year, the greatest number of workplace fatalities occurs in the construction industry.\(^{257}\) Foreign-born workers, especially Latino immigrant workers, are disproportionately represented in the construction trades relative to their overall presence in the workforce.\(^{258}\) Among all foreign-born worker fatalities in the United States, each year the most occur in the construction industry.\(^{259}\)

Recent reports have demonstrated that a significant number of immigrant worker fatalities occur as a result of "falls," in the context of building erection and roofing work.\(^{260}\) Despite this growing concern, OSHA has issued an interpretation weakening worker protections in this area. Specifically, in 2002, OSHA issued a compliance directive that allows contractors to forgo the installation of protective "netting" or "decking" when workers are required to use a safety harness.\(^{261}\) The decking provides a second layer of protection in the event that a harness

\(^{260}\) Loh \& Richardson, \textit{supra} note 33, at 48-49 (noting that "falls to a lower level" were the second most frequent cause of workplace fatalities among foreign-born workers from 1996 to 2001). \textit{See also} \textit{Immigrant Workers at Risk, \textit{supra} note 19, at 3} (noting that falls account for approximately 15\% of workplace fatalities among foreign-born workers).


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fails to operate properly. Recent incidents in Las Vegas reveal that at least nine workers died from workplace falls during a sixteen-month period between 2007 and 2008; a number of those lives might have been saved had OSHA insisted on both levels of protection. Although OSHA recently rescinded the 2002 directive, this lax interpretation of standards ignored documented trends of fatalities and injuries among immigrants.

C. Inspections and Training

The existing standards and procedures for worksite inspections systematically disadvantage foreign-born workers. The current “triggers” for worksite inspections are not likely to be initiated by immigrant workers or their advocates; in this regard, the presence (or absence) of a union figures prominently. The criteria used by OSHA for “random” inspections are likewise prone to exclude large numbers of immigrant workers. Moreover, the inspection process itself is not accessible to many immigrant workers due to language barriers and other factors.

1. “Triggers” for Inspections Exclude Immigrant Workers

When OSHA conducts an unprogrammed inspection of a worksite, it typically initiates the inspection based on a workplace complaint or a record of workplace health and safety violations. However, foreign-born workers may be inhibited from filing a complaint due to multiple factors, including limited English proficiency, lack of familiarity with their rights or the legal process, fear of jeopardizing their immigration status, the need for job security, lack of knowledge about government agencies, and more. Consequently, OSHA may not know to flag an employer that relies heavily on immigrant workers and fails to report workplace injuries (or discourages its employees from doing so).

In this context as well, unions play a pivotal role in the effectiveness of the regulatory regime. Where a workplace is organized, a union can request and obtain an OSHA inspection with relative ease. The union can then designate a representative to participate in the inspection and monitor compliance with any citations issued by OSHA’s Compliance

262. Berzon, supra note 261.
264. See OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 5.
265. See id. at 5, 7.
266. See MENDELOFF, supra note 79, at 91.
Safety and Health Officers.\textsuperscript{267} Absent a union, there are few entities with the leverage to challenge the employer on its workplace safety record.\textsuperscript{268}

Statistically speaking, OSHA inspections are a relatively rare occurrence, absent a complaint or a serious accident.\textsuperscript{269} Even when inspections do occur, an employer can refuse entrance to an inspector unless the inspector has an administrative warrant issued pursuant to a "neutral" selection process.\textsuperscript{270} Moreover, unless there is an obviously dangerous situation at the workplace, the employer can delay the inspection for a few days by objecting to the warrant.\textsuperscript{271}

As noted above, OSHA's SST Program, which generates an inspection plan for non-construction worksites, includes only those worksites that have forty or more employees.\textsuperscript{272} This approach leaves out many foreign-born workers due to their concentration in smaller workplaces.\textsuperscript{273} Similarly, for the construction industry, where fatality and injury rates are the highest, OSHA relies upon data from the F.W. Dodge Report\textsuperscript{274} to

\textsuperscript{267} Id.

\textsuperscript{268} See id. ("Most OSHA officials with whom I have spoken agree that the vast majority of requests for inspections are filed from unionized workplaces.").

\textsuperscript{269} For example, in 2006, a total of 96,936 inspections were conducted by federal or state occupational safety and health officials. See Is OSHA Working for Working People?: Hearing Before the Subcomm. on Employment and Worker Safety of the S. Comm. on Health, Education, Labor, and Pensions, 110th Cong. 6 (2007) (statement of Peg Seminario, Director of Safety and Health, AFL-CIO). Assuming each inspection was conducted at a different worksite, these inspections cover only 1.1% of the 8.5 million worksites covered by OSHA. Id. Moreover, as noted in Section II.B.2, supra, in recent years OSHA has shifted towards a voluntary compliance scheme whereby a significant part of OSHA's compliance work is done with businesses that have voluntarily agreed to participate in OSHA's programs of yearly worksite check-ins, exemptions from routine inspections, free consultations, and other incentives. See U.S. GEN. ACCOUNTING OFFICE, supra note 167, at 5, 8. Businesses that have not agreed to voluntary compliance are generally only investigated when employees lodge a complaint or a serious accident occurs, although OSHA also partly bases its inspection plan on data regarding injury and illnesses in particular industries or worksites. See id.


\textsuperscript{271} See 2 Guide to Employment Law and Regulations § 18:31 (West 2009). But see THOMAS D. SCHNEID & MICHAEL S. SCHUMANN, LEGAL LIABILITY: A GUIDE FOR SAFETY AND LOSS PREVENTION PROFESSIONALS 62 (1997) (although employers can challenge an inspection warrant, frivolous challenges may subject them to contempt citations).


\textsuperscript{273} See NESS, supra note 86, at 22–23, 25 (noting that immigrant workers tend to be concentrated in less-regulated workplaces).

\textsuperscript{274} The F.W. Dodge Report is a listing of construction projects nationwide that are available for public bidding. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 28. The report is compiled by McGraw Hill Construction Information and is available online at a password protected site. See Find a Project Now (Dodge Reports), http://www.fwdodge.com (last visited Aug. 30, 2009).
develop a list of target inspection sites. This report does not contain comprehensive information about smaller construction sites, where immigrant workers are often employed. OSHA’s Special Emphasis Programs may capture additional worksites, but their overall effectiveness has not been studied.

OSHA may also be reluctant to target smaller employers due to the costs potentially imposed on those businesses. Some small and medium-sized companies have expressed concern that the cost of compliance with OSHA regulations will require layoffs of employees or other cutbacks that ultimately harm workers. Some continue to argue, following a purely economic analysis, that workplace accidents and illnesses should be prevented only “up to the point at which it becomes more expensive to prevent them than to allow them to occur.” It is impossible, of course, to avoid moral judgments about the “cost” of saving one life over another or the “cost” of a life versus the economic cost of compliance.

2. Barriers to Immigrant Workers During the Inspection Process

Even when OSHA does inspect a workplace with foreign-born workers, it faces significant problems during the inspection process itself. Linguistic barriers often arise between inspectors and employees who do not speak English. The Office of the Inspector General of the Department of Labor noted that OSHA’s inspectorate had difficulty communicating with workers who speak languages other than English and that interpreters hired from outside OSHA who are not familiar with technical terms may have trouble facilitating investigations. Inspectors themselves have


276. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 12. See also Inspection Scheduling for Construction, supra note 275 (describing an OSHA study that found that the Dodge Report covers 90% of construction projects over $50,000).

277. See, e.g., LOFGREN, supra note 100, at 67–68 (describing an employer who threatened that abatement of an OSHA-cited hazard would lead to a reduction in his workforce).

278. MENDELOFF, supra note 79, at 7.

279. See id. at 6.

280. Apart from the challenges unique to immigrant workers, inspectors simply may not detect violations of standards, given the thousands of standards with which they must become familiar. See MENDELOFF, supra note 79, at 88. See generally LOFGREN, supra note 100 (describing the wide range of industries and standards that an OSHA inspector must be able to navigate).

281. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 7. The linguistic barriers in the inspection process are not cured simply by hiring bilingual personnel or recruiting
reported challenges involved in speaking with limited English proficient employees. Moreover, the use of a telephonic interpretation service, which OSHA has recommended in its Field Operations Manual, would make obtaining written statements extremely cumbersome, and generally seems a suboptimal way to build confidence in the agency and its personnel.

Even when OSHA inspectors and foreign-born employees share a language, developing trust can be a challenge. Although inspectors may interview employees in private, immigrant workers may fear retaliation for speaking candidly about workplace concerns. Workers might also be concerned, especially in smaller workplaces, that a complainant could be easily identified, even if the complaints are submitted anonymously and the worker is interviewed in private.

Moreover, immigrant workers, especially those with a tenuous immigration status, are unlikely to welcome a conversation with a federal government employee. This has been an even greater challenge in recent years as the government has heightened its immigration enforcement efforts. To complicate matters further, federal immigration enforcement officers have used the ruse of a “mandatory” workplace safety meeting to conduct a worksite raid.

3. A Shift Towards Voluntary Compliance

As discussed in Section II.B.2, supra, in recent years OSHA has opted for even fewer inspections and has emphasized more collaborative, semi-voluntary compliance programs, including the VPP. In order to be successful, these programs require employers to take the initiative in revealing both their successes and challenges with workplace safety and be willing to partner with the federal government. To its credit, as of

interpreters. The individuals communicating with immigrant workers must be familiar with OSHA regulations and terminology and must be able to translate technical terms between languages.

282. Sec, e.g., LOFGREN, supra note 100, at 94 (describing how the author communicated with employees during an inspection by presenting workers with a card written in Spanish).

283. OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 3-24.

284. IMMIGRANT WORKERS AT RISK, supra note 19, at 10.


February 2009, OSHA had registered over 2200 employers in the VPP.\(^{287}\) Unfortunately, this represents only a tiny fraction of the millions of employers in the United States.\(^{288}\)

Moreover, it is logical that employers who participate in the VPP generally are larger entities in more established industries who already have some safety and health plans in place. Although OSHA’s list of VPP participants does not specify the relative size of the workplaces, a significant number are well known, established companies that operate regionally or nationally.\(^{289}\) Although SHARP focuses on smaller workplaces, it, like the VPP, requires considerable transparency on the part of the employer. The most vulnerable workers, who labor in the informal or underground economy, are effectively overlooked by this regulatory approach.

Furthermore, cooperative programs presuppose a longer-term relationship between the employer and OSHA in which the two entities work together to move towards full compliance in the long run. By their very nature, however, construction projects, where many immigrant workers are employed, are short lived; each project has a distinct physical layout and, therefore, requires its own diagnosis.\(^{290}\) In response to this concern, OSHA recently moved to expand the VPP to include mobile workforces.\(^{291}\) It remains to be seen whether the VPP will contribute to a reduction in fatalities or injuries among immigrant construction workers, or even among construction workers in general.\(^{292}\)

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290. See Morantz, supra note 194, at 186 n.5.

291. See Revisions to the Voluntary Protection Programs to Provide Safe and Healthful Working Conditions, 74 Fed. Reg. 927–952 (Jan. 9, 2009) (describing an expansion of the VPP to allow participation by mobile workforces, which predominate in the construction industry).

4. Limitations of OSHA’s Training Efforts

In order to reduce the number of fatalities and injuries among foreign-born workers, the workers must receive appropriate training on workplace hazards and the use of personal protective equipment. Most existing OSHA standards do not explicitly require employers to tailor their training programs to the language abilities and literacy levels of their employees.293 Given the growing diversity of the U.S. workforce and the increased mobility of human capital in the globalized economy, OSHA and employers must address issues of language and literacy. Similarly, trainings offered in foreign languages may not always address the cultural barriers that affect worker receptivity to, and comprehension of, training materials. To its credit, OSHA has made efforts to offer training courses in Spanish and to cultivate trainers with Spanish language ability.294

Worker access to training is another concern. Although OSHA has sought to make its trainings available in different locales, immigrant workers may simply be unaware of the existence of trainings, especially if they do not work for established employers or are not represented by unions. While OSHA’s Alliance Program helps to deliver trainings directly to some foreign-born workers,295 many more outlets for education and training could be pursued.296

D. State Plans: Unpredictability

OSHA’s relationship with the occupational safety and health departments of individual states is another element of its regulatory framework that has a profound impact on worksite conditions. As described above, the OSH Act empowers states to assume primary enforcement authority for occupational safety and health matters. The limitation of the state-plan approach, however, is that it requires OSHA to police the enforcement efforts of the states.297 Lapses in OSHA oversight,

293. See OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 15 (noting that OSHA’s standards for training employees in workplace safety, with one exception, do not require employer consideration of their employees’ literacy and language, but stating that OSHA claims it interprets these provisions “to mean providing training in a manner that employees understand”).


296. See infra Section IV.B.2 (recommending greater collaboration in OSHA’s training and education efforts).

297. Mcgarity & Shapiro, supra note 109, at 174–75 (noting that the OSH Act
when coupled with regulatory failures on the state level, can lead to disastrous consequences.\textsuperscript{298} The likely result is that vulnerable workers are subject to the vicissitudes of state political processes. State and local politics influencing safety and health regulation are often even more beholden to powerful local economic interests, and state agencies are therefore even less willing to regulate certain sectors of the economy for fear of driving commerce away from the state.\textsuperscript{299} Although several authors have warned of the proverbial “race to the bottom” as states endeavor to attract business,\textsuperscript{300} this fear has little, if any, empirical basis.\textsuperscript{301} Nevertheless, the role of states must be considered carefully by federal OSHA regulators, particularly given the restrictive, ostensibly anti-immigrant policies that some local and state government officials have adopted.\textsuperscript{302} As some jurisdictions move to limit services and benefits for immigrants—particularly those who are undocumented—it is not unrealistic to fear that regulatory resources might similarly be withheld when immigrant workers are involved.

requires OSHA to ensure that state programs provide at least the level of protection that the federal government would give, and describing a GAO report and a Department of Labor audit that found deficiencies in OSHA’s oversight of state plans).

\textsuperscript{298}. See id. (describing an incident in North Carolina in which twenty-five workers were burned to death in a plant that had not been inspected in eleven years and had inadequate fire protections, after OSHA had deemed the state’s monitoring program “effective” in spite of its small number of inspectors). More recently, OSHA announced the formation of a task force to investigate the performance of Nevada’s Occupational Safety and Health Administration following a rash of construction fatalities in the Las Vegas area. Alexandra Berzon, Rare Study by Feds May Prompt OSHA Changes, LAS VEGAS SUN, July 31, 2009, at 1, available at http://www.lasvegassun.com/news/2009/jul/31/rare-study-feds-may-prompt-osha-changes.

\textsuperscript{299}. See, e.g., LOFGREN, supra note 100, at 27 (describing the politicization of OSHA enforcement efforts in California and how a new administration was expected to bring a new, “more relaxed,” approach to OSHA enforcement); Morantz, supra note 194, at 186 (“[I]f officials in state-plan states are especially beholden to local business interests, they might seize upon the Consultation Program as a convenient form of ‘window dressing’ that helps satisfy [the devolution provision of] the OSH Act without antagonizing local firms.”).

\textsuperscript{300}. See, e.g., Bradbury, supra note 117, at 212.

\textsuperscript{301}. Cf Morantz, supra note 194, at 183 (finding that although “state inspectors use traditional enforcement tools more sparingly than their federal counterparts, typically citing fewer violations and collecting lower fines per violation,” and federal enforcement seems to lower the frequency of nonfatal injuries to construction workers, state programs also see fewer fatal worksite injuries, making the overall effectiveness of state plans relative to federal enforcement ambiguous).

E. Insufficient Penalties and Infrequent Prosecutions

Although enforcement and deterrence are major components of OSHA's mandate, the agency has faced criticism for its limited civil penalties, its frequent reductions of penalty amounts, and its rare prosecutions.\(^{303}\) OSHA is authorized to impose penalties of up to $7000 for serious violations and $70,000 for willful violations, but the actual penalties imposed rarely reach these ceilings. In workplace fatality investigations conducted in 2007, the median initial penalty assessed by OSHA was $5900; after negotiations and review—which are encouraged by existing OSHA guidelines—the final penalty dropped to a median of $3675.\(^{304}\) Where the fatality was deemed to be the result of a willful violation, the median final penalty rose only to only $29,400, less than half of the maximum penalty authorized under the statute.\(^{305}\) During the same year, the average penalty for all serious violations (including non-fatality cases) was a mere $906, an amount unlikely to have any deterrent effect.\(^{306}\) These fines stand in stark contrast to other federal statutes, which impose equivalent or higher fines for conduct that does not jeopardize human life.\(^{307}\)

The imposition of these modest penalties is accompanied by a reluctance to prosecute employers who violate the OSH Act. A 1988 congressional report on occupational safety determined that “a company official who willfully and recklessly violates federal OSHA laws stands a greater chance of winning a state lottery than being criminally charged.”\(^{308}\) Of all of the workplace fatality cases that were deemed eligible for

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303. See, e.g., David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1 (revealing that even among the 1242 cases from 1982 to 2002 in which OSHA determined that workplace deaths resulted from employers’ “willful” violations of safety regulations, OSHA sought prosecution in only 7% of the cases, and contrasting OSHA’s low fines to the much stiffer civil penalties imposed for companies that mislead investors). The relevant legislative history suggests that the Department of Labor lacked the political will to impose and enforce fines even before the OSH Act had passed through Congress. Then Secretary of Labor George Shultz noted that, given the “tight labor markets,” “to become known as an employer with unsafe practices is to have the reputation of operating an undesirable place to work. And this in many ways is the most severe penalty that is involved.” MENDELOFF, supra note 79, at 23 (citing Occupational Safety: Hearing Before the S. Comm. on Labor and Public Welfare, 91st Cong. 88 (1970) (statement of George Shultz, Secretary of Labor)).


305. Id.

306. 2008 Seminario Statement, supra note 200, at 3.


308. Barstow, supra note 303.
prosecution between 1982 and 2002, 93% of those cases were not prosecuted.\footnote{309} Similarly, of the 237 willful violations eligible for referral between 2003 and 2008, only fifty were referred for criminal prosecution; of those fifty, only ten (4.2%) were actually prosecuted by the Department of Justice.\footnote{310} From the enactment of the OSH Act through 2007, approximately 365,000 workers have died on the job in the United States.\footnote{311} Yet, as of 2003, these fatalities had resulted in only sixteen prison sentences for guilty employers.\footnote{312} In recent years, only a handful of additional employers have been sentenced to prison for OSHA-related violations.\footnote{313}

Another enforcement challenge arises if an employer chooses to appeal an OSHA citation to the OSHRC. This appeals process can last for several years.\footnote{314} Don Lofgren describes the problems that flow from this scenario:

With such long delays, a temporary job can be completed and a contractor may have a new name and address long before action can be taken. And, while the citation is under appeal, the contractor is not liable for repeat citations, which carry higher penalties.\footnote{315}

The problems cited by Lofgren are especially problematic for immigrant workers, who are often employed by undercapitalized contractors and subcontractors.\footnote{316}
IV.
RECOMMENDATIONS: A NEW VISION FOR WORKPLACE REGULATION

A complex and interrelated set of factors has placed foreign-born workers in a vulnerable position vis-à-vis workplace safety and health and left them marginalized in the regulatory regime. To its credit, however, OSHA has taken some steps to address the rise in workplace fatalities and injuries among foreign-born workers. In October 2001, OSHA formed a special task force to examine the issue of rising fatalities among Latino workers. The agency has also cultivated some relationships with community-based organizations that work closely with the Latino community. In addition, OSHA created a Hispanic/ESL coordinator position in each of its ten regions. These coordinators work with individuals, businesses, and other institutions in the community to coordinate education and outreach to Spanish-speaking workers.

While the measures taken by OSHA are laudable, more fundamental and aggressive steps must be taken to bring the occupational safety concerns of immigrant laborers to the forefront of the regulatory agenda. Indeed, the data from the BLS and other organizations demonstrate that immigrant workers continue to suffer a disproportionate number of workplace fatalities and experience a significant number of work-related injuries and illnesses.

In presenting recommendations for reforms at OSHA, I offer not simply a list of discrete policy proposals, but rather a new normative vision for regulating safety in the workplace given the changing demographics of the workforce. The trend documented in this article calls for an examination of theories of regulation in light of an agency's failure vis-à-vis a particular, historically disadvantaged constituency.

I propose three regulatory imperatives to guide OSHA and other similarly situated agencies: (1) transparency, (2) collaborative regulation, and (3) antisubordination. A set of comprehensive reforms guided by these imperatives will serve three important purposes: (1) to remedy some

317. OSHA Programs to Help Hispanic Workers, supra note 34.
318. See generally OSHA HISPANIC OUTREACH, supra note 294; Weekend Edition Sunday: Latinos’ Job Fatality Rate Highest of All Workers (NPR radio broadcast Mar. 2, 2008) (“Welsh says Cal-OSHA and other OSHA agencies across the country have been reaching out to Latino labor and community organizations over the past decade. The groups can then act as intermediaries, encouraging Latino workers to report dangerous work conditions, so OSHA knows where to investigate.”), available at http://www.npr.org/templates/story/story.php?storyId=87837162.
320. See supra Section I.
of the entrenched limitations of the regulatory regime related to occupational safety and health; (2) to cultivate a stronger voice for immigrant laborers in a regulatory process that, by its nature, will have a political dimension; and (3) to counter the historical subordination of immigrant laborers.

In the remainder of this section, I address the question of agency resources, while acknowledging the importance of increased funding in order for OSHA to realize its statutory mandate. I then outline the regulatory imperatives that should guide OSHA's work, describing both their theoretical underpinnings and their practical applications in the present context.

A. The Question of Resources

Regulatory reforms, including some of those proposed below, often involve significant costs that must be considered as part of the appropriations process. This is particularly true for OSHA, an agency which, according to many observers, has historically been underfunded. Notably, the amount budgeted for OSHA in 2008 was very similar to the amount the agency received almost thirty years earlier in 1980. Moreover, in 2008, the OSHA budget for enforcement activities was 12% lower than the 1980 budget for enforcement activities. For fiscal year 2009, however, the Obama administration has expanded the OSHA budget by $27 million, for a total of $513 million.

321. This section, and the article as a whole, presupposes the need for government intervention on behalf of workers to adjust the balance of power in the employer-employee relationship and to ensure adequate health and safety protections for workers. Certainly, some critics of OSHA have called for the deregulation of labor markets on the premise that unregulated markets can address health and safety concerns through embedded structural features such as the payment of a "wage premium" to workers to compensate them for workplace risks. See John D. Worrall, Compensation Costs, Injury Rates, and the Labor Market, in SAFETY AND THE WORK FORCE: INCENTIVES AND DISINCENTIVES 1, 9 (John D. Worrall ed., 1983).

This literature, however, fails to consider whether workers—particularly immigrant workers—have exercised an autonomous choice between accepting a wage premium and forcing an employer to reduce or eliminate workplace risks. The reality, of course, is that most low-wage immigrant workers in the United States lack the power to make such a choice. For economic migrants, who often face significant competition for employment and who have only temporary lawful immigration status or are undocumented, meaningful negotiation of the terms of employment is a rare occurrence. This is evidenced by the fact that, from a statistical perspective, immigrant workers' hourly wages are lower on average than those of native-born residents. URBAN INSTITUTE, IMMIGRANT FAMILIES AND WORKERS, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE (2003).


323. Id.

324. Ames Alexander, OSHA Funding Up $27 Million, CHARLOTTE OBSERVER, Mar.
Increased funding, which can translate into additional human resources, is needed to enhance all of the core functions of OSHA: standard setting, inspections, enforcement, education, and training. While funding is integral for agency effectiveness, additional resources alone will not cure OSHA's shortcomings vis-à-vis the foreign-born workforce. Rather, as presented in this article, the agency must adopt different approaches in dealing with the workplace health and safety concerns of immigrants.

B. Three Regulatory Imperatives for OSHA

1. Transparency

In addressing the problem of workplace fatalities and injuries among immigrants, OSHA should continue to embrace the principle of transparency. In public pronouncements by its officials, OSHA has already acknowledged that foreign-born workers face greater risks in the workplace than their native-born counterparts. In terms of governance, the logical next step is for OSHA to continue to gather and disseminate as much information as possible about the workplace safety and health concerns of the immigrant workforce and to ensure that its data collection mechanisms capture the experiences of these workers.

Much of the literature on transparency theory describes transparency of information as a regulatory tool that allows members of the public (especially consumers) to make more informed choices and to protect themselves from harm.\(^3\) Readily available data regarding workplace hazards and trends in illnesses, injuries, and fatalities will allow immigrant workers and their advocates to fully understand the risks posed by certain occupations. Although immigrant workers may not have the economic leverage to decline or change employment due to possible health and safety concerns, at a minimum, this information would expose the consequences of failing to use protective equipment or taking other risks on the job and would help responsible employers to continue to improve protective measures and equipment. Transparency as a protective

12, 2009, at 3A.

regulatory principle is not unknown to OSHA, which has issued hazard communication standards requiring the disclosure of information to workers about the risks posed by different chemicals.\textsuperscript{326}

The principle of transparency is also consistent with the trend over the last two decades of providing the public with greater access to government information generally.\textsuperscript{327} Access to information is viewed not only as a moral duty of the government, but also as a way to ensure more efficient governance.\textsuperscript{328} When political forces are left to their own devices, the result is often information gaps or "asymmetries" that serve as obstacles to addressing public priorities.\textsuperscript{329} Greater access to government information regarding the risks faced by foreign-born workers will help to guard against any effort (intentional or otherwise) to hide the experience of immigrants behind the broader narrative of an increasingly safe and secure workplace.\textsuperscript{330} The information will also allow immigrant workers and their advocates to make a stronger case for government intervention and to link their everyday experiences with documented trends. The principle of transparency must, therefore, carry over into the rulemaking process to ensure full participation by interested actors and openness regarding agency processes and decisions.\textsuperscript{331}

By providing more information about the hazards that immigrant workers face on the job, OSHA, workers, and organizations advocating on behalf of immigrant workers can better identify and respond to gaps in standard setting and enforcement. Gathering data about hazards, in turn, requires identifying the most accurate sources of that information. Ultimately, collection and public disclosure of the information will serve multiple purposes: informing the public, as well as the regulatory actors, about the risks faced in the workplace; and providing accountability and benchmarks for the performance of the agency.

The practical implementation of this theory of transparency translates into the following concrete proposals for OSHA to consider.

\textsuperscript{326} 29 C.F.R. § 1910.1200 (2007).
\textsuperscript{328} \textit{Id.} at 53.
\textsuperscript{329} See Fung, Weil, Graham & Fagotto, \textit{supra} note 325, at 1 (noting that information asymmetries act as barriers to furthering policy objectives and government intervention is often needed to compel disclosure by public and private organizations and agencies).
\textsuperscript{330} See \textit{supra} notes 28–31 and accompanying text (noting that, as overall fatalities have declined, fatalities among Latino workers have increased and quoting a BLS press release stating that fatality rates among all workers are declining).
a) Implement a Comprehensive Data Collection Plan for Illnesses, Injuries, and Fatalities Among Foreign-Born Workers

OSHA and its partner agencies must evaluate the sources of existing data and assess whether those sources provide accurate information. For example, the new leadership at OSHA has already announced a new recordkeeping initiative that will examine the logs and records used to track illnesses and injuries with an eye towards possible reforms. OSHA may also look to external sources of data, such as state workers’ compensation records, which may provide greater insight into the number and nature of the accidents that have occurred.

Although the existing data already suggest a significant problem regarding health and safety issues for foreign-born workers, the need for transparency will not be met simply by publishing data that are already available. The BLS and OSHA should develop more specific protocols related to data collection for foreign-born workers. One remarkable deficiency, for example, is the paucity of information regarding workplace illnesses and injuries among this population.

When evaluating data, OSHA must carefully consider the inhibitions and barriers that many foreign-born workers face when reporting illnesses and injuries to any government agency. For example, workers may be hesitant to come forward out of fear of retaliation or due to cultural or linguistic barriers. For these reasons, community-based approaches to data collection, while resource intensive, may provide a more accurate reflection of the experience of these workers. OSHA could expand the scope of its Alliance Program agreements to include data collection among participating workers. Similar efforts could be undertaken through direct partnerships with community organizations that work with immigrant populations or through grants to such organizations.

333. MENDELOFF, supra note 79, at 149.
334. Occupational illnesses, in particular, appear to be underreported by immigrants. See HIDDEN TRAGEDY, supra note 9, at 12 (citing studies that explore barriers that immigrants face in reporting occupational illnesses).
335. See, e.g., Azaroff, Levenstein & Wegman, supra note 82, at 597–98 (comparing data collection systems for workplace injuries and illnesses in Lowell, Massachusetts, and noting that in-home surveys among Lao and Cambodian immigrants reflected a much higher incidence of injuries and illnesses than reflected in state workers’ compensation case records or hospital medical records).
336. See OSHA ALLIANCE PROGRAM, supra note 188.
b) Disseminate Data to Affected Community Members and Their Advocates

As the BLS and OSHA develop more effective mechanisms for gathering data about foreign-born workers and occupational safety and health, the agency must concomitantly formulate a plan to disseminate this information to immigrant communities in an effective manner. OSHA has already developed some outreach materials and public service announcements in Spanish, which are targeted towards the Latino immigrant community. These materials could integrate data trends regarding foreign-born workers and the risks they face more explicitly. This information is helpful to both workers and employers, as it helps to quantify the risks that workers face and may influence the choices that both workers and employers make in the workplace. Access to this data would also help advocates in the community, as it would allow them to target their education and training efforts and would provide empirical support for advocacy and grant-writing purposes. Finally, enhanced transparency in data dissemination would contribute to greater accountability within OSHA itself, by providing visible benchmarks for measuring the agency’s progress in protecting immigrant workers.

2. Collaborative Regulation

Collaborative regulation is another imperative to guide OSHA’s future efforts with respect to immigrant workers. In recommending this principle of governance, I do not suggest that OSHA should adopt a laissez faire approach or leave regulation to the private sector. Rather, this principle calls for a diffusion of regulatory power to other stakeholders who are able to advocate for the interests of workers at risk. By involving a greater variety of stakeholders, this approach will also serve to counter the historical centralization of regulatory power in the hands of OSHA and organized labor.

Many scholars have written about the value of collaborative regulation, or, more broadly, collaborative governance. Advocates of


339. See, e.g., Chris Ansell & Allison Gash, Collaborative Governance in Theory and
this approach emphasize that a centralized, bureaucratized regulatory body will be ineffective in realizing public policy goals. Regulators may instinctively opt for a less effective strategy because it appears to be “safer” or “more controllable” than a collaborative approach. The result, however, is retrenchment into a slow-moving, adversarial regulatory model that is ultimately driven only by the most powerful interests.

Jody Freeman has criticized the ossification of federal administrative agencies and written of the need for collaborative governance within those agencies. Freeman calls for a new approach to regulation, characterized by five features: (1) a “problem-solving orientation,” which requires information sharing and creativity; (2) “participation by interested and affected parties in all stages of the decision-making process”; (3) “provisional solutions,” which will allow agencies to act under conditions of uncertainty; (4) “accountability that transcends traditional public and private roles in governance,” accompanied by questioning of long-standing roles and functions; and (5) a “flexible, engaged agency” that perceives itself as a facilitator in a regulatory process that involves many actors.

OSHA has faced virulent criticism for its bureaucratic delays, lack of engagement on emerging trends related to occupational safety and health, and the politicization of its rulemaking and enforcement processes. Adoption of the principle of collaborative regulation, including some of the features suggested by Freeman, will provide a blueprint, if not a detailed plan, for reforming OSHA.

While rife with possibilities, a collaborative regulatory approach does present some shortcomings that must be considered. First, although this approach welcomes the participation of a wide range of actors, many individuals and organizations lack the experience, training, or resources to meaningfully engage in the regulatory process. Consequently, any reforms that call for enhanced collaboration must contemplate providing support to newly-invited regulatory actors. This will allow for a gradual shift away
from the traditional, tripartite model of regulation involving government, employers, and organized labor. Additionally, although greater flexibility and speed would benefit OSHA, engaging additional actors may actually require more time and resources; moreover, any permanent standards that are developed must necessarily be based on "substantial evidence," a fact-intensive standard that is partly responsible for the slow pace of the existing standard-setting process.\textsuperscript{345}

With these challenges and limitations in mind, some concrete proposals include the following.

\textit{a) Invest in Partnerships with Community-Based Organizations for Enforcement and Training Purposes}

OSHA must work to include a broader range of stakeholders in its regulatory activities. Specifically, OSHA must pursue closer collaborations with existing Committee/Coalition on Occupational Safety and Health groups,\textsuperscript{346} as well as community-based organizations that work with vulnerable immigrant workers. Through formal, effective partnerships, governmental and non-governmental entities can work closely on enforcement and training efforts. Although OSHA has made some progress in this regard with its Alliance Program, these collaborations can be expanded significantly to include OSHA participation in worker centers, informal hiring halls, and community organizations that address a range of issues affecting the immigrant community.

OSHA regulations currently authorize a "representative of employees" to file a complaint and thereby trigger an inspection.\textsuperscript{347} On their face, the regulations do not specify whether community-based organizations (and not just official collective bargaining representatives) may file complaints. Region 2 of OSHA, which includes New York State, has interpreted "representative of employees... to include community groups such as the New York Committee on Occupational Safety and Health."\textsuperscript{348} OSHA has amended its Field Operations Manual, indicating that complaints may be received from "nonprofit groups and

\textsuperscript{345} 29 U.S.C. § 655(f) (2006). See also Mintz, \textit{supra} note 140, at 166–68 (noting that an OSHA standard that has been challenged "will be affirmed only if supported by 'substantial evidence'" and listing some of the significant court decisions on the validity of OSHA standards).

\textsuperscript{346} Twenty-one such organizations exist around the United States and have organized themselves under the umbrella of the National Council for Occupational Safety and Health. National Council for Occupational Safety and Health, About Us, http://www.coshnetwork.org/About%20Us (last visited Aug. 30, 2009).

\textsuperscript{347} 29 C.F.R. § 1903.11 (2007).

\textsuperscript{348} OIG IMMIGRANT FATALITIES REPORT, \textit{supra} note 3, at 16.
OSHA should consider issuing an official Letter of Interpretation at the national level, reflecting the guidance in the Field Operations Manual and authorizing community groups and nonprofit organizations to file complaints on behalf of vulnerable immigrant workers. OSHA should also create a formal mechanism for workers to designate an official representative for occupational safety and health-related matters. Such a structure would particularly benefit workers at nonunion worksites and would help formalize the advocacy role of individuals or organizations that assist immigrant workers.

Community partners, including nonprofit organizations and worker centers, can also be important sites for education and training efforts. Nonunionized workers currently have few formal opportunities to receive training, as participation in OSHA-certified courses typically occurs through unions or larger employers. Foreign-born workers who are new to certain industries and who are working for smaller employers are unlikely to receive comprehensive training on health and safety issues. Community organizations and worker centers are ideal venues to offer training courses to this segment of the immigrant worker population. OSHA should also cultivate partnerships with organizations that do not focus on workplace issues, but nonetheless can serve as gateways for educating immigrants about occupational safety and health issues. Community-based health clinics and organizations that work with small business owners could serve that purpose.

Grant making by OSHA is a necessary complement to a collaborative approach involving community organizations, as grant funds will allow such organizations to develop the infrastructure and programs needed to

349. OSHA'S FIELD OPERATIONS MANUAL, supra note 84, at 9-3.
351. See Linda Rae Murray, Sick and Tired of Being Sick and Tired: Scientific Evidence, Methods, and Research Implications for Racial and Ethnic Disparities in Occupational Health, 93 AM. J. PUB. HEALTH 221, 224 (2003) (urging that information about workplace hazards should be provided in non-workplace forums such as churches, community settings, popular radio, and television programs).
address workplace safety and health issues. During the Carter administration, OSHA implemented an experimental program entitled New Directions. The goal of the program was to "utilize labor unions, trade associations, educational institutions, and nonprofit organizations to provide to employers and employees job safety and health education and training, including assistance in hazard recognition and control, and training in employer and worker rights." New Directions was ultimately succeeded by a similar program, the Susan Harwood Training Grant Program. Additional appropriations for this program in the coming years will be essential for OSHA to collaborate effectively with advocates and other stakeholders in immigrant communities.

b) Create a "Private Enforcement" Provision for OSHA Enforcement

The regulation of environmental hazards offers useful guidance for incorporating the voices of affected individuals in the regulatory process. In the environmental context, Congress has empowered affected individuals to enforce environmental laws through the use of "citizen-suit" provisions. These "private attorneys-general" may sue in federal district court to enforce environmental permits and emissions limitations when the government fails to take action against a private party that is violating the law.

Thomas McGarity and Sidney Shapiro have proposed a similar provision for enforcing OSHA standards, given the agency's limited enforcement resources. Under this proposal, affected individuals would be able to file either before the OSHRC or directly in federal court to enforce occupational safety and health standards. OSHA would be given an opportunity to prosecute the action, and workers would be allowed to seek statutory penalties and injunctive relief. The implementation of such a proposal would signal a major transformation in the regulatory regime. It would enable individuals who are directly affected by OSHA violations to hold both their employers and OSHA accountable while countering any entrenched agency favoritism towards employers. To be

357. Id. at 325.
sure, the proposal also presents some limitations, including the possibility of abuse or inconsistent penalties.\textsuperscript{358} Furthermore, the question of standing to sue would likely arise in such cases.\textsuperscript{359}

c) Facilitate the Participation of Immigrant Workers in the Settlement Process for OSHA Citations and Provide Greater Protections for Workers Who Choose to Report Violations

Under the existing regulations, injured workers have only limited involvement in settlement discussions when an employer appeals an OSHA citation to the OSHRC. Affected employees and their representatives may elect party status and file an objection,\textsuperscript{360} but only related to the amount of time given to an employer to abate a workplace hazard.\textsuperscript{361} Apart from this limited nod to employee involvement, the Secretary of Labor has “the unfettered discretionary authority to withdraw or settle a citation issued to an employer . . . or to settle, mitigate or compromise any assessed penalty.”\textsuperscript{362} Several circuit courts have held that employees cannot challenge the substantive terms of a settlement agreement between OSHA and an employer.\textsuperscript{363}

Providing a more prominent role for workers—especially immigrant workers—in these substantive settlement discussions is consistent with recognition of their humanity and their indispensable role in the workplace. At a minimum, employees or their representatives should be allowed to participate in settlement meetings which lead to agreements between OSHA and employers, if only in an observer role. Another possibility would be to modify existing law and regulations to allow workers to formally object to the terms of a settlement; such an objection could then lead to a secondary review.\textsuperscript{364} Finally, OSHA might consider making greater use of mediation or alternative dispute resolution

\textsuperscript{358} Id. at 327–28.


\textsuperscript{360} 29 C.F.R. § 2200.20(a) (2007).

\textsuperscript{361} § 2200.100(b).

\textsuperscript{362} Donovan v. Occupational Safety & Health Review Comm’n, 713 F.2d 918, 927 (2d Cir. 1983).


\textsuperscript{364} McGARTY & SHAPIRO, supra note 109, at 323–24.
mechanisms, which would allow workers to participate in face-to-face discussions with employers and government representatives.365

Another provision relating to OSHA violations that merits scrutiny is one that prohibits employers from discriminating against any employee for having exercised a right afforded by the OSH Act.366 This provision was included in an effort to create a space for employee participation in the enforcement of OSHA standards. Certain practical and procedural aspects, however, have hampered its effectiveness, particularly as applied to immigrant workers.

First, the provision requires that a complaint regarding a violation of the anti-discrimination provision be filed within thirty days of the incident.367 This requirement is unduly restrictive, particularly for immigrant workers who may be unaware of their rights under these circumstances. A longer period of time would be consistent with other whistleblower statutes.368 A second, more practical concern is the length of time it takes for OSHA to investigate claims that employers have discriminated or fired an employee for exercising OSHA rights. An audit conducted in 1997 by the Office of the Inspector General at the Department of Labor expressed concerns regarding delays in the investigation and litigation of such complaints.369 A subsequent study similarly exposed delays in OSHA’s handling of whistleblower complaints.370 Expedient resolution of these claims is particularly important for immigrant workers, as economic demands or temporary immigration status may preclude their participation in lengthy investigative processes.

d) Harness the Successes of State-Plan States and Better Integrate Federal and State Regulatory Efforts

One component of collaborative regulation is the strategic reliance on state-plan states. As noted above, in the current political climate, reliance on individual states to regulate matters relating to immigrant workers can

365. Legislation recently introduced in Congress supports the position that the voices of affected workers should be strengthened in the settlement process. See Protecting America’s Workers Act, H.R. 2067, 111th Cong. §§ 306–07 (2009).
367. § 660(c)(2).
be risky; growing anti-immigrant sentiment has fueled calls for limiting support and opportunities for these individuals.\textsuperscript{371} In this environment, federal oversight of the work of the state-plan states is critical to ensure the vigorous enforcement of the laws with respect to all categories of workers.

With this concern firmly in mind, OSHA has failed to take advantage of the generally successful records of the state-plan states. Several studies have concluded that state-plan states have lower rates of workplace fatalities than federal OSHA states.\textsuperscript{372} Although data regarding nonfatal injuries are mixed,\textsuperscript{373} there are compelling reasons for continuing to involve states in the regulation of workplace safety and health, including their knowledge of local trends; familiarity with affected workers, businesses, and communities; and, in some instances, the flexibility and political will to adopt more stringent standards.\textsuperscript{374}

Although scholars continue to debate the value of regulatory federalism, one advantage of delegating authority to the state occupational safety and health departments is the spirit of innovation that the state-plan states have brought to the regulatory project.\textsuperscript{375} States have adopted a number of creative approaches, including electronic access to information, industry-specific campaigns and partnerships, plain language standards, financial incentives, awards programs, and much more.\textsuperscript{376} OSHA can systematically monitor the initiatives undertaken by the states as a way to reform its own approach and recommend best practices to other jurisdictions. In this regard, OSHA might enhance the role of the Occupational Safety and Health State Plan Association (OSHSPA), an organization comprised of representative officials from the states with OSHA-approved plans.

\textsuperscript{371} See supra note 297–302 and accompanying text.

\textsuperscript{372} See, e.g., Bradbury, supra note 117, at 223; Morantz, supra note 194, at 201, 207.

\textsuperscript{373} In a recent study, an empirical analysis revealed that state-plan states register higher rates of nonfatal work injuries, as compared with federal OSHA states. Morantz, supra note 194, at 207. This outcome is puzzling, given that state-plan states typically have lower rates of workplace fatalities, as compared with federal OSHA states. One explanation for this discrepancy is the possible underreporting of workplace injuries in federal OSHA states. Id.

\textsuperscript{374} See, e.g., OSHSPA REPORT, supra note 352, at 131–38 (cataloging the unique occupational safety and health standards of various states); Bradbury, supra note 117, at 212 ("[L]ocal regulators may be more attuned to the business environment of a particular state; therefore, local regulation may be more efficient as a result of lower monitoring costs.").

\textsuperscript{375} See generally OSHSPA REPORT, supra note 352 (describing a wide range of occupational safety and health initiatives at the state level relating to emergency preparedness, enforcement, outreach and education, and more).

\textsuperscript{376} OSHSPA REPORT, supra note 352, at 41–42, 133–37 (describing multifaceted approaches in Hawaii, Indiana, and Kentucky focused on the construction industry); Bradbury, supra note 117, at 217.
Another strategy for enhancing coordination between federal and state government would be the establishment of regional centers focused on occupational and environmental health. These centers could be staffed with federal and state occupational safety and health officials, who could collaborate on research, monitoring, and the testing and implementation of outreach and education strategies across shared industries and geographies.

e) Foment Inter- and Intra-Agency Collaborations at the Federal and State Levels

As part of a collaborative regulatory approach, OSHA and its state analogs might consider better coordination between agencies that possess information related to employees, employers, or workplace safety and health hazards. At the federal level, for example, OSHA might expand upon existing efforts at information sharing and coordination with the Employment Standards Administration (ESA) of the Department of Labor. Under an existing Memorandum of Understanding, ESA representatives who encounter safety hazards while investigating violations of other workplace laws may refer the matter to OSHA for investigation. A range of creative agency partnerships is possible beyond basic referrals and information sharing.

The California government has piloted a more integrated collaborative model with the establishment of the Economic and Employment Enforcement Coalition (EEEC), “a multi-agency enforcement program consisting of investigators from the [state] Division of Labor Standards Enforcement, Division of Occupational Safety and Health, Employment Development Department, Contractor’s State License Board, and [the] U.S. Department of Labor.” In creating the EEC, the state reasoned that businesses operating in the underground economy are likely to violate multiple state laws; to effectively monitor

377. Murray, supra note 351, at 224.
378. Occupational Safety & Health Admin., U.S. Dep't of Labor, Directive No. CPL-02-00-092: Memorandum of Understanding Between the Employment Standards Administration and OSHA (Feb. 28, 1991), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=1664&p_table=DIRECTIVES. This type of collaboration is reciprocal, with OSHA forwarding any relevant information to ESA. Id. A similar program has been adopted by Alaska Occupational Safety and Health (AKOSH). AKOSH has developed a construction targeting system, which links worksite inspections to information in payroll records, allowing AKOSH to plan inspections during peak construction activity. OSHSPA REPORT, supra note 352, at 39.
380. OSHSPA REPORT, supra note 352, at 58. The inspectors who comprise the EEEC collect and share information using “standardized forms and protocols.” Id.
such employers, a coordinated approach would be more efficient than multiple contacts by different agencies. Similar efforts could be undertaken among federal agencies, perhaps through an initial pilot project in a particular region.

Another fertile area for collaboration is between state workers’ compensation agencies and state occupational safety and health agencies.\textsuperscript{381} Workers’ compensation records could be used to supplement the agencies’ own data sets.\textsuperscript{382} The records might also suggest injury, illness, or fatality trends among particular employers and industries. In turn, this information may inform the enforcement and rulemaking activity of the occupational safety and health agency.

\textbf{f) Make Better Use of the Existing “Toolbox” of Regulatory Tools}

By making better use of existing regulatory tools and increasing the number of voices in the standard-setting process, OSHA can begin to address specific workplace safety concerns that disproportionately affect immigrant workers.

The most direct route for individuals and organizations to jumpstart a rulemaking process is through a petition to promulgate, modify, or revoke a standard.\textsuperscript{383} As trends relating to workplace safety and health emerge, interested parties can appeal to OSHA to issue a new standard or to strengthen an existing one.\textsuperscript{384} While a petition to promulgate typically

\textsuperscript{381} A similar collaboration is already taking place in New York, where the state Workers’ Compensation Board has partnered with OSHA to jointly develop training materials and share best practices. \textit{See} Press Release, Occupational Safety & Health Admin., U.S. Dep’t of Labor, OSHA Joins with New York State Workers’ Compensation Board to Reduce Injuries and Illnesses in Empire State Workplaces (Jan. 25, 2006), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11865. Based on the information provided by OSHA, it appears that this collaboration is limited to education and training and does not include the strategic use of workers’ compensation data for OSHA enforcement purposes. \textit{Id.}

\textsuperscript{382} Such comparisons have already been made by scholars who wish to highlight the limitations of the BLS’s data. \textit{See}, e.g., Leslie I. Boden & Al Ozonoff, \textit{Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses}, 18 ANNALS EPIDEMIOLOGY 500, 501, 503 (2008) (comparing workers’ compensation data from six states with the BLS’s data and concluding that both data sets show likely underreporting of injuries with greater underreporting in the BLS’s statistics).


\textsuperscript{384} In 2002, for example, the Rhode Island Committee on Occupational Safety and Health, a non-governmental organization, partnered with the Rhode Island Workers’ Rights Board of Jobs with Justice, a union and community coalition, to request that OSHA promulgate a standard relating to motor vehicle and traffic safety. Rhode Island Committee on Occupational Safety and Health, Petition to the U.S. Occupational Safety and Health Administration Requesting a Standard for Motor Vehicle and Traffic Safety (July 17, 2002), available at http://www.defendingscience.org/upload/RICOSH-OSHA
requires some empirical support, immigrant worker advocates are well suited to make direct appeals to OSHA, either independently or in collaboration with organized labor. Moreover, OSHA could facilitate the submission of these standards by developing clear, reasonable procedures for submitting such petitions. A publicly available list of pending petitions would facilitate cooperation and information sharing between interested parties across the country.

Another tool that OSHA can utilize more effectively is negotiated rulemaking, which, as noted above, allows a range of interest groups to develop a consensus standard that is later presented to OSHA for formal approval. As it has done in the past, OSHA can proactively call for the establishment of a negotiated rulemaking committee in light of data trends regarding particular hazards. Although negotiated rulemaking appears on its face to be a welcome alternative to traditional rulemaking, several potential shortcomings must be considered. First, negotiated rulemaking is not necessarily quicker than the standard notice-and-comment process. Moreover, negotiated rulemaking can be costly and time consuming for participants, which may limit the participation of stakeholders from the nonprofit sector. Some scholars have also expressed concern that negotiated rulemaking represents a potentially dangerous delegation of control to the private sector. This concern may weigh in favor of an alternate approach, which would involve the establishment of advisory committees that would seek broad public input but would not be responsible for crafting the text of a final rule.

387. For example, negotiated rulemaking contributed significantly to the drafting of a steel erection standard. The first request for negotiated rulemaking was made in 1990, but the final rule was not issued until 2001. Safety Standards for Steel Erection, 66 Fed. Reg. 5196–97 (Jan. 18, 2001).
388. See Jeffrey S. Lubbers, Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking, 49 S. TEX. L. REV. 987, 998 (2008). A related budgetary concern is the cost to the agency itself. Id. at 997 (“There is no question that convening and conducting a [negotiated rulemaking] involves a greater cost than organizing a notice-and-comment process.”).
390. Section 7 of the OSH Act explicitly authorizes the creation of advisory committees to assist with the development of standards. 29 U.S.C. § 656(b) (2006). Such advisory committees could, for example, address the growing concerns related to workplace violence, or the risks faced by immigrant domestic workers. See supra Section III. The California Occupational Safety and Health Standards Board offers a slightly different
Interpretive guidance is another regulatory tool that OSHA could deploy on behalf of immigrant workers. Currently, OSHA issues interpretations of standards in response to questions posed by employers or other interested parties.\textsuperscript{391} Instead of relying upon inquiries from the private sector, OSHA could conduct a review of the standards that are implicated in fatalities and injuries among immigrant workers by examining incident and investigation reports. Where ambiguities in standards exist, OSHA can issue interpretive guidance in order to provide the strongest level of protection for vulnerable workers.\textsuperscript{392}

3. Antisubordination

The principle of antisubordination has been carefully parsed by scholars of constitutional law, particularly those writing about the Equal Protection Clause. The antisubordination principle rests on a “conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”\textsuperscript{393} Antisubordination theorists envision fundamental changes to societal structures, as opposed to anti-discrimination theories, which call for enshrining formal equality in the law.\textsuperscript{394} Although these concepts are closely related, the antisubordination principle suggests that the law should be structured to “remove the conditions that contribute to the establishment of an underclass in society,” while the traditional anti-discrimination principle merely calls for equal treatment and the uniform application of laws.\textsuperscript{395}

The principle of antisubordination is directly relevant to the experience of immigrant workers in the United States and the hazards that
they continue to face on the job. Immigrant workers are marginalized in the regulatory process not simply because they lack advocates or because they are disparately affected by limitations in the regulatory regime. The historical invisibility and subordination of immigrant workers—especially Latino workers—also contributes to their challenges in the workplace safety context. Indeed, public attention to worker safety issues is greatest when the individuals affected are made visible and are identifiable:

Their spokesmen can testify at hearings, bringing along those already afflicted owing to lax standards or enforcement in the past. They can ask, “What will you do to protect us?” In this situation, the culture’s strictures against putting a money value on life are heavily reinforced. OSHA officials do appear to show less concern for costs when the potential beneficiaries are more easily identifiable.396

Over many decades, American law has been complicit in rendering immigrant labor “invisible” and easily commodified. Throughout much of the twentieth century, U.S. immigration law has been structured to provide a low cost, disposable pool of immigrant labor. The infamously exploitative Bracero Program, under which approximately one million Mexican workers were temporarily admitted into the United States to serve the needs of the agricultural sector, is indicative of the way in which law has tacitly (yet indelibly) framed immigrant labor, particularly Latino immigrant labor, as an expendable and replaceable resource, rather than a group of people bearing rights.397 This commodification of immigrant labor also surfaced several decades before the Bracero Program during the Great Depression, when the U.S. government repatriated what industry believed to be an excess of Mexican immigrant laborers, many of whom had lawfully established permanent residence in the United States.398

Given these historical and legal underpinnings, immigrant laborers are often perceived by employers, the government, and the American public as a temporary resource, and they are used to meet shifting demands of the market.399 Immigrant workers entered the national consciousness with

396. MENDELOFF, supra note 79, at 72–73.
these attributes and have continued to occupy that space, despite efforts to underscore their demographic complexity. This historic categorization of immigrant labor dovetails with the mark of “foreignness” that Latino immigrants, along with Asian immigrants, have carried in the context of a society built around Black-White relations. This set of historical conditions, together with the ongoing subordination and dehumanization of immigrant laborers, has rendered the group vulnerable in the workplace.

Immigrant workers continue to be categorized as expendable labor to the present day. Current debates around immigration reform and efforts to create new categories of “guest worker” visas reinforce the perception of immigrant labor as a commodity to be used on a short-term basis and then discarded. The Latino immigrant worker has emerged as the central protagonist in the immigration reform debate. This is wholly consistent with the presumed “foreignness” ascribed to many categories of immigrants and the general expectation that the sojourn of these workers in the United States will be temporary and will cleanly meet the needs of the market without reciprocal obligations to protect their safety, health, or other rights. When these immigrant workers overstay their employment visas or begin to occupy a broader role in the economy and society, demands for their removal from some sectors have been immediate and fierce. The controversies that have encircled day laborer centers perfectly highlight these interrelated factors, as day laborers are much more visible than other immigrant workers because they seek work in public view.

The data regarding the trends in workplace fatalities and injuries among foreign-born workers, particularly Latino immigrant workers, raise a host of questions about their underpinnings. To be sure, fatality and injury rates, and corresponding enforcement efforts, may fluctuate depending on political considerations and the relative power of OSHA in a given administration. The trend, however, is not simply a reflection of lack of political will or financial resources, but is reflective of a more complex set of drivers, including the multifaceted subordination of foreign-born workers in the United States, both historically and in the context of current debates regarding the role of immigrant workers in the U.S. economy.

In moving forward to address this trend, OSHA must be mindful of this history of subordination and consider steps to “re-center” the


402. See, e.g., Bill Turque, Herndon to Shut Down Center for Day Laborers, Wash. Post, Sept. 6, 2007, at A1 (describing the latest developments in controversy over town council’s decision to shut day laborer center in spite of judicial mandate).
immigrant worker and to begin to address the factors that have contributed to her marginalization. Among the relevant factors are linguistic isolation, concerns about immigration status, and the societal view towards the value of immigrant labor. The following recommendations flow from this approach.

a) Develop a Memorandum of Understanding Between OSHA and the Department of Homeland Security

OSHA should explore a Memorandum of Understanding (MOU) with the Department of Homeland Security (DHS), which specifies that U.S. Customs and Immigration Enforcement (ICE) will refrain from conducting a worksite raid or otherwise engaging in enforcement operations at any worksite that is being investigated by OSHA for possible safety and health violations. The MOU should specify that ICE agents will not use the convening of a workplace safety meeting as a cover for conducting a workplace raid, as occurred at the Seymour Johnson Air Force Base in North Carolina in 2005.

Such an MOU has historical antecedents: in November 1998, the Department of Labor and the INS entered into an MOU intended to coordinate the enforcement activities of the two agencies and to establish procedures for information sharing and mutual training. Notably, the MOU specifies that the two “agencies will develop and implement policies . . . that avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute matter.” Further, it declares that the Department of Labor will not ask workers for their immigration status nor review employers’ I-9 (employment eligibility verification) forms while conducting labor standards investigations based on workers’ complaints alleging violations of their employment rights “so as to avoid discouraging complaints from unauthorized workers who may be victims of labor standards violations by their employer.”


404. Employment Standard Admin., Dep’t of Labor, Memorandum of Understanding (Nov. 23, 1998), available at http://www.dol.gov/esa/whd/whatsnew/mou/nov98mou.htm. Although the Bush Administration never formally withdrew the agreement, its ongoing effect is unclear, particularly given the incorporation of the INS into DHS. Similarly, it is unclear how the Obama administration will interpret the existing MOU.

405. Id.

406. Id.
Although such an agreement would not prevent employers from making retaliatory threats related to immigration status, the agreement would, at a minimum, prevent those threats from being realized, at least in the short term. Moreover, in order for such an agreement to have a positive effect on employee behavior—i.e., an effect that would encourage the reporting of potential occupational safety and health violations—it must be accompanied by clear public statements from agency leaders and be integrated into related training materials targeted at immigrant populations. Such an agreement would also require enhanced communication between DHS and the occupational safety and health agencies for approved state-plan states.

b) Develop a Comprehensive Language Access Plan for OSHA and Adopt Related Changes to Worker Training Protocols

Linguistic competence is a major barrier for OSHA in its inspections and enforcement efforts. OSHA must increase the percentage of its inspectorate that is fluent in Spanish and other languages spoken by immigrant workers.407 Enhanced communication between workers and government occupational safety and health personnel is likely to facilitate the presentation, processing, and resolution of complaints.408 As the workplace continues to diversify and as employers recruit temporary guest workers from across the globe,409 the need for OSHA to adopt a nuanced language access plan is paramount. In crafting such a plan, and in allocating resources, OSHA might look to regional and state data regarding immigrant populations, languages spoken, and immigrant representation in particular industries. Building upon this information, OSHA could establish protocols for tracking language needs at particular worksites. Considerations of language access must also be part of OSHA’s oversight of state-plan states and its review of work by OSHA grantees.

Apart from enforcement and outreach, an agency language access plan

407. This common-sense recommendation was made by the Department of Labor’s Office of the Inspector General (OIG) in its 2003 Report. OIG suggested that OSHA could increase its language proficiency through staff training or by emphasizing language ability in new hires. See OIG IMMIGRANT FATALITIES REPORT, supra note 3, at v. OSHA might adopt the practice of the Virginia Department of Labor and Industry, which lists foreign language ability as a desirable trait on all job announcements. See OSHSPA Report, supra note 352, at 91.

408. Data from the Washington Division of Safety and Health, as reported by the OSHSPA, reveal that safety investigations involving Spanish-speaking workers are less likely to be dismissed, and more likely to settle, when a bilingual investigator is handling the matter. OSHSPA Report, supra note 352, at 127–28.

409. The plight of guest workers from India, for example, has received significant public attention. See, e.g., Julia Preston, Workers on Hunger Strike Say They Were Misled on Visas, N.Y. TIMES, June 7, 2008, at A9.
must also cover training efforts. OSHA regulations require that workers be trained to carry out their job duties in a safe manner. In a recent report, OSHA estimated that “about 25% of the fatalities the agency investigates are in some way related to language or cultural barriers.”

The traditional training curricula, however, need to be adapted to the needs of the immigrant workforce. First, language ability as well as literacy must be considered when developing training materials. Although OSHA has translated much of its website, along with many of its outreach materials, into Spanish, the agency must take a more thoughtful approach to the issue of limited English proficiency. In its 2003 report, the Office of the Inspector General at the Department of Labor recommended that OSHA “[i]ssue an Interpretation Letter . . . requir[ing] employers to provide training in a manner that employees understand taking into account different languages and literacy levels.” Safety training curricula should also be prepared in a culturally appropriate manner and should be tailored to the unique vulnerabilities and risk factors of different segments of the immigrant workforce.

By way of example, Nevada has implemented a more targeted, rigorous approach for training workers with limited or no English proficiency. Nevada's OSHA requires that written materials and trainings by employers be made available “in a language and format” understandable to each employee. Inspectors look beyond the mere fact of translation or interpretation and assess how employers are evaluating their workers’ actual understanding of the materials. Such an approach, if adopted at the federal level, could constitute a small part of a larger language access plan.

410. OSHA Programs to Help Hispanic Workers, supra note 34.
411. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at iv.
414. As noted above, existing research suggests that younger workers and male workers may be particularly susceptible to workplace hazards. See supra Section I. Immigrant women workers may also face a high risk of injury, depending on the industries in which they are employed. Additional research would help identify trends which, in turn, can be addressed through training curricula.
415. OSHSPA Report, supra note 352, at 86.
416. Id.
c) Increase Penalties for Violations and Discretion in Assessing Fines

The project of restoring the importance of workplace safety and health, particularly as it applies to immigrant workers, requires a renewed emphasis on the value of immigrant lives and the cost of failing to protect them. In this vein, increased maximum penalties are essential in order for the sanctions to have a deterrent effect. OSHA might also consider increasing the “criminal charges under § 17(e) of the OSH Act from a misdemeanor to a felony, and [expanding] § 17(e) to cover employers whose willful violations result in serious physical harm.”

Several of the state-plan states have already moved in the direction of imposing more stringent penalties for a range of violations. Eight of the state-plan states impose higher maximum prison sentences than the federal government for willful violations that result in death. In California, for example, an employer may be prosecuted for committing a felony and can face two to three years in prison. California law also allows for the prosecution of individuals who are in management positions and does not allow these individuals to hide behind the corporate veil for purposes of liability. Similarly, Virginia has adopted a manslaughter policy under which criminal manslaughter prosecutions are recommended when “flagrant violations” of state occupational safety and health laws result in a worker fatality.

The initial decisions relating to penalties rest with OSHA officers who follow guidelines contained in OSHA’s Field Operations Manual. One possible modification to the manual, which would address the specific history of subordination of immigrant workers, would allow OSHA officers to consider an employer’s deliberate exploitation of a worker’s immigration status when deciding on the amount of the penalty. OSHA guidelines currently provide for assessment of penalties based on the “gravity of the violation,” the “size of the employer’s business,” whether the employer has acted in “good faith,” and the “employer’s history of previous violations.” The “good faith” factor currently allows for a penalty reduction when an employer has, inter alia, addressed the unique needs of limited English proficient and non-English-speaking workers.

417. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at v. Increased penalties have also been proposed in legislation currently pending in Congress. See Protecting America’s Workers Act, H.R. 2067, 111th Cong. §§ 310–11 (2009).
418. These states are Arizona, California, Iowa, Michigan, Puerto Rico, Tennessee, Utah, and Vermont. OIG IMMIGRANT FATALITIES REPORT, supra note 3, at 20.
419. Id.
420. Id.
421. OSHSPA Report, supra note 352, at 66.
422. OSHA’S FIELD OPERATIONS MANUAL, supra note 84, at 6-3.
423. Id. at 6-12.
This factor could be expanded to allow for a penalty *increase* when the workplace safety and health needs of such individuals are deliberately disregarded because of their immigration status.

**CONCLUSION**

The workplace experiences of immigrants in the United States have garnered significant attention, and justifiably so. A range of issues, from employment discrimination to wage and hour violations to human trafficking, have captured the attention of activists and scholars. With this article, I have sought to raise the profile of an equally important workplace concern for immigrants: the dangerous hazards that many immigrant workers encounter on a daily basis at their places of work. As documented herein, all too many immigrants have succumbed to these hazards, resulting in countless injuries and a disproportionate number of workplace fatalities.

The statistics relating to injuries and fatalities are, on one level, unsurprising. Immigrant workers in the United States have historically faced abuse and mistreatment on the job and have long been exposed to unsafe working conditions. Cultural, linguistic, and class differences, often reinforced by economic forces and concerns about immigration status, have curtailed the power of immigrants in the workplace. The spike in the data, however, is not attributable solely to long-standing social and economic conditions. The role of OSHA, as the agency responsible for regulating safety in the workplace, deserves significant scrutiny.

As laid out above, the history, structure, and present-day operations of OSHA have obscured the workplace safety and health concerns of immigrants, thereby contributing to conditions that underlie the fatality and injury trends among immigrant workers. To be sure, OSHA has acknowledged these trends and has made efforts to address them. The remedies adopted thus far by the agency, however, will not correct the deeper structural deficiencies in the regulatory regime that disadvantage immigrant workers. OSHA must embrace a new vision of workplace regulation that acknowledges the growing ranks of immigrant workers and the agency's failures with respect to those workers. Greater transparency is needed to shed light on the nature of the problem and to monitor OSHA's response.

Similarly, a cooperative approach to regulation will help to diffuse power to community-based organizations and to the workers themselves so that both may be active participants in the regulatory process. While many unions are genuinely concerned about the plight of immigrant workers, OSHA's heavy reliance on unions for worker advocacy, combined with unions' historical difficulties in organizing immigrant workers, leave many
immigrant workers without an advocate on safety and health issues. Opening up the sphere of advocacy to other entities such as workers’ rights centers, nonprofit organizations, and the workers themselves will allow for the needs of immigrant workers to be heard and addressed by OSHA.

Finally, OSHA must take affirmative steps to correct for the various ways in which immigrant workers, by operation of law or due to the absence of legal protection, have been subordinated in the workplace and left even more vulnerable to safety and health hazards. Linguistic isolation and exploitation of immigration status concerns are two elements of this mistreatment, which can begin to be reversed through the adoption of a regulatory imperative of antisubordination. Enhanced penalties for OSHA violations will also serve to counter the commodification of immigrant labor and the historical devaluing of immigrant lives.

These principles of transparency, collaborative regulation, and antisubordination can serve as guideposts for OSHA, or for other agencies that have failed to adequately address the needs and concerns of a disadvantaged constituency. This type of fundamental reexamination of the regulatory approach is necessary in order to provide a basic level of protection and oversight for immigrant workers while strengthening their voices in the regulatory regime.