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OSHA — WHAT'S NEW AT A "TWENTY-SOMETHING" AGENCY: WORKPLACE ENVIRONMENTAL HAZARDS[©]

by JoAnne Levy¹

In recent years, predictions have been rampant regarding a resurgence of occupational safety and health issues and a strengthening of the Occupational Safety and Health Administration (OSHA). Since 1991, which represented the twentieth anniversary of the Occupational Safety and Health Act (OSH Act),² these predictions have certainly proven to be accurate. OSH Act reform has been hotly contested in Congress; new regulations have been issued by OSHA; and older regulations have been further interpreted by OSHA and the courts.

Furthermore, the overlap between matters within the jurisdictions of OSHA and the Environmental Protection Agency (EPA) continues to grow. Occasionally, in areas such as indoor air pollution, the proper allocation of jurisdiction between OSHA and EPA has become part of the substantive debate in the area. This article is designed to provide an overview of some of today's "hot topics" in the area of occupational safety and health law.

I. OSHA ADMINISTRATION

For some time now, OSHA has been without a head, with David Zeigler serving as the Acting OSHA Administrator. Effective April 1, 1993, however, the U.S. Department of Labor hired Joe Dear, the former director of the Washington Department of Labor and Industries, as a consultant to OSHA.³ On July 1, Dear was formally nominated for the position of administrator of OSHA.⁴ Dear's managerial experience and working knowledge of OSHA requirements (Washington being one of only a few states with an approved state OSHA plan) supported his nomination.⁵ On November 10, Dear's nomination was approved by the full Senate.⁶

In the meantime, senior OSHA staff members have been preparing a briefing paper for Labor Secretary Robert Reich on OSHA operations. The briefing paper, which is still in draft form, is designed both to raise Reich's awareness of the challenges facing OSHA and to offer suggestions for improvements.

II. OSH ACT REFORM

In August 1992, the Comprehensive OSH Reform Act⁷ was introduced simultaneously in the House and Senate.⁸ Inspired in part by the tragic fire in Hamlet, North Carolina, in September 1991, this legislation was introduced at a time designed to coincide with the twentieth anniversary of the original OSH Act. Described as organized labor's "wish list," the legislation faced vehement opposition from both the Bush administration and the business community.⁹ Eventually, in both the House and Senate, the legislation failed to reach the floor after committee approval.¹⁰

OSH Act reform, however, remained a controversial issue — and a top priority. A January 7, 1993, General Accounting Office report entitled *Labor Issues* identified legislative reform of the OSHA Act as a top priority in 1993.¹¹

On March 10, 1993, a new version of the Comprehensive OSH Reform Act¹² was introduced by Rep. Ford (D-Mich.), the chair of the House Education and Labor Committee.¹³ In general, the legislation contains the following provisions:

- All employers would have to develop and implement workplace safety and health programs.¹⁴
- Employers with eleven or more employees would have to establish joint labor-management safety and health committees.¹⁵
- Minimum \$1000 civil penalties would be established for serious safety and health violations.¹⁶
- Criminal sanctions under the OSH Act would be stiffened.¹⁷
- The scope of the OSH Act would be broadened to include approximately 7.3

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² 29 U.S.C. §§ 651-678 (1988).

³ OSHA, *Act Reform, Use of Resources Cited Among Challenges for Next OSHA Head*, 69 DER (BNA) D-10 (Apr. 13, 1993).

⁴ Senate Labor Committee Approves Dear's Nomination to Head OSHA, 212 D.L.R. (BNA) D-8 (Nov. 4, 1993).

⁵ *Id.*

⁶ *Id.*

⁷ H.R. 3160, 103d Cong., 1st Sess. (1993); S. 1622, 103d Cong., 1st Sess. (1993).

⁸ The bill was introduced by Reps. Ford (D-Mich.) and Gaydos (D-Pa.) and by Sens. Kennedy (D-Mass.) and Metzenbaum (D-Ohio).

⁹ Hill Briefs, Nat'l Journal's Cong. Daily (Nat'l J. Inc.) April 19, 1993; Carolyn Lochhead, *Clinton Might Rev Up Regulatory Agencies, Experts Expect New President to Seek Expanded Activism*, S.F. CHRON., November 30, 1992, at A5.

¹⁰ See Clinton Should Convene Work Group to Draft New OSHA Legislation, Kinney Tells NAM Meeting, 232 D.L.R. (BNA) A-8 (Dec. 2, 1992).

¹¹ GAO Examines Issues Facing DOL in 'Transition Series' Report, 5 D.L.R. (BNA) A-13 (Jan. 8, 1993).

¹² H.R. 1280, 103d Cong., 1st Sess. (1993).

¹³ Hearings on H.R. 1280 were first held on April 28, 1993, the date recognized by organized labor as the Workers' Memorial Day.

¹⁴ H.R. 1280, 103d Cong., 1st Sess. § 101 (1993).

¹⁵ § 201.

¹⁶ § 516.

¹⁷ § 512.

million state and local government employees.¹⁸

- Specific provisions addressing safety and health issues in the construction industry are included.¹⁹

- The Supreme Court's ruling in *Gade v. National Solid Waste Management Ass'n*,²⁰ on states' safety and health licensing abilities would be reversed.²¹

- The Eleventh Circuit's ruling in *AFL-CIO v. OSHA*,²² on air contaminant exposure limits would effectively be reversed.²³

- A revolving fund for consultation and technical assistance programs would be established with expectations that it would raise approximately \$40 million for OSHA.²⁴

On August 6, House Republicans introduced alternative legislation, known as the Occupational Safety and Health Reform Act.²⁵ In contrast to the Democratic-sponsored bill, H.R. 2937 emphasizes OSHA's role as a technical assistant to businesses rather than as an enforcement entity. Specifically, H.R. 2937 would, among other things:

- Expand OSHA's consultation and training program for employers;²⁶

- Provide incentives and rewards (mostly in the form of exemptions from inspections) for reductions in workplace hazards;²⁷

- Provide for flexibility in OSHA's decisions regarding health and safety standards;²⁸

- Extend coverage of the OSH Act to federal employees²⁹ and delay coverage of state and local employees pending a study of the costs associated with such coverage;³⁰

- Reduce maximum penalties under the OSH Act from \$70,000 to \$7000 but retain OSHA's egregious case policy;³¹ and

- Require OSHA to promulgate employee drug and alcohol testing standards.³²

Supporters of the OSH Act reform legislation describe it as based upon the concepts of employee empowerment and a workplace approach to safety and health.³³ Organized labor, in particular, has strongly supported the bills, especially the joint safety and health committees, which is interesting because labor groups historically have insisted on the necessity for *worker-only* committees.³⁴ Management groups generally oppose the legislation, especially the *mandatory* joint committees, arguing that employers need more flexibility in handling safety and health

issues in the workplace.³⁵

The Clinton administration has not specifically endorsed the OSH Reform Act legislation. Labor Secretary Reich, whose appointment was generally favored by organized labor, has announced the administration's general support of legislative efforts to improve worker safety and health. Reich also announced the administration's plans to establish a task force to review the proposed legislation and to develop recommendations.³⁶

Reaction has been guarded from former OSHA officials. Three former OSHA heads — Thorne Auchter, John Pendergrass and Gerard Scannell — have urged that OSH Act reform be dealt with at an administrative, rather than legislative, level.³⁷ Nonetheless, they predict that OSH Act reform legislation likely will pass, but probably not until 1994.

III. REGULATORY ACTIVITIES

A) Bloodborne Pathogens

On December 6, 1991, OSHA promulgated its long-awaited regulation on bloodborne pathogens.³⁸ The standard is intended to protect employees who have

18 § 301. Separate legislation, the Federal and Postal Service Employees OSH Act of 1993 (H.R. 115, 103d Cong., 1st Sess. (1993)), was introduced on January 6, 1993, by Rep. Clay (D-Mo.) and would establish occupational safety and health provisions for approximately 3 million federal employees. Hearings were held on H.R. 115 on April 29, 1993.

19 H.R. 1280, 103d Cong., 1st Sess. §§ 1201 - 1212 (1993). Many of these provisions had appeared previously in separate legislative proposals, including the Construction Safety, Health and Education Act.

20 112 S. Ct. 2374 (1992).

21 H.R. 1280, 103d Cong., 1st Sess. § 1007 (1993).

22 965 F.2d 962 (11th Cir. 1992).

23 H.R. 1280, 103d Cong., 1st Sess. § 409 (1993).

24 § 701.

25 H.R. 2937, 103d Cong., 1st Sess. (1993). The bill is sponsored by Rep. Goodling (R-Pa.) and Rep. Fawell (R-Ill.) and is pending before the House Education and Labor Committee. In the Senate, Sen. Kennedy (D-Mass.), who chairs the Labor and Human Resources Committee, and Sen. Metzenbaum (D-Ohio), who chairs the Labor and Human Resources Committee's Subcommittee on Labor, introduced the Senate version of H.R. 1280, known as S. 575, 103d Cong., 1st Sess. (1993) on March 11, 1993. Most of the provisions in H.R. 1280 are included in Senate Bill 575, which is currently pending before the Senate Labor and Human Resources Committee.

26 H.R. 2937, 103d Cong., 1st Sess. § 6(a)(2)(A) (1993).

27 § 7.

28 § 3(a)(E).

29 § 2(a)1.

30 § 11(d).

31 § 12(a).

32 § 15.

33 Clinton Administration's Mandate for Change Likely to Mean New Approaches to Old Problems, 22 O.S.H. Rep. (BNA) 1417 (Jan. 13, 1993); Highlights of Current Report, 22 O.S.H. Rep. (BNA) 113 (June 17, 1992).

34 See Few Complaints Filed Over Joint Committees, 143 Lab. Rel. Rep. (BNA) D-29 (Aug. 16, 1993); Cf. Oregon Law Resulted in Fewer Accidents, Elevated Presence of State OSHA, Official Says, 23 O.S.H. Rep. (BNA) 248 (Aug. 4, 1993).

35 House Panel to Mark Up Bill May 21; Changes Eyed for Committees, Other Areas, 21 O.S.H. Rep. (BNA) 1669 (May 20, 1992).

36 A position paper on OSHA reform is due from the task force to Reich this fall. Labor Department Panel to Send Report on OSH Act Reform to Reich in September, 158 D.L.R. (BNA) D-11 (Aug. 18, 1993).

37 Former OSHA Administrators Argue Against Legislative Changes, 95 D.L.R. (BNA) D-9 (May 19, 1993).

38 29 C.F.R. § 1910.1030 (1993).

occupational exposure to bloodborne pathogens, such as the human immunodeficiency virus (HIV) and the hepatitis B virus (HBV). The standard, which became effective July 6, 1992, affects approximately 5.6 million workers and has generated concern from both employees and employers as to which workers are covered and what employers need to do to comply with the rule.

All employees who are exposed to blood and potentially infectious materials (such as saliva, amniotic fluid, human tissues, etc.) are covered by the standard.³⁹ Employers with covered employees had to establish Exposure Control Plans by May 5, 1992.⁴⁰ These Exposure Control Plans must include an exposure determination, an explanation of how compliance with the OSHA regulation will be achieved, and procedures for investigating exposures.⁴¹

The regulation also requires use of "universal precautions" (treatment of all blood and other potentially infectious materials as contaminated).⁴² Engineering and work practice controls must also be used to eliminate or at least to minimize occupational exposures.⁴³ If the occupational exposure cannot be eliminated, then personal protective equipment (gloves and masks, etc.) must be provided at no cost to the employee.⁴⁴ As of July 6, 1992, a hepatitis B vaccination must also be made available,⁴⁵ at no cost, to covered employees.⁴⁶

General hygiene and labeling and disposal

procedures are also required in the bloodborne pathogens rule. Employee information and training was required as of June 4, 1992, and at least annually thereafter.⁴⁷ Also, beginning this past June, training and medical records must be maintained.⁴⁸ Training records must be kept for three years from the date of training while medical records must be kept, in a confidential manner, for 30 years after the employee's term of employment ends.⁴⁹

In March 1992, OSHA issued an instruction on uniform inspection procedures for the bloodborne pathogens rule.⁵⁰ Some observers have predicted that the rule and its 71-page instruction will result in much enforcement, especially in the health care industry.⁵¹ Currently, OSHA conducts about 350 inspections yearly at sites where employees are exposed to infectious materials.⁵²

Since issuance of the final bloodborne pathogens rule, various groups have challenged its implementation. The American Dental Association (ADA) and the Home Health Services and Staffing Association, Inc. (HHSSA), for example, sought a stay of the rule.⁵³ The ADA argued that the rule is invalid because in determining the feasibility of the standard, OSHA did not take into account the effect on sufficient and affordable dental care to the public. HHSSA argued that the rule was vague as to workplaces where the health care employer does

not control the site, such as with in-home services. On January 28, 1993, the Seventh Circuit Court of Appeals generally upheld the rule but acknowledged that the rule is not necessarily a good standard.⁵⁴ In particular, the Seventh Circuit vacated the rule as it applies to sites not controlled by the employer.⁵⁵

In late July 1992, the House Appropriations Committee directed OSHA to reexamine the rule to determine whether changes are necessary in the provisions affecting dentistry.⁵⁶ OSHA is still in the process of that reexamination.

On a related note, organized labor has indicated an intent to focus on the issue of tuberculosis (TB) among health care workers.⁵⁷ The Service Employees International Union (SEIU) petitioned OSHA to issue a standard on ventilation systems, isolation rooms, screening procedures for TB patients, and surveillance programs for health care workers at risk for exposure.⁵⁸

In August, the Labor Coalition to Fight TB in the Workplace, representing over nine million workers, petitioned Labor Secretary Robert Reich to issue an emergency temporary standard (ETS) on TB, to initiate rulemaking, and to publish enforcement guidelines.⁵⁹ On October 8, Reich indicated that no ETS would be issued, but an enforcement memorandum has been issued to OSHA regional offices and a TB task force established.⁶⁰ The enforcement memorandum

39 § 1910.1030(a).

40 § 1910.1030(c)(1).

41 § 1910.1030(c)(1)(iii).

42 § 1910.1030(d).

43 § 1910.1030(c)(2).

44 §§ 1910.1030(d)(2)(i), 1910.1030(c)(3)(i).

45 § 1910.1030(f).

46 In a July 1, 1992, memorandum to regional administrators, OSHA said that first aid providers whose primary job is not first aid will not have to be offered a pre-exposure hepatitis B vaccination.

47 § 1910.1030(g)(2).

48 § 1910.1030(h).

49 *Id.*

50 OSHA Instruction CPL 2-2.44C (1992); see *OSHA Instruction Establishes Policies to Ensure Uniform Inspection Procedures*, 30 Gov't Empl. Rel. Rep. (BNA) 339 (March 9, 1992).

51 *Standard on Bloodborne Pathogens Issued, Unions Urge 'Strong Enforcement' of Rule*, 21 O.S.H. Rep. (BNA) 875 (Dec. 11, 1991).

52 *Highlights of Current Report*, 21 O.S.H. Rep. (BNA) 1335 (March 4, 1992); *NIOSH Evaluation of Indianapolis Hospital Finds Maintenance Workers Overexposed to ETO*, 150 D.L.R. (BNA) A-16 (Aug. 6, 1993).

53 *American Dental Ass'n v. Lynn Martin, Secretary of Labor*, 984 F.2d 823, 824 (7th Cir. 1993), cert. denied, No. 93-7 (Oct. 4, 1993).

54 *Id.* at 831.

55 *Id.* at 830.

56 138 CONG. REC. H 10,583, 10,586, 102d Cong., 2d Sess. (1992).

57 *TB Poses Danger to Health Care Workers*, 142 Lab. Rel. Rep. (BNA) D-27 (Feb. 8, 1993).

58 *Labor Union Coalition Petitions OSHA to Issue Standard on Tuberculosis*, 164 D.L.R. (BNA) D-5 (Aug. 26, 1993).

59 *OSHA Non-committal in Response to Union Petition for TB Standard*, 23 O.S.H. Rep. (BNA) 612 (Oct. 20, 1993).

60 *Id.*; *TB Enforcement Policy Laid Out in Memo; Task Force Formed at OSHA's National Office*, 23 O.S.H. Rep. (BNA) 613 (Oct. 20, 1993).

details use of both the OSH Act's general duty clause and OSHA regulations on respiratory protection to cite employers in five settings: health care, correctional institutions, homeless shelters, long-term elderly care facilities, and drug treatment centers.⁶¹

On October 12, the Center for Disease Control published draft guidelines on the protection of health care workers from TB.⁶² Comments are due December 13. The guidelines describe administrative measures, engineering controls, and personal respiratory protective equipment.⁶³

In Congress on May 12, 1993, Rep. Schumer (D-N.Y.) introduced the Tuberculosis Prevention and Control Amendments of 1993.⁶⁴ This legislation would authorize \$380 million for TB programs under the Centers for Disease Control.⁶⁵ An additional \$250 million would be authorized to improve hospitals and health care centers. The legislation is currently pending before the House Energy and Commerce Committee.

B) Cumulative Trauma Disorders

Business and industry are currently seeing a growth of cumulative trauma disorders (CTDs) — injuries caused by repetitive motion.⁶⁶ According to the Bureau of Labor Statistics, CTDs accounted for 52% of all occupational illnesses in 1989.⁶⁷ The Bureau of Labor Statistics reports that since 1984, the number of CTDs have more than tripled.⁶⁸ Of these disorders, carpal tunnel syndrome has attracted the most attention,

although back injuries are still the most frequent of the CTDs.⁶⁹

In an attempt to reduce CTDs in the workplace, OSHA sent a draft notice to ergonomics experts in June 1991, seeking their input before OSHA issued an advance notice of proposed rulemaking for a standard to prevent such disorders in general industry. The advance notice was issued in August 1992.⁷⁰ The advance notice will allow OSHA to gather information from industry on what is the state of the art in ergonomics,⁷¹ before it develops a proposed rule on CTDs.

In April 1993, OSHA also began a nationwide survey of employers regarding their ergonomic programs. As of July, approximately 1500 companies had responded to the survey.⁷² A report on the survey results is due out by year-end.

Based on ergonomic guidelines issued by OSHA for the red meat industry in August 1990, a good ergonomic program will likely include four components: work site analysis, hazard prevention through engineering and administrative controls, medical monitoring, and training and education.⁷³

On July 1, 1991, an industry consulting group sent a document to OSHA which outlined a recommended standard for controlling CTDs.⁷⁴ The recommended standard calls for identifying, evaluating and managing CTDs. Under the recommendations, employers should examine their illness and injury records, workers' compensation

records and employee complaints to determine if their employees are suffering from a higher rate of CTDs than other populations.⁷⁵ If so, the employer should develop a written program, which includes management's commitment and employee involvement in assessing job hazards, training and informing employees, and instituting and implementing a medical management plan.⁷⁶

Other comments received by OSHA focused on the interplay of a CTD standard with the Americans with Disabilities Act and workers' compensation laws. In the meantime, voluntary guidelines are also being developed by ergonomics groups formed by other industries, such as food distribution, nursing homes and postal workers, in cooperation with OSHA.⁷⁷ The American National Standards Institute (ANSI) is also developing a voluntary standard on reducing CTDs in the workplace.⁷⁸

On April 20, 1992, then-Labor Secretary Lynn Martin denied a petition from 31 unions led by the United Food and Commercial Workers calling for OSHA to issue an emergency temporary standard (ETS) on ergonomic hazards.⁷⁹ Martin cited insufficient definitive data indicating a grave enough danger to warrant an ETS.⁸⁰ Nevertheless, preventing CTDs likely will remain an OSHA priority for some time.

Because the rulemaking process is so slow, OSHA had been using the OSH Act's "general duty" clause to reach employers who expose their workers to ergonomic

61 *Id.*

62 58 Fed. Reg. 52,810 (1993).

63 *Id.*; see also *CDC Seeks Comments on Draft Guidelines for Protecting Healthcare Workers from TB*, 23 O.S.H. Rep. (BNA) 532 (Oct. 13, 1993).

64 H.R. 2110, 103d Cong., 1st Sess. (1993).

65 *Id.*

66 *But see Occupational Injury and Illness Rate Declines*, 141 Lab. Rel. Rep. (BNA) D-28 (Nov. 30, 1992).

67 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL INJURIES AND ILLNESSES IN THE UNITED STATES BY INDUSTRY, 1989, BULLETIN No. 2379 (1991), cited in 57 Fed. Reg. 34,192 (1992).

68 *Id.*

69 B. Webster and S. Snook, *The Cost of Compensable Low Back Pain*, 32 J. OF OCCUP'L MED. 13 (1990), cited in 57 Fed. Reg. 34,192 (1992).

70 57 Fed. Reg. 34,192 (1992). No dates have yet been established for issuance of proposed or final rules.

71 "Ergonomics" is defined as the biotechnological study of body movements made to perform work tasks.

72 OSHA Ergonomics Survey 'On Track', 132 D.L.R. (BNA) D-25 (July 13, 1993).

73 OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, SAFETY AND HEALTH PROGRAM MANAGEMENT GUIDELINES, 54 Fed. Reg. 3904 (1989), cited in 57 Fed. Reg. 34,192 (1992); DOL Releases Ergonomic Guides for Red Meat Industry, 170 D.L.R. (BNA) A-A (Aug. 31, 1990).

74 Employers Advised to Adopt Team Approach in Cutting Cumulative Trauma Disorders, 196 D.L.R. (BNA) D-23 (October 13, 1993).

75 *Id.*

76 *Id.*

77 See e.g., *Union Blasts OSHA for not Seeking Data on Effectiveness of Ergonomics Program*, 151 D.L.R. (BNA) A-4 (Aug. 6, 1991).

78 ANSI Committee No. Z365.

79 Letter from Lynn Martin, Secretary, U.S. Dep't of Labor, to William Wynn, International President, United Food and Commercial Workers Union, AFL-CIO & CLC (April 19, 1992), cited in 57 Fed. Reg. 34,192 (1992).

80 *Id.*

hazards.⁸¹ On March 26, 1993, however, an administrative law judge (ALJ) ruled that OSHA cannot use the general duty clause to force abatement of repetitive stress hazards.⁸² In June, OSHA announced that despite the decision, it would continue its policies and procedures with respect to ergonomic hazards (including citations under the general duty clause).⁸³ In September, in response to Labor Secretary Reich's petition, the OSH Review Commission agreed to review the ALJ's decision.⁸⁴

In fact, OSHA recently announced several large settlements involving ergonomic hazards. Both Crane & Co., Inc. and ConAgra Poultry Co. agreed to corporate-wide settlements, each involving approximately \$500,000. Crane, a paper manufacturer, has agreed to a five-year program to reduce or eliminate ergonomic hazards at eleven of its facilities nation-wide, which will affect 1200 workers.⁸⁵ In July 1990, Crane was charged with 52 willful OSHA Act violations and faced proposed fines totaling \$156,400. In exchange for OSHA's dropping the "willful" characterization of the violations, Crane will pay a \$125,120 fine and begin an ergonomics program.⁸⁶

ConAgra was cited in June 1989 with 250 safety and health violations, facing total proposed penalties of \$1 million. The settlement requires ConAgra to pay a \$425,000 penalty and initiate a four-year ergonomics program at 21 plants, involving about 16,000 employees.⁸⁷

Both companies will hire consultants to perform ergonomic analyses and to recommend hazard abatement methods. Training and medical management must be provided to employees, and strict recordkeeping and reporting requirements also apply.⁸⁸

At the state level, California's Division of Occupational Safety and Health is circulating a draft ergonomic standard which would require all California employers to provide training to employees on CTD risks.⁸⁹ The standard would also require employers to implement administrative and engineering controls to eliminate or reduce risks in a timely fashion according to the severity of the hazard.⁹⁰

C) Video Display Terminals

Video display terminals (VDTs) pose two types of hazard concerns: health hazards and ergonomics hazards. Several studies regarding VDT use during pregnancy have culminated in inconclusive results.⁹¹ A recent study performed by the California Department of Health Services indicated no significant connection between VDT use during pregnancy and miscarriage, low birth weight or premature delivery.⁹² The study did reveal an elevated risk for intrauterine growth retardation for heavy (more than 20 hours per week) VDT use.⁹³ A study published in August 1991 in the American Industrial Hygiene Association Journal, ("Hazard Assessment Study") found no evidence of worker exposure to electric and magnetic

fields significantly above ambient levels.⁹⁴ This study examined 1,166 workers in clerical positions at a company in Canada.⁹⁵ More study is necessary before OSHA will act upon the health risks allegedly posed by VDTs.

Many studies, including the *Hazard Assessment Study*, however, have shown a clear correlation between VDT use and CTDs or other ergonomic discomforts.⁹⁶ The *Hazard Assessment Study* indicated VDT users had a "significantly higher incidence of excessive discomfort" than non-users for eye-strain, blurred vision and neck/shoulder aches.⁹⁷ These discomforts were linked to the time spent looking at the VDT, to pressure to meet deadlines, and to repetitive work. As an ergonomic hazard, VDT use likely will be addressed by OSHA in its general industry ergonomic standards presently being developed.

On April 2, 1993, Rep. Byrne (D-Va.) introduced the Electromagnetic Labeling Act of 1993.⁹⁸ The legislation would require manufacturers to provide information on the strength of electromagnetic fields emitted by products such as VDTs. Although the bill is described primarily as a consumer safety measure, it would also protect workers. The bill is currently pending before the House Energy and Commerce Committee.

Some states and municipalities have developed legislation on VDT use.⁹⁹ The most controversial ordinance was San Francisco's VDT ordinance, which required work breaks

81 See David J. Kolesar, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079 (1992).

82 *Secretary of Labor v. Pepperidge Farm Inc.*, 22 O.S.H. Rep. (BNA) 1897 (1993).

83 *Id.*; *Ergonomics*, 175 D.L.R. (BNA) D-2 (Sept. 13, 1993).

84 *Commission to Review Pepperidge Farm Case; Use of General Duty Clause to be Considered*, 183 D.L.R. D-8 (BNA) (Sept. 23, 1993).

85 *Crane & Co. Agrees to Spend \$500,000 Annually for Five Years on Program to Eliminate Hazards*, 18 D.L.R. (BNA) A-4 (Jan. 28, 1992).

86 *Id.*

87 *ConAgra to Implement Ergonomics Program, Pay \$425,000 Under OSHA Settlement*, 21 D.L.R. (BNA) A-1 (Jan. 31, 1992).

88 *Id.*

89 *California Safety and Health Agency Proposes Ergonomics Training for all Workers*, 109 D.L.R. (BNA) A-17 (June 5, 1992).

90 *Id.*

91 Doug Chandler, *Studies Provide Inconclusive Findings about Dangers of Monitor Emissions*, PC WEEK, July 8, 1991.

92 Kaiser Permanente Medical Care Program, *The Risk of Miscarriage and Birth Defects Among Women Who Use Video Display Terminals During Pregnancy*, 18 AM. J. INDUS. MED. No. 6 (1988), cited in *Kaiser Permanente Study Links Use of VDTs with Higher Miscarriage Rate*, 26 Gov't Empl. Rel. Rep. (BNA) 876 (June 13, 1988).

93 *Id.*

94 M.L. Walsh, *Hazard Assessment of Video Display Units*, 52 AM. INDUS. HYGIENE ASS'N J. (1991), cited in *VDT Study Finds No Excess Radiation Exposure, But Shows 'Substantial' Ergonomic Discomfort*, 170 D.L.R. (BNA) A-4 (Sept. 3, 1991).

95 *Id.*

96 See Kaiser Permanente Medical Care Program, note 66, *supra*; *Id.*

97 *Id.*

98 H.R. 1665, 103d Cong., 1st Sess. (1993).

99 See Chris Scott, *Few Localities Pursuing VDT Law*, CRAIN'S N.Y. BUSINESS, July 22, 1991, at 29; see e.g., ME. REV. STAT. ANN. TIT. 26, § 251 (West 1992); H.B. 1285, Fla. Laws 1992 (considered); A.B. 2110, 644, Calif. Laws 1991 (considered). But see *ILC Data Device Corp. v. County of Suffolk*, 588 N.Y.S.2d 845 (N.Y. App. Div. 1992), where the court found that the state Labor Law preempted a county's law on VDT employee safety.

and ergonomic equipment for VDT operators in San Francisco.¹⁰⁰ The ordinance as it applied to private employers was struck down by a California state court in 1992, on the theory that it was preempted by the California OSH Act of 1973.¹⁰¹ The ruling was affirmed on appeal on August 5, 1993.¹⁰²

Proposed legislation in Washington state calls for the promulgation of health and safety standards on safeguards and practices to be followed by employers to protect employees using VDTs.¹⁰³ Other governments, such as Contra Costa County in California, have issued voluntary guidelines for VDT use, which include ergonomically designed work stations, work breaks, annual vision inspections and operator training.¹⁰⁴ On July 3, 1991, the California Assembly approved a VDT measure that requires existing equipment to be upgraded by 1995 and new equipment (purchased after July 1, 1993) to meet ergonomic standards adopted by ANSI.¹⁰⁵

D) Formaldehyde Exposure Limits

Formaldehyde once again has become an important issue for OSHA. On May 27, 1992, the agency finally published¹⁰⁶ revisions to the previous formaldehyde rule published in December 1987.¹⁰⁷ OSHA had been sued by the Auto Workers, which argued that OSHA had insufficiently explained its finding that formaldehyde pre-

sented no significant risk at a 1 ppm permissible exposure limit (PEL) and that OSHA had failed to include medical removal protection.¹⁰⁸ In response to a remand order issued by the court, OSHA, on July 15, 1991, issued a draft proposal to lower the PEL from 1 ppm to 0.75 ppm,¹⁰⁹ implement medical removal protection for workers¹¹⁰ and alter the rule's hazard communication requirements by expanding a one-time worker training requirement to an annual training requirement.¹¹¹ The Office of Management and Budget on June 11, 1991, reversed its earlier rejection of the draft proposal.¹¹²

The American Conference of Government Industrial Hygienists recommended the adoption of a stricter exposure limit, eliminating the PEL and short term exposure limits and replacing them with a threshold limit value (TLV) that no exposure should exceed 0.3 ppm.¹¹³ Although TLV is a recommended limit and does not have the weight of a regulatory standard, TLVs have often formed the basis for regulatory standards.

With a few exceptions, the latest revisions to the OSHA formaldehyde standard are generally unchanged from the July 26, 1991, draft proposal. The revised standard took effect June 26, 1992, although all of the new requirements carried compliance dates at least three months later than that.¹¹⁴ For

example, employers were required to offer respiratory protection to workers to meet the new exposure limit as soon as possible but no later than September 24, 1992.¹¹⁵ Employers were required to have engineering and work practice controls in place by June 26, 1993.¹¹⁶

Besides reducing the exposure limit to 0.75 ppm, OSHA's revisions will accomplish the following:

- Require employers to implement medical removal programs for employees who suffer adverse health effects from formaldehyde.¹¹⁷ This provision must have been in place by December 28, 1992;¹¹⁸
- Enact specific labeling requirements for all forms of formaldehyde composed of 0.1 percent formaldehyde or greater and for materials capable of releasing formaldehyde in excess of 0.1 ppm.¹¹⁹ Until the December 28, 1992, deadline for these new labeling requirements, OSHA's general hazard communication standard was applicable;¹²⁰
- Establish additional labeling requirements for situations in which formaldehyde levels may exceed 0.5 ppm.¹²¹ The December 28 deadline also applied to these requirements;¹²² and
- Implement annual training for all workers exposed to formaldehyde concentrations of 0.1 ppm or greater.¹²³ This periodic training must have begun no later than August 25, 1992.¹²⁴

100 See *City, Union will not Appeal Court Decision to Strike Down San Francisco VDT Ordinance*, 182 D.L.R. (BNA) D-12 (Sept. 22, 1993).

101 *C & T Management Serv. Inc. v. City & County of San Francisco*, 1992 WL 49929 (Cal. App. Dep't Super. Ct. Feb. 14, 1992).

102 *C & T Management Serv. Inc. v. City & County of San Francisco*, No. A057544 (Cal. Ct.App. Aug. 5, 1993).

103 See O. Casey Corr, *The Laws of Demand - Businesses Big and Small Seek Relief in Variety of Proposals to Legislature*, SEATTLE TIMES, December 31, 1990, at E1.

104 See VDT's, 17 D.L.R. (BNA) A-3 (Jan. 25, 1991).

105 A.B. 110, Calif. Laws 1991.

106 57 Fed. Reg. 22,290 (1992).

107 29 C.F.R. § 1910.1048 (1992).

108 *UAW v. Pendergrass*, 878 F.2d 389 (D.C. Cir. 1989).

109 29 C.F.R. § 1910.1048(c) (1992).

110 § 1910.1048(l)(8).

111 § 1910.1048(n).

112 See *OSHA Issues Proposal to Lower Exposure Limit for Formaldehyde*, 136 D.L.R. (BNA) A-6 (July 16, 1991).

113 See generally, *OSHA Proposes Lower Chemical Exposures to Reduce Risk for 17 Million Workers*, 110 D.L.R. (BNA) A-10 (June 8, 1988).

114 57 Fed. Reg. 22,290 (1992).

115 29 C.F.R. § 1910.1048(p)(3)(i) (1992).

116 § 1910.1048(p)(3)(ii).

117 § 1910.1048(l)(8).

118 § 1910.1048(p)(3)(iii).

119 § 1910.1048(m)(1)(i).

120 § 1910.1048(p)(3)(iv).

121 § 1910.1048(m)(3)(iii).

122 § 1910.1048(p)(3)(iv).

123 § 1910.1048(n)(1).

124 § 1910.1048(p)(3)(v).

E) Process Safety

Chemical process safety has been on OSHA's agenda for some time. Several major petrochemical accidents focused public attention on the issue in early 1991 and, in May 1991 at a hearing on a Louisiana chemical plant accident, Rep. Tom Lantos (D-Cal.) publicly criticized OSHA for not preventing such accidents.¹²⁵

In fact, in July 1990, OSHA had issued an Advance Notice of Proposed Rulemaking on process safety management procedures to protect employees from accidents involving highly hazardous chemicals.¹²⁶ Pursuant to the 1990 amendments to the Clean Air Act, the rule was to be published by November 15, 1991. But, in September 1991, OSHA reopened the public record on the rule to allow comments on an 18-month John Gray Institute study on contractor safety in the petrochemical industry.¹²⁷ The study had been requested by OSHA following several petrochemical explosions, including an October 1989 fire in Pasadena, Texas, which killed 23 workers and injured over 100.¹²⁸ The study recommended increased training of contractors and employees.¹²⁹

On February 24, 1992, OSHA issued its final process safety rule.¹³⁰ OSHA expects the rule, parts of which took effect May 26, 1992, will prevent 264 deaths and 1534 injuries annually.¹³¹

The rule primarily affects petrochemical and chemical companies, natural gas manufacturers, and industries that transport or mix chemicals. A list of about 130 chemicals and their threshold levels is included in the rule; flammable liquids and gases in amounts equal to or greater than 10,000 pounds are also covered.¹³² Covered facilities that are over the threshold level of a listed chemical must comply with the rule.¹³³ The rule requires those facilities to perform process hazard analyses¹³⁴ (with deadlines phased in over five years, and a first deadline of May 1994)¹³⁵ and to take actions to prevent chemical releases or explosions.¹³⁶ Written operating and safety procedures must be prepared.¹³⁷

Extensive employee training is required on health and safety hazards, emergency operations, and safe work practices.¹³⁸ Initial training and refresher training, at least every three years, must be provided.¹³⁹ Contractors must train their workers to insure the safety of their workers and the site owner's workers.¹⁴⁰ Recordkeeping of all training and injuries and illnesses is required.¹⁴¹

Four provisions of the rule were delayed until August 26, 1992, in response to industry requests for additional time to comply.¹⁴² On August 25, OSHA lifted its stay.¹⁴³ The stayed provisions included those on operating procedures, contractor training, mechan-

ical equipment integrity, and management of process change.¹⁴⁴ OSHA determined, however, that no stay was warranted for the provisions pertaining to employee participation, pre-startup safety review, and emergency planning and response.¹⁴⁵

Various groups, including the Chemical Manufacturers Association, the American Petroleum Institute, and the United Steelworkers, filed court petitions challenging the rule in general and the effective date of the standard in particular.¹⁴⁶

In September 1992 (after the effective date of the rule, which caused some concern among the regulated community), OSHA issued a compliance directive on enforcement of the process safety rule.¹⁴⁷ In addition to the compliance directive, further clarification of the rule arose from a settlement reached between the United Steelworkers and OSHA in April 1993.¹⁴⁸

Under the terms of the settlement, the rule will be applied to all contractor activities involving process safety. Both the primary employer and the general contractor will be responsible for informing subcontractors of hazards and for ensuring compliance with this rule.¹⁴⁹ A primary employer must consult not only with its own employees, but also with its contract employees, with respect to the process safety hazard analyses required by the rule.¹⁵⁰ The clarifications contained in

125 *Site of Fatalities Not Inspected for Nearly a Decade, OSHA Testifies*, 93 D.L.R. (BNA) A-11 (May 14, 1991).

126 55 Fed. Reg. 29,150 (1990).

127 56 Fed. Reg. 48,133 (1991).

128 *Id.*

129 *Id.*

130 29 C.F.R. § 1910.119 (1993).

131 *Steelworkers' Court Challenge Faults Effectiveness of Newly Issued OSHA Rule*, 44 D.L.R. (BNA) A-5 (March 5, 1992).

132 29 C.F.R. § 1910.119(a)(1)(iii) (1993).

133 § 1910.119(a)(1)(i).

134 § 1910.119(e).

135 § 1910.119(e)(1)(iv).

136 *See OSHA to Delay Chemical Rule Provisions Effective May 26 Following Industry Appeal*, 101 D.L.R. (BNA) A-8 (May 26, 1992).

137 § 1910.119(f).

138 § 1910.119(g).

139 § 1910.119(g)(2).

140 § 1910.119(h)(3)(iii).

141 § 1910.119(g)(3) and § 1910.119(h)(2)(vi).

142 *OSHA to Delay Chemical Rule Provisions Effective May 26 Following Industry Appeal*, 101 D.L.R. (BNA) A-8 (May 26, 1992).

143 *OSHA Ends Stay of Four Provisions in Chemical Explosion Safety Standard*, 166 D.L.R. (BNA) A-8 (Aug. 26, 1992).

144 *Id.*

145 *See OSHA to Delay Chemical Rule Provisions Effective May 26 Following Industry Appeal*, 101 D.L.R. (BNA) A-8 (May 26, 1992).

146 *Industry, Union File Challenges to OSHA Chemical Safety Standard*, 79 D.L.R. (BNA) A-6 (Apr. 23, 1992).

147 OSHA Instruction CPL 2-2.45A (1992). The directive was issued by an internal task force set up by OSHA specifically to address process safety. Since May 1992, OSHA has conducted 72 process safety management inspections, resulting in over 220 proposed citations. *See Most Inspections Triggered by Complaints, Referrals, and Fatalities, OSHA Official Says*, 23 O.S.H. Rep. (BNA) 518 (Oct. 13, 1993).

148 *United Steelworkers v. OSHA*, No. 92-3106 (3d Cir. filed March 2, 1993).

149 *OSHA's Chemical Process Safety Rule Clarified on Contractor Responsibility*, 68 D.L.R. (BNA) (Apr. 12, 1993).

150 *Id.*

the settlement will be incorporated into a revised OSHA Instruction CPL 2-2.45A, which should be issued soon.¹⁵¹

EPA recently issued a proposed chemical safety standard.¹⁵² The proposed standard is similar, but not identical, to OSHA's rule. EPA's rule would affect companies that produce, process, handle or store any listed substance above certain threshold levels, but the substances listed by EPA differ from those listed by OSHA.¹⁵³ EPA's rule would be promulgated pursuant to congressional directions to both EPA and OSHA, with EPA to focus on releases to air and OSHA to focus on workplace issues. The two agencies have been working together to coordinate their respective rules.

F) Workplace Smoking and Indoor Air Pollution

Another issue attracting a lot of attention is workplace smoking. In 1992, the Office of Disease Prevention and Health Promotion, an agency of the Department of Health and Human Services, conducted a study of 1507 work sites with 50 or more employees.¹⁵⁴ About 59% of the employers had a formal smoking policy (up from 27% in 1985).¹⁵⁵ Approximately 34% of the sites had a total smoking ban while 25% of the sites allowed smoking in a separately ventilated area.¹⁵⁶

Companies cited health concerns and employee complaints as the driving forces be-

hind smoking policies.¹⁵⁷ Also, several recent surveys reveal that one to four percent of companies refuse to hire smokers.¹⁵⁸ Typical discipline policies for violations of smoking restrictions include oral warnings, written warnings, suspension, enrollment in stop-smoking programs, and, after repeated violations, termination.¹⁵⁹

According to *State Legislated Actions on Tobacco Smoke*, a report issued in May 1993 by the Coalition on Smoking and Health, 45 states and the District of Columbia place restrictions on smoking in public places, as of the end of 1992.¹⁶⁰ Of those governments, 41 states and D.C. include public workplaces among public places and 19 states and D.C. place restrictions on private workplaces.¹⁶¹

On June 25, 1990, the EPA issued a draft risk assessment report identifying secondhand smoke as a carcinogen.¹⁶² In May 1991, EPA issued another draft report that concluded secondhand smoke kills 53,000 non-smokers annually and is a leading contributor to indoor air pollution.¹⁶³ A final report on this subject, entitled *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, was released by EPA in January 1993 and classified secondhand smoke as a known human carcinogen.¹⁶⁴ In June 1993, the report was challenged by a group of tobacco growers and cigarette manufacturers who filed a federal

lawsuit seeking to overturn the report.¹⁶⁵

In a July 1991 bulletin, the National Institute of Occupational Safety and Health (NIOSH) stated that secondhand tobacco smoke causes cancer and heart disease in non-smokers and should be eliminated from the workplace whenever possible.¹⁶⁶ If smoking is permitted, NIOSH suggested that it be limited to separate enclosed areas that are labeled and ventilated to the outside.¹⁶⁷ Similarly, EPA's draft report, *Environmental Tobacco Smoke: A Guide to Workplace Smoking Policies*, issued in 1990, recommended that employers eliminate or reduce employee exposure to environmental tobacco smoke in workplaces.¹⁶⁸ The final report is due to be issued this fall and the recommendation on employers' actions reportedly will not significantly change.

In September 1991, OSHA published a request for information on indoor air quality, including specific questions on tobacco smoke in the workplace.¹⁶⁹ Of the approximately 1200 responses, totaling 17,000 pages, to the request for information received by OSHA, approximately 70% of the comments favored some form of regulation.¹⁷⁰ OSHA is currently in the process of drafting an options paper on the potential health hazards posed by poor indoor air and environmental tobacco smoke.¹⁷¹ Two approaches are reportedly under consideration: (1) issuance of a broad rule dealing with

151 OSHA Revised Directive to Clarify Enforcement, 113 D.L.R. (BNA) D-23 (June 15, 1993). Two pamphlets on process safety are available from OSHA: PROCESS SAFETY MANAGEMENT (No. 3132) and PROCESS SAFETY MANAGEMENT GUIDELINES FOR COMPLIANCE (No. 3133). The Chemical Manufacturers Association has also issued a booklet on process safety, MANAGING PROCESS CHANGES: A MANAGER'S GUIDE TO IMPLEMENTING AND IMPROVING MANAGEMENT OF CHANGE SYSTEMS.

152 58 Fed. Reg. 54,190 (1993).

153 EPA Chemical Process Safety Expected at OMB Before Mid-March, Official Says, 15 Chem. Reg. Rep. 1679 (Feb. 28, 1992).

154 HHS Agency Survey Shows Employers Expanding Workplace Health Programs, 71 D.L.R. (BNA) A-7 (Apr. 15, 1993).

155 *Id.*

156 *Id.*

157 Majority of Employers Have Instituted Workplace Smoking Policies, Survey Shows, 171 D.L.R. (BNA) A-11 (Sept. 4, 1991).

158 See e.g., *Id.*

159 *Id.*

160 Workplace Smoking Restricted in 41 States, 102 D.L.R. (BNA) D-21 (May 28, 1993).

161 *Id.*

162 55 Fed. Reg. 25,874 (1990).

163 Safety and Health, 110 D.L.R. (BNA) A-A (June 7, 1991).

164 See 57 Fed. Reg. 27,772 (1992).

165 Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA, No. 6-93CV00370 (D. Minn. filed June 22, 1993); see OSHA Regulation of Secondhand Smoke May Require Employer Warnings, Official Says, 120 D.L.R. (BNA) D-14 (June 24, 1993).

166 Environmental Tobacco Smoke in the Workplace, NIOSH Current Intelligence Bulletin No. 54. See Secondhand Smoke Causes Heart Disease, Cancer in Non-Smokers, NIOSH Bulletin Says, 139 D.L.R. (BNA) A-9 (July 19, 1991).

167 *Id.*

168 See *Id.*

169 56 Fed. Reg. 47,892 (1991). No dates have been established yet for issuance of proposed or final rules.

170 See EPA Report Maintains Secondhand Smoke Causes Lung Cancer, Respiratory Illnesses, 22 O.S.H. Rep. 147 (June 24, 1992).

171 OSHA Nearing Completion of Indoor Air Options Paper for New Administration, Official Tells Committee, 30 D.L.R. (BNA) A-5 (Feb. 17, 1993).

numerous air contaminants and ventilation standards, and (2) issuance of a narrow rule focused on environmental tobacco smoke.¹⁷²

In the meantime, OSHA will be conducting two studies to research the link between workplace tobacco smoke and increased lung cancer and heart disease.¹⁷³ The studies are due to be completed by February 1994 and September 1994.

In court actions, a national anti-smoking public interest group, the Action on Smoking and Health (ASH), has sued the U.S. Department of Labor several times, attacking OSHA's refusal to issue an emergency temporary standard to ban or limit workplace smoking.¹⁷⁴ ASH has urged the court to encourage or force OSHA to ban smoke in the workplace.¹⁷⁵ The courts so far have rejected ASH's petitions to review OSHA's decision *not* to issue an emergency temporary standard banning smoking in the workplace and have said that OSHA's decision was reasonable because the risk associated with workplace smoke could not be quantified.¹⁷⁶

In December 1992, however, ASH renewed its petitions against OSHA, attempting to prompt OSHA to regulate environmental tobacco smoke and to ban workplace smoking.¹⁷⁷ Two prior petitions filed by ASH were rejected by OSHA in light of the agency's review of comments responding to the September 1991 Request for Information on

indoor air quality.¹⁷⁸ In response to ASH's December 1992 petition, OSHA pointed to its on-going review of comments as well as its work on an options paper; nonetheless, the D.C. Court of Appeals on May 10 denied OSHA's motion to dismiss ASH's petition.¹⁷⁹ ASH also filed a similar petition in July 1993, seeking an emergency temporary standard to protect workers from environmental tobacco smoke.¹⁸⁰

There continues to be increasing public pressure to take action regulating environmental tobacco smoke. In December 1992, a coalition of public health groups (including the American Heart Association, the American Lung Association, and the American Cancer Society) urged then-President-elect Clinton to place a high priority on anti-smoking policies.¹⁸¹ In February 1993, another public interest group, Public Citizen, urged OSHA to issue an emergency standard to protect workers from environmental tobacco smoke.¹⁸² In March, organized labor petitioned OSHA to issue an indoor air quality rule "promptly."¹⁸³ The petition stated that indoor air pollution affects 30 to 70 million building occupants and annually costs tens of billions of dollars in lost work time, medical expenses and decreased productivity.¹⁸⁴ The unions' petition argued for a "building systems" approach that would review ventilation systems and investigate specific contaminants.¹⁸⁵

The Indoor Air Act of 1993¹⁸⁶ was introduced into the House on by Rep. Joseph Kennedy (D-Mass.)¹⁸⁷ The House bill would direct EPA to develop a list of indoor air contaminants and also would require the Consumer Product Safety Commission to develop test methods for identifying respiratory irritants.¹⁸⁸

Senator Mitchell's bill (which is more likely to pass the full Congress) requires OSHA to research on the health effects of indoor air contaminants and issue health bulletins/advisories, as appropriate; determine the effectiveness of existing ventilation standards and the costs and benefits of compliance with those standards; and assess the benefits of increasing air ventilation rates.¹⁸⁹ The legislation would authorize total funding of \$48.5 million annually.¹⁹⁰

G) Asbestos

For some time now, OSHA has been considering revisions to its current air contaminants standards on asbestos.¹⁹¹ One controversial area involves possible requirements for private building owners or other employers to inspect commercial buildings for asbestos and to evaluate potential worker exposure to asbestos.¹⁹²

The Service Employees International Union (SEIU) has been pushing EPA to promulgate such an inspection rule.¹⁹³ A September 1991 report, *Health Effects*

172 OSHA Asks for Comments on Health Effects of Workplace Smoking, Other Air Contaminants, 184 D.L.R. (BNA) A-9 (Sept. 23, 1991).

173 OSHA Orders Studies of Workplace Exposure to Determine Lung Cancer, Heart Disease Risks, 23 O.S.H. Rep. (BNA) 614 (Oct. 20, 1993).

174 See Anti-Smoking Group to Petition OSHA to Regulate Secondhand Smoke by End of 1991, 21 O.S.H. Rep. 879 (Dec. 11, 1991).

175 *Id.*

176 Action on Smoking and Health v. OSHA, 1991 U.S. App. Lexis 10487 (D.C. Cir. May 10, 1991), Action on Smoking and Health v. OSHA, 1992 U.S. App. Lexis 14861 (D.C. Cir. Jan. 29, 1992).

177 Action on Smoking and Health v. Dep't of Labor, No. 92-1661 (D.C. Cir. filed Dec. 22, 1992).

178 Action on Smoking and Health v. OSHA, 1991 U.S. App. Lexis 10487 (D.C. Cir. May 10, 1991), Action on Smoking and Health v. OSHA, 1992 U.S. App. Lexis 14861 (D.C. Cir. Jan. 29, 1992).

179 Action on Smoking and Health v. OSHA, 1991 U.S. App. Lexis 10487 (D.C. Cir. May 10, 1991).

180 OSHA Petitioned for Anti-Smoking Standard, 138 D.L.R. (BNA) D-18 (July 21, 1993).

181 Clinton Urged to Address Indoor Air, Workplace Smoking in Health Care Plan, 30 Gov't Empl. Rel. Rep. (BNA) 1636 (Dec. 14, 1992).

182 Group Urges OSHA to Issue Emergency Standard to Stem Exposure to Secondhand Smoke, 25 D.L.R. (BNA) A-4 (Feb. 9, 1993).

183 Caterpillar Asks Strikers Back; UAW Authorizes More Strikes, 64 D.L.R. (BNA) A-4 (Apr. 2, 1992).

184 *Id.*

185 *Id.*

186 Indoor Air Act of 1993, H.R. 1930, 103 Cong., 1st Sess. (1993). Sen. Mitchell (D-Maine) introduced legislation known as the Indoor Air Quality Act of 1993 in the Senate on March 25, 1993 (S. 656, 103 Cong., 1st Sess. (1993)). On October 29, 1993, the Indoor Air Quality Act of 1993 was approved by the Senate.

187 Indoor Air Act of 1993, H.R. 1930, 103 Cong., 1st Sess. (1993).

188 H.R. 1930, 103 Cong., 1st Sess. §§ 5(b), 6(f) (1993).

189 S. 656 103d Cong., 1st Sess. §§ 5-7 (1993).

190 § 16.

191 29 C.F.R. §§ 1910.1001 and 1926.58 (1993).

192 Labor Unions Urge OSHA to Adopt Rule Requiring Building Inspections for Asbestos, 17 D.L.R. (BNA) A-14 (Jan. 28, 1993).

193 *Id.*

Institute - Asbestos Research focused the concern especially on building custodians and other maintenance personnel.¹⁹⁴

EPA and OSHA have agreed to work together on new asbestos rules, with OSHA to take the lead and EPA to follow.¹⁹⁵ In July 1990, OSHA proposed amendments to its asbestos regulations.¹⁹⁶ The amendments include lowering the permissible exposure limit; requiring communication of asbestos hazards to building owners, employers and employees; and defining the exemptions to the negative pressure enclosure requirement.¹⁹⁷

In November 1992, OSHA reopened the comment period on its worker protection rule to consider whether to require commercial buildings to be inspected for asbestos-containing materials (ACM).¹⁹⁸ Other options being evaluated include training maintenance workers on how to handle suspect ACM, requiring building owners to sample all suspect ACM, and developing building records on suspect ACM that would not require owners to sample all materials.¹⁹⁹

As part of the November 1992 notice, OSHA sought comments on an alternative to general building inspections.²⁰⁰ The alternative would require that thermal insulation and any sprayed-on or troweled-on surfacing materials in buildings built between 1920 and 1980 be treated as asbestos-containing,

unless proven otherwise.²⁰¹ This alternative has become known as the "presumed asbestos-containing materials" approach.

In response to the November notice, the AFL-CIO has urged Labor Secretary Reich to issue a final rule on asbestos quickly.²⁰² NIOSH has submitted comments to OSHA, seeking to broaden the scope of the final rule.²⁰³ Specifically, NIOSH has recommended that the presumed asbestos-containing materials approach cover vinyl asbestos floor tile and transite ceiling tile.²⁰⁴ Several industry groups have endorsed the alternative, but also have urged expansion of the list of presumed asbestos-containing materials and deletion of the pre-1920 exemption.²⁰⁵ Several labor organizations continue to urge OSHA to adopt a comprehensive building inspection requirement.²⁰⁶

In light of the reopening of the comment period, OSHA plans to issue a final rule soon. EPA's rule is expected to follow, probably in mid-1994.²⁰⁷

H) Exposure Limits

• Glycol Ethers

On March 23, 1993, OSHA published a proposed rule that would reduce by up to 99% the workplace exposure limits for four industrial solvents due to reproductive hazards.²⁰⁸

<u>Solvent</u>	<u>Eight-hour limits</u>
2-Methoxyethanol	25 ppm to 0.1 ppm
2-Methoxyethanol acetate	25 ppm to 0.1 ppm
2-Ethoxyethanol	200 ppm to 0.5 ppm
2-Ethoxyethanol acetate	100 ppm to 0.5 ppm

The rule also includes provisions on monitoring, medical surveillance, training, personal protective equipment, recordkeeping, and emergency response.²⁰⁹ The proposed rule would effect about 46,000 employees in approximately 10,000 workplaces. The cost to employers would be \$31 million initially and \$7 million annually.²¹⁰

• Air Contaminants

Following the Eleventh Circuit Court of Appeals ruling in *AFL-CIO v. OSHA*,²¹¹ striking down the 1989 air contaminant exposure limits, and the Clinton administration's decision not to appeal the ruling,²¹² OSHA has announced that it will enforce the exposure limits in effect before 1989.²¹³ Some of these exposure limits date back to 1971. On August 5, 1993, OSHA issued guidance to its field offices, affirming its policy of citing employers under the general duty clause for air contaminant violations.²¹⁴

194 See *SEIU Will Not Refile Suit Against EPA While Awaiting Public Building Asbestos Rules*, 2 D.L.R. (BNA) A-8 (Jan. 3, 1992); but see *Missouri Study Finds No Health Risk to Custodians Routinely Working Near Material*, 22 O.S.H. Rep. (BNA) 2006 (Apr. 21, 1993).

195 *Public Building Asbestos Rule to be Proposed in 1993 by EPA, Official Says*, 134 D.L.R. (BNA) A-2 (July 13, 1992).

196 55 Fed. Reg. 29,712 (1990); see *OSHA Receives Criticism From All Sides on Proposed Changes to Asbestos Standard*, 162 D.L.R. (BNA) A-2 (Aug. 21, 1990).

197 55 Fed. Reg. 29,712 (1990).

198 57 Fed. Reg. 49,657 (1992).

199 *Public Building Asbestos Rule to be Proposed in 1993 by EPA, Official Says*, 134 D.L.R. (BNA) A-2 (July 13, 1992).

200 57 Fed. Reg. 49,657 (1992).

201 *Id.*; see *NIOSH Urges OSHA to Broaden Scope of Buildings, Materials in Final Rule*, 22 O.S.H. Rep. (BNA) 1607 (Feb. 10, 1993).

202 *OSHA Preparing Draft Emergency Standard on Workplace Exposure to Asbestos Fiber*, 160 D.L.R. (BNA) A-9 (Aug. 17, 1983).

203 *NIOSH Urges OSHA to Broaden Scope of Buildings, Materials in Final Rule*, 22 O.S.H. Rep. (BNA) 1607 (Feb. 10, 1993).

204 *Id.*

205 *Id.*

206 *Labor Unions Urge OSHA to Adopt Rule Requiring Building Inspections for Asbestos*, 17 D.L.R. (BNA) A-14 (Jan. 28, 1993).

207 *Public Building Asbestos Rule to be Proposed in 1993 by EPA, Official Says*, 134 D.L.R. (BNA) A-2 (July 13, 1992).

208 58 Fed. Reg. 15,526 (1993), corrected at 58 Fed. Reg. 31,923 (1993). A final rule is scheduled for May 1995.

209 58 Fed. Reg. 15,526 (1993).

210 *OSHA Proposes New Exposure Limits for Substances Based on Reproductive Hazards*, 22 O.S.H. Rep. (BNA) 1755 (March 24, 1993).

211 965 F.2d 962 (11th Cir. 1992).

212 See *Clinton Administration Will Not Seek Supreme Court Review on OSHA Exposure Limits*, 54 D.L.R. (BNA) AA-1 (March 23, 1993).

213 The exposure limits to be enforced are those found in the "Transitional Limits" columns of Tables Z-1-A, Z-2 and Z-3 in 29 C.F.R. § 1910.1000 (1993); see *OSHA to Publish Revised Exposure Limits*, 123 D.L.R. (BNA) D-19 (June 29, 1993).

214 See *OSHA Issues Guidance to Field Staff on Enforcing Air Contaminants Standards*, 153 D.L.R. (BNA) D-12 (Aug. 11, 1993); *OSHA Memorandum to Agency Officials, Regional Administrators Transmitting Most Frequently Asked Questions on Air Contaminants Rule*, reprinted in 22 O.S.H. Rep. (BNA) 1960 (March 30, 1993).

In Congress, House Resolution 2919 would require EPA to promulgate guidelines for the identification and elimination of air contaminants.²¹⁵ The bill would also require EPA to establish a certification program for indoor air consultants. No hearings have yet been held on H.R. 2919.

• Lead

On May 4, 1993, OSHA published an interim rule to protect more than 900,000 construction workers who are exposed to lead.²¹⁶ The rule reduces the eight-hour time-weighted average permissible exposure limit from 200 micrograms per cubic meter to 50.²¹⁷ It also establishes an action level of 30 micrograms per cubic meter.²¹⁸ The rule became effective on June 3, 1993, and will remain in effect until a permanent standard is developed.²¹⁹

The interim standard is based on voluntary guidelines published in 1990 by the Department of Housing and Urban Development and OSHA's general industry standard.²²⁰ Promulgation of the interim rule satisfied a congressional deadline contained in the Housing and Community Development Act of 1992, which became law in October 1992.²²¹

In the meantime, EPA is working on proposed accreditation and certification requirements for lead abatement workers and plans to issue a proposal this fall. The impe-

tus behind EPA's efforts is also the Housing and Community Development Act.

• Confined Space

On January 14, 1993, OSHA issued a final rule on Permit-Required Confined Spaces.²²² The rule became effective on April 15, 1993.²²³ The rule is designed to protect approximately 1.6 million workers in about 240,000 workplaces.²²⁴ Over 5000 serious injuries and 54 fatalities annually should be prevented by the rule.²²⁵ The cost to industry (and, in particular, the electric, gas and sanitary services industries) is estimated at \$202.4 million annually.²²⁶

OSHA has been working on this standard since 1975.²²⁷ OSHA promulgated the rule after determining that existing standards did not adequately protect employees from atmospheric, mechanical or other hazards in confined spaces.²²⁸ Furthermore, OSHA decided to require comprehensive confined space entry programs to address ongoing monitoring, testing and communication needs in confined spaces.²²⁹

Immediate reaction from industry to the rule was generally favorable, with some concern that certain provisions are too vague.²³⁰ Organized labor's reaction was critical, especially with respect to the rule's exemption of agriculture, construction and shipyard employment.²³¹

In mid-March 1993, three challenges to

the rule were filed in federal court:

- *Edison Elec. Inst. v. OSHA*, No. 93-2251 (11th Cir. filed 3-11-93).
- *American Gas Ass'n v. OSHA*, No. 93-1302 (4th Cir. filed 3-12-93).
- *United Steelworkers v. OSHA*, No. 93-3112 (3d Cir. filed 3-15-93).

On April 14, 1993, OSHA and Edison Electric reached a settlement of the first challenge.²³² In an interim interpretation of the rule, OSHA agreed not to enforce the rule with respect to electric and steam utility manholes, natural gas vaults, and other underground transmission facilities.²³³ The other two challenges are still pending.

By late June, OSHA plans to issue a compliance directive on enforcement of the rule. Publication of the directive was originally targeted for April 15, but has apparently been delayed in part pending nomination and approval of an OSHA director (which is expected soon). In the meantime, OSHA has published a 16-page booklet, entitled "Permit-Required Confined Spaces" (No. 3138), discussing the new rule.²³⁴

IV. ENFORCEMENT HIGHLIGHTS AND TRENDS

A) General

OSHA continues to encourage voluntary compliance and offers many training, consultation, and incentive programs to employers; however, OSHA also backs this assis-

215 H.R. 2919, 103d Cong., 1st Sess. (1993).

216 58 Fed. Reg. 26,590 (1992). See *OSHA Regulatory Agenda Sets December Date for Rulemaking Notice on Lead in Construction*, 213 D.L.R. (BNA) A-10 (Nov. 3, 1992), *OSHA Publishes Interim Rule to Protect More than 900,000 Workers in Construction*, 22 O.S.H. Rep. 2065 (May 5, 1993).

217 58 Fed. Reg. 26,590 (1992).

218 *Id.*

219 *Id.* No date has yet been scheduled for issuance of a final rule.

220 See *Lead Standard Mandated by Congress Must Cover All Construction Workers*, Rep. Ford Tells DOL, 232 D.L.R. (BNA) A-16 (Dec. 2, 1992).

221 Pub. L. No. 102-550, 106 Stat. 3672 (1992), (codified in scattered sections of 42 U.S.C.).

222 Permit-Required Confined Spaces for General Industry, 58 Fed. Reg. 4549 (1993) (to be codified at 29 C.F.R. § 1910.146).

223 58 Fed. Reg. 44,621 (1993).

224 *OSHA Confined Space Rule Includes Provisions Requiring Worker Training, Atmospheric Testing*, 9 D.L.R. (BNA) A-6 (Jan. 14, 1993).

225 *Id.*

226 *Id.*

227 *Id.*

228 *Id.*

229 *Id.*

230 *OSHA's Final Rule on Confined Spaces Draws Criticism from Union Officials*, 17 D.L.R. (BNA) A-1 (Jan. 28, 1993).

231 *Id.*

232 *Confined Space Rule Restricted in Electric, Gas Utilities*, OSHA Says, 73 D.L.R. (BNA) D-13 (Apr. 19, 1993).

233 *Id.*

234 To order a copy, contact an OSHA regional or area office (the St. Louis office can be reached at 314/425-4249, or send a self-addressed label to: OSHA Publications Office, OSHA, Room N-3101, 200 Constitution Avenue, N.W., Washington, D.C. 20210).

tance with enforcement. During fiscal year 1992, OSHA conducted about 42,500 inspections, including about 9000 health inspections and about 33,000 safety inspections.²³⁵ OSHA plans approximately the same number of inspections for fiscal year 1993.

In general, these inspections were much more comprehensive and resulted in more serious, willful, repeat and failure-to-abate citations than in past years. In fact, total penalties reached \$116.1 million for the fiscal year ending September 30, 1992, well ahead of the previous high of \$91 million that was recorded in fiscal year 1991.²³⁶ Average penalties for serious violations rose to \$800, while the average penalty per enforcement case was \$3396.²³⁷ As in past years, the Hazard Communication Standard continued to be the most frequently cited OSHA standard in 1992.²³⁸

B) Civil Penalties

In an attempt to raise additional revenue (estimated at \$900 million) to offset the budget deficit, Congress gave OSHA the ability to levy significant new financial penalties for violations of OSHA standards. Under the Omnibus Budget Reconciliation Act of 1990,²³⁹ maximums for most OSHA violations increased sevenfold with the ceiling reaching \$70,000 for willful and repeat violations.²⁴⁰ In addition, the Act instituted a new *minimum* penalty of \$5,000 for willful violations.²⁴¹ This new penalty structure is applied in all inspections initiated on or after March 1, 1991, for violations determined to

be existing after November 5, 1990.²⁴²

OSHA used the new penalty structure against CITGO Petroleum Corporation in an August 1991 enforcement action. That action resulted in \$8.1 million in proposed fines and a settlement under which the company agreed to pay \$6 million.²⁴³ The agency used the new \$70,000 ceiling for the first time on September 26, 1991, in proposing \$2.78 million in fines against General Motors Corporation.²⁴⁴

To implement the new penalty scheme, OSHA revised its Field Operations Manual (FOM).²⁴⁵ The FOM contains directions on conducting inspections and on calculating penalties. Penalties are calculated on a matrix, depending upon the violation's severity and probability. OSHA determines fines by assessing the gravity of the violation, which is determined by the severity of likely injuries and illnesses, plus the prospect that an injury or illness would result.²⁴⁶ OSHA also considers the size of businesses, the good faith of the employer, and the employer's history of previous violations.²⁴⁷ Then the Gravity Based Penalty is adjusted; increases are made if, for example, the violation is willful or repeated.²⁴⁸

In practice, employers can expect OSHA civil penalties to increase 3½ to 4 times over what they once were. So far, the sevenfold increases only have been applied in the most egregious cases. In fact, on October 1, 1990, the Department of Labor formalized its policy for handling those egregious cases — cases OSHA considers to involve flagrant violations.²⁴⁹ In February 1993 the egregious

case policy was upheld by the OSH Review Commission.²⁵⁰

Under the egregious case policy, OSHA penalizes the employer for each instance of a violation, rather than grouping similar violations under one overall penalty.²⁵¹ The result is a large (often multi-million dollar) fine intended to deter willful violators and to emphasize the importance that OSHA places on workplace health and safety.

OSHA inspectors are to evaluate the following criteria in determining whether to issue violation-by-violation citations to willful violators:

- Worker fatalities, work site catastrophe, or a large number of serious injuries or illnesses resulting from the violation;
- Persistently high rates of worker injuries or illnesses resulting from the violation;
- Extensive history of prior violations by the employer;
- Intentional disregard of workplace safety and health responsibilities by the employer;
- Employer's conduct which amounts to clear bad faith in carrying out its responsibilities under the OSH Act; or
- A large number of violations that significantly undermine the effectiveness of any existing safety and health plan.²⁵²

OSHA uses the egregious case policy primarily as a tool to effect corporate-wide settlements — settlements in which the employer agrees to correct widespread problems throughout its facilities in exchange for a reduced penalty.²⁵³ In 1985 to 1990,

235 OSHA Imposed \$116 Million in Fines in Fiscal 1992, *Data Show*, 11 D.L.R. (BNA) A-18 (Jan. 19, 1993).

236 *Id.*

237 *Id.*

238 *Report Urges Strong OSHA Role in Enforcing Hazard Communication Rule*, 242 D.L.R. (BNA) A-1 (Dec. 16, 1992).

239 Pub. L. 101-508, 104 Stat. 1388.

240 OSHA Urged to Use Caution in Enforcing New Civil Penalties, 215 D.L.R. (BNA) A-6 (Nov. 6, 1990).

241 *Id.*

242 *New Penalties for OSHA, Child Labor Violations to be Assessed March 1*, 245 D.L.R. (BNA) A-4 (Dec. 20, 1990). The above statistics represent the first full year of enforcement under the new penalty structure.

243 *New Penalties for OSHA, Child Labor Violations to be Assessed March 1*, 245 D.L.R. (BNA) A-4 (Dec. 20, 1990).

244 *Id.*

245 OSHA Instruction Outlines Higher Penalties, Gives Agency More Latitude in Adjusting Fines, 20 D.L.R. (BNA) A-8 (Jan. 30, 1991).

246 Attorney Recommends Comprehensive Safety, Health Program as Leverage in Reducing Fines, 22 O.S.H. Rep. (BNA) 1286 (Dec. 9, 1992).

247 *Id.*

248 *Id.*

249 OSHA Instruction CPL 2.80 (1990).

250 *Secretary of Labor v. Caterpillar Inc.*, No. 87-0922 (1993) (upholding 167 violations of OSHA's recordkeeping standard); see *OSHA's Egregious Penalty Policy for Recordkeeping Violations Upheld*, 22 O.S.H. Rep. (BNA) 1601 (Feb. 10, 1993).

251 OSHA Formalizes Controversial Policy of Issuing Violation-by-Violation Citations, 193 D.L.R. (BNA) A-16 (Oct. 4, 1990).

252 *Id.*

253 *Id.*

OSHA has used this technique to issue approximately 100 citations against 90 employers, and to impose fines totalling \$45 million.²⁵⁴ Nearly two-thirds of these citations were settled, often with the employer agreeing to a corporate-wide abatement of the violating practice.²⁵⁵ Administrator Zeigler recently predicted that OSHA will have 33 corporate-wide settlements in place by the end of 1994.²⁵⁶

C) Criminal Penalties

In the past couple of years, Congress considered increasing criminal sanctions for OSHA violations, but to date no such increases have been enacted into law. Considerable congressional interest still exists on the subject, however, and legislation regarding criminal sanctions has been introduced into both houses of Congress as part of the OSH Reform Act legislation discussed above.

Regardless of the success of these legislative efforts, criminal enforcement already has increased dramatically. During the first six months of 1991, OSHA referred a recordsetting ten workplacesafetyand health cases to the Department of Justice for possible prosecution. Since 1971, only 80 cases had been referred.²⁵⁷

Criminal sanctions also are being applied to workplace violations through innovative enforcement of environmental regulations. Because environmental laws often define criminal conduct to include endangerment and assault, enforcement of environmental regulations can result in criminal penalties being applied to workplace violations found to endanger human life. Therefore, even if Congress fails to expand the use of criminal sanctions for OSHA violations beyond willful violations resulting in a worker fatality, the

use of environmental laws will expand the application of criminal sanctions to workplace violations that endanger human life.

In addition, because of increased awareness of workplace health and safety, the public is pressuring states to prosecute employers for workplace deaths and injuries under state criminal laws such as reckless homicide, manslaughter and battery.²⁵⁸ California stands out as a prime example of increased criminal enforcement at the state level.²⁵⁹ Several state courts have ruled against preemption of local prosecutions by OSHA.²⁶⁰ Until the federal criminal penalties under the OSH Act are stiffened to exceed those available under local state law, local prosecutions of workplace violations are likely to increase.

V. OSHA AND EPA

On November 23, 1990, OSHA and the EPA announced an inter-agency agreement which provided a framework under which the two agencies will work together to enforce both environmental and health and safety regulations in the workplace.²⁶¹ A Memorandum of Understanding between the agencies, signed in November 1990, calls for certain cooperative efforts:²⁶²

- Joint inspections by EPA and OSHA officials;
- A system of referrals between EPA and OSHA on hazards identified during separate inspections by either agency;
- Exchange of data relating to complaints, inspections, investigations, violations discovered or imposition of civil penalties; and
- Cross training programs for inspectors of both agencies to ensure that they are knowledgeable about regulations of both agencies.²⁶³

In March 1991, the agencies fleshed out the Memorandum of Understanding with a detailed work plan to implement their cooperative efforts in 1991.²⁶⁴ During 1991, the agencies focused on data exchange, referrals, and training for inspections at petrochemical plants and lead smelters.²⁶⁵

In July 1992, the agencies reaffirmed their commitment to continuing their efforts from 1991.²⁶⁶ Plans to focus on the issues of asbestos and premanufacture notices (under the Toxic Substances Control Act) were dropped for 1992. Instead, the agencies intended to target hazardous waste incinerators for joint inspections.²⁶⁷

Companies need to be aware that OSHA and EPA inspectors are being trained to recognize violations of both OSHA and environmental regulations. If violations of the other agency's regulations are noted by an inspector, it is likely in the future that an inspector from the other agency will show up on site shortly thereafter because of the information-sharing between the two agencies. Although limited resources are available for enforcement by either OSHA or EPA, this cooperative agreement expands these limited resources by giving each agency the ability to have the other agency's inspectors out in the workplace looking for its problems.

VI. CONCLUSION

Although no major changes are predicted to occur as Joe Dear is confirmed as OSHA head, it is clear that having him officially in charge should begin to speed the regulatory process at OSHA. Within the next year or so, major new programs should be in place. Thus, OSHA will likely move into its "thirty something" years as a revitalized force in the workplace.

254 *Id.*
 255 *Id.*
 256 *Process Safety, Bloodborne Regulation Eat Up OSHA's Funds, Zeigler Testifies on Hill*, 22 O.S.H. Rep. (BNA) 2066 (May 5, 1993).
 257 *OSHA Refers Record Number of Criminal Cases to Justice Department in First Half of 1991*, 164 D.L.R. (BNA) A-1 (Aug. 23, 1991).
 258 *Local Officials Seen as Ever More likely to Seek Prosecution for Workplace Hazards*, 71 D.L.R. (BNA) CC-1 (Apr. 14, 1986).
 259 *Prosecution of Safety Violations Reduces Construction Deaths, Study Says*, 137 D.L.R. (BNA) A-4 (July 18, 1988).
 260 *See Wisconsin ex rel. Cornellier v. Black*, 425 N.W.2d 21, 13 O.S.H. Cas. (BNA) 1761 (Wis. Ct. App. 1988); *Illinois v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 13 O.S.H. Cas. (BNA) 2001 (Ill. 1989); *Maine v. Moores-Neron, Inc.* 14 O.S.H. Cas. (BNA) 2054 (Me. 1991); *New York v. Pymm*, 563 N.E.2d 1, 14 O.S.H. Cas. (BNA) 1833 (N.Y. 1990), *aff'g*, 14 O.S.H. Cas. (BNA) 1287; *Sabine Consol. Inc. v. Texas*, 806 S.W.2d 553, 14 O.S.H. Cas. (BNA) 2049 (Tex. Ct. App. 1991).
 261 *OSHA, EPA Say Cooperative Agreement Will Increase Worker, Environment Protections*, 230 D.L.R. (BNA) A-4 (Nov. 29, 1990).
 262 *See e.g., Federal Investigation of 29 Incinerators Finds Violations, No Worker Overexposures*, 20 O.S.H. Rep. (BNA) 1744 (May 29, 1991).
 263 *Id.*
 264 *OSHA, EPA Announce Joint Work Plan for Data Exchange, Inspector Training*, 49 D.L.R. (BNA) A-2 (March 13, 1991).
 265 *Id.*
 266 *OSHA, EPA to Continue Joint Projects Under Interagency Cooperative Agreement*, 140 D.L.R. (BNA) A-2 (July 21, 1992).
 267 *Id.*