



# **OSHA's Next 50 Years**

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## **Legislating a Private Right of Action to Empower Workers**

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A web-friendly version of this report is available on our website at <https://progressivereform.org/our-work/workers-rights/osha50pra>



## Table of Contents

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Executive Summary .....	1
Introduction.....	3
OSHA's Failure on Coronavirus Is Emblematic.....	4
Workers Left Without a Backstop.....	5
Workers Deserve a Private Right of Action.....	6
Features of a Private Right of Action.....	9
Notice of Intent to Sue.....	9
Waiting Period.....	9
Past, Present, and Continuing Violations.....	13
Posting Requirement .....	13
Access to Materials.....	13
OSHA Enforcement and Settlements.....	14
Choice of Venue and Jurisdiction .....	14
Statutes of Limitation.....	15
Standing .....	16
Article III Standing.....	16
Cause of Action.....	18
Discovery: To Pursue the Truth .....	21
Burden-Shifting Mechanisms .....	22
Remedies and Settlements.....	23
Attorney's Fees .....	24
Whistleblower Protections.....	25
Avoiding Compulsory Arbitration and Waivers.....	28
State Adoption of the Private Right of Action.....	29
State Plan States.....	29
Savings Clause.....	30
Overcoming Objections.....	32
Conclusion.....	34
Endnotes.....	35

# OSHA's Next 50 Years

## Legislating a Private Right of Action to Empower Workers

### Executive Summary

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Over the last several decades, through a concentration of economic and political power by corporate executives and their allies in government institutions, workers have been systematically disempowered and silenced. Two important results of this dynamic are that the nation's workplaces are not nearly as safe or healthy as they need to be to protect all workers, and workers lack the power they deserve to speak up against exploitation without fear of significant retaliation.

The handling of the coronavirus pandemic is emblematic of several decades of choices by our national and state leaders that prioritize short-term profits ahead of people. At this very moment and in plain view, President Trump and his Occupational Safety and Health Administration (OSHA), conservatives in Congress, and many state leaders are failing to protect workers from the potentially fatal risks of COVID-19. Significantly, this increased burden is not equally shared by all. Black, Latinx, and other people of color are disproportionately represented in many occupations that make up the low-paid, high-risk jobs, such as health services, child care, public transit, grocery clerks, janitorial services, and meatpacking, which are deemed essential during the pandemic.

While these workers are deemed essential, our governing institutions have done little to safeguard them from the health hazards or economic challenges exacerbated by COVID-19. Instead, our leaders are sending them to work without proper equipment and without mandating robust protections to ensure they do not get sick or spread COVID-19 to their families and the public at large.

It does not have to be this way. Agencies like OSHA should play a key role in setting policies that ensure health, safety, stability, and power for workers in addressing workplace hazards. But since 1970, Congress and the White House have hollowed out the agency, denying it resources and trimming its authority, leaving it in a weak state. The failure has been bipartisan. Republicans have been overtly hostile to OSHA, and Democrats have often lacked the political will to pursue progressive standard-setting and enforcement policies.

Consequently, OSHA has failed not only to protect workers from existing hazards – ranging from unsecured trenches to infectious diseases like COVID-19 – but has also taken minimal action to tackle emerging risks, such as those associated with climate change, the reshoring of manufacturing jobs, increased automation, and the expansion of artificial intelligence in the workplace.

As the 50th anniversaries of the Occupational Safety and Health Act (OSH Act) and OSHA approach in December 2020 and April 2021, respectively, it is time to address the law's and agency's shortcomings and chart a course of action to revolutionize worker health and safety for the next 50 years.

Fixing the current system requires an updated and vastly improved labor law that empowers workers to speak up about health and safety hazards, rather than risk their lives out of fear of losing employment and pay. It also requires that workers be empowered to fight back when government agencies fail to enforce safety and health requirements. Our vision is to guarantee all workers a private right of action to enforce violations of the OSH Act, coupled with incentives for speaking up and strong whistleblower protections to ensure workers can and will utilize their new authority. In addition, this private right of action should cover the millions of workers who are currently unprotected by OSHA, including misclassified independent contractors, agricultural workers, and public sector workers in states under federal OSHA's jurisdiction. Congress should also ban mandatory arbitration as a condition of employment, since the purpose of such arbitration requirements is to disempower workers by denying access to the courts. Finally, Congress should require that all states and territories that operate their own occupational safety and health programs in lieu of federal OSHA incorporate a private right of action into their state plans.

Promoting laws and regulations that safeguard workers physically and financially and that rebalance the power dynamic between employers and workers is a necessary and vital step in building strong, resilient families and communities. Providing a private right of action, a common tool in a variety of other laws, is a long overdue measure that would empower workers to ensure safer and healthier workplaces when the agency tasked with protecting them is unwilling or unable to do so. Engaging workers more meaningfully in the enforcement of health and safety standards will not only improve their immediate conditions but also disrupt the cycle of worker disempowerment that contributes to unsafe and unhealthy working conditions, giving workers a voice to achieve lasting improvements in the workplace.

# OSHA's Next 50 Years

## Legislating a Private Right of Action to Empower Workers

### Introduction

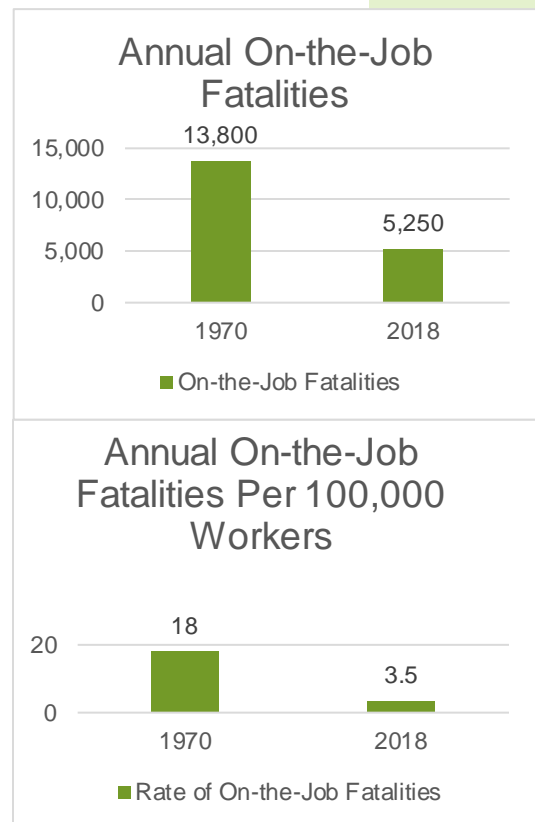
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On December 29, 1970, President Richard Nixon signed into law the Occupational Safety and Health Act (OSH Act) to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions."<sup>1</sup> The law created the Occupational Safety and Health Administration (OSHA), which opened its doors on April 28, 1971. As the Act and agency celebrate their 50th anniversaries in December 2020 and April 2021, respectively, important progress has been made toward reducing worker fatalities and injuries through federal occupational health and safety standards, regulations, and enforcement. At the same time, it is important to acknowledge the shortcomings of OSHA and the OSH Act, as well as the need to learn from those failures and chart a course of action to revolutionize worker health and safety for the next 50 years.

The reduction in workplace fatalities year-over-year since the OSH Act became law is evidence of its positive effect on improving working conditions.

Despite these improvements, OSHA and employers have fallen far short of ensuring safe and healthful working conditions for every worker. More than 5,000 workers still die each year in workplace incidents, tens of thousands more die from work-related occupational diseases, and workers incur millions of work-related injuries. Of course, these bare figures understate the true impact of OSHA's failure to protect worker safety and health – the emotional and financial costs to these workers' families and communities do not get the attention they deserve, and the cumulative numbers gloss over racial disparities.

Despite early progress, backsliding began during the deregulatory frenzy of the Reagan administration, and the agency has never fully recovered its bearings. Consequently, OSHA's progress on improving working conditions has stalled over the past four decades due to funding constraints, intense political pressure, and unhelpful court decisions.<sup>2</sup> The



failure has been bipartisan. Republicans have been overtly hostile to OSHA, and Democrats have often lacked the political will to pursue progressive standard-setting and enforcement policies. The agency also has issued only a handful of new health and safety standards over the past two decades, and it has declined to move forward to address such critical hazards as infectious diseases like COVID-19, line speeds in meatpacking plants, ergonomic hazards, workplace violence, and extreme heat.

OSHA's record of inaction has left workers in a range of industries vulnerable not just to longstanding hazards, but to a host of emerging dangers, as well. For example, climate change poses many threats, some legitimately

existential, but among them are significant hazards to workers' health and safety and the economic

stability of working families, employers, and the economy as a whole. Similarly, we must grapple with major changes in the nature of work, including the "reshoring" of dangerous manufacturing jobs returning from overseas plants, increased automation, and the expansion of artificial intelligence capabilities into the workplace.



One manifestation of the funding shortages and political interference hamstringing OSHA is that its inspection and enforcement resources and authority simply have not kept pace with the growing number of workers and workplaces across the country or with the evolving nature of work. As of 2018, the agency employed 1,815 inspectors (752 federal and 1,063 state) to cover the 9.8 million workplaces within the statute's jurisdiction.<sup>3</sup> In other words, there is one inspector for every 79,262 workers and, at their 2018 pace, OSHA and its counterparts can perform one inspection per worksite every 134 years.<sup>4</sup>

### **OSHA's Failure on Coronavirus Is Emblematic**

The coronavirus pandemic and workers' unmitigated exposure to the deadly disease that causes COVID-19 is a prime example of the agency's failure to protect workers in the modern era. Since the beginning of the pandemic, frontline workers have been forced to labor without basic protective gear such as masks, gloves, soap, or water; without sufficient distancing between workstations and coworkers; and alongside infected colleagues.<sup>5</sup> Black, Latinx, and other people of color are disproportionately represented in many occupations that make up the low-paid, high-risk jobs, such as health services, childcare, public transit, grocery clerks, janitorial services, and meatpacking, which are deemed essential during the pandemic.<sup>6</sup> Yet OSHA has been absent, even so far as disregarding thousands of complaints and retaliation claims filed by workers and their representatives. The agency has also ignored calls by unions and workers to adopt emergency standards to



protect workers from infectious diseases, including coronavirus.<sup>7</sup> In fact, when unions challenged OSHA's decision not to put in place an emergency standard for infectious diseases, the agency spent precious resources defending its inaction in court, rather than putting those resources to use protecting workers.

Without an infectious diseases standard, the agency is forced to rely on the general duty clause – a power it rarely utilizes – to cite employers for exposing workers to coronavirus. Under the general duty clause, employers have a general duty to provide a workplace free from recognized hazards that cause or are likely to cause death or serious physical harm. The agency has also issued a number of guidance documents to various industrial sectors, not one of which is enforceable. And as noted above, the agency has largely ignored complaints from workers and their representatives. For those few complaints it has followed up on, the agency has sent letters to companies notifying them of the complaint and asking them to take precautions. Other complaints are handled using the agency's "rapid response investigation" procedures, which rely on the employer to *inspect itself* and report its findings to the agency.

To grasp the vacuum of enforcement around COVID-19 complaints, as of July 21, the national office of OSHA had only opened 720 virus-related inspections (many of which are not on-site inspections) and had issued only four citations for coronavirus in the workplace – several months after the pandemic began to spread across the United States infecting thousands of workers.<sup>8</sup> OSHA issued the citations against a nursing home facility in Georgia and three in Ohio, citing a minor reporting violation in the Georgia facility and respiratory protection violations in the Ohio facilities.<sup>9</sup>

### **Workers Left Without a Backstop**

A major gap in the OSH Act is its failure to provide workers a private right of action to enforce health and safety standards and regulations. Enforcement relies on government agencies, but recognizing that those agencies sometimes fall short – because of budget shortages, ideological objections, the absence of political will, or sheer incompetence – Congress has frequently written provisions into major statutes allowing private plaintiffs to bring litigation to enforce the law. The Clean Air Act and the Fair Labor Standards Act are two prominent examples of laws that allow citizen suits of this sort. The Occupational Safety and Health Act has no such provision, and as a result, workers must rely on OSHA and its state counterparts to respond to complaints by conducting inspections and issuing citations. As a result, when OSHA fails to or chooses not to do its job, as it has failed during the coronavirus crisis, workers have no recourse.

Instead, the Act enlists workers as OSHA's "eyes and ears," helping the agency prioritize its limited resources by authorizing workers to file

complaints that help the agency focus on the most dangerous worksites. To encourage workers to speak up by filing complaints about hazardous conditions, the Act prohibits employers from retaliating and includes whistleblower protections in the event an employer does take an adverse action. Unfortunately, the whistleblower protections in the law are now so weak and outdated that workers have few genuine protections from retaliation, and labor attorneys rarely, if ever, advise their clients to rely on the anti-retaliation provisions of the statute in deciding to come forward with concerns. Their calculus: An OSHA that has declined to do its job by conducting inspections is not likely to vigorously defend whistleblowers, either. As the number of inspectors declines, input from workers is all the more important to the agency's efforts to enforce its standards. Yet workers still lack any mechanism for enforcing the OSH Act, and they have little protection if they speak up about hazards they encounter.

Another significant failing of the Act is that it does not cover millions of workers, including public sector workers, many farmworkers, and "gig workers" misclassified as independent contractors. In the context of the coronavirus, that failing of the law has been particularly significant. Federal



agency employees and about 8 million state and local government employees,<sup>10</sup> many of whom are providing critical health and other services amid the pandemic, have no protections under the OSH Act, and no support from OSHA, to help protect them from exposure to COVID-19 in their workplaces. Similarly, many

farmworkers, most of whom are Hispanic or Latinx,<sup>11</sup> work side-by-side around the clock to prevent interruptions in our food supply chain and have no recourse if they contract the deadly disease. And most so-called "gig workers," such as the shoppers and drivers for Instacart, are left to find their own personal protective gear and their own resources on how to properly protect themselves from coronavirus on the job. As with many inequities in our society, COVID-19 has brought new attention to systemic problems that public interest advocates have been working on for years. For local government employees, farmworkers, "gig workers," and others, the OSH Act's loopholes demand a fix that will empower them to achieve better protections from myriad hazards.

### **Workers Deserve a Private Right of Action**

Knowing what we know about the reasons for OSHA's stalled progress and looking ahead to the next 50 years, one of the most significant fixes that Congress must make to the OSH Act is to provide workers a private right of action to ensure safe and healthy workplaces. This right must be coupled

with incentives for speaking up and strong whistleblower protections to ensure workers can and will utilize their new authority. Congress should also expand the scope of the OSH Act to cover the millions of workers who are currently unprotected on the job. Providing to workers a private right of action is a necessary reform that would radically transform the future of work in the United States.

Empowering workers with a private right of action is critical to ensuring safer and healthier workplaces because, even with a robust regulatory system, there will always be limits on what OSHA has the resources and political will to do.<sup>12</sup> When the prospect of a private lawsuit is put on the table, the agency may be more motivated, even compelled, to pursue the serious allegations raised by employees. Further, when OSHA's resources are especially limited due to budget cuts or an unfriendly administration, private citizen suits can help OSHA identify problematic worksites despite a shortage of inspectors. Finally, employers who have relied on OSHA's apparent disinterest in enforcing the law would have reason to fear lawsuits filed by their own employees, and thus be better motivated to protect their workers from harm.

*Empowering workers with a private right of action is critical to ensuring safer and healthier workplaces because, even with a robust regulatory system, there will always be limits on what OSHA has the resources and political will to do.*

In the pages that follow, we outline what such a private right of action provision would entail. Lawsuits filed under the provision would be premised on an employer's violation of an OSHA standard, regulation, or the OSH Act's general duty clause. Workers and their representatives would continue to have the option of filing a complaint with OSHA and navigating the traditional process with the agency. But providing workers and their representatives a private right of action to enforce violations in court would provide an alternative means of securing a safe and healthy workplace where OSHA has chosen not to inspect or issue a citation.

As noted, model frameworks already exist for citizen enforcement of agency regulations, often called a "citizen suit," in several federal environmental laws such as the Clean Air Act and the Clean Water Act. Legislation introduced in 2019, the Protecting the Right to Organize (PRO) Act, proposes to provide workers a private right of action under the National Labor Relations Act (NLRA). Further, state laws, such as the California Private Attorney General's Act, could serve as a model.

This report will examine the many components required to create an effective private right of action, including a notice of intent to sue, standing, statutes of limitation, discovery, robust whistleblower protections, strong remedies and a bounty provision that pays workers 30 percent of civil penalties recovered, and a prohibition on forced arbitration requirements.

Ensuring workers have access to the courts, an incentive to bring a case to court, and strong protections from retaliation when they do step forward are all critical to creating a private right of action that workers can actually utilize. In each section, we explore model statutory language that already exists or has been proposed and that could be adopted for the OSH Act. Additionally, we conclude with a discussion of how a federal cause of action would be incorporated into existing state plans for those states and territories that choose to operate their own health and safety programs in lieu of federal OSHA.

## Features of a Private Right of Action

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### Notice of Intent to Sue

#### *Waiting Period*

In existing laws that provide a private right of action, the right to file a lawsuit only becomes available after the intended plaintiff provides a "Notice of Intent to Sue" to the enforcement agency and the party alleged to be in violation. These notices require a "waiting period" to give the alleged violator an opportunity to correct the problem and the agency an opportunity to "diligently enforce" the statute. If the agency has already begun, or chooses to begin, an enforcement action during the waiting period, the party filing a lawsuit may not be able to proceed with their case.

Under many federal environmental statutes, for example, potential plaintiffs must give federal and state officials, as well as the noncomplying company, 60 days' notice of their intent to sue. If the 60 days elapses without government enforcement action, plaintiffs may then file their case in court. Environmental law practitioners indicate that 60 days' notice is too long, especially in imminent danger cases. In fact, in such cases, the Resource Conservation and Recovery Act (RCRA) requires no notice of an intent to sue.<sup>13</sup>

Similarly, under the PRO Act, employees would have the right to file a civil action against an employer for violating certain rights under the Act. The employee could not file a civil action until 60 days had elapsed from when they filed a charge with the National Labor Relations Board (NLRB) alleging an unfair labor practice. The employee would be able to file an action in district court within 90 days of either (i) the expiration of the 60-day notice period or (ii) the Board notifying the employee that it will not issue a complaint against the employer, whichever occurs earlier.

Further, under the California Private Attorney General's Act, once an employee files a notice of intent to sue, the Labor and Workforce Development Agency (LWDA) has 60 days to intervene. The agency has 65 days to notify the employee or representative of its decision on whether or not to investigate. If the agency provides notice that it does not intend to investigate or if it does not respond within 65 days, the employee may file a civil action in court. If the agency decides to investigate, it has 120 calendar days to issue a citation, with the possibility of an additional 60-day extension. If the agency does not do so, the employee may proceed with the civil action. Because the California Private Attorney General's Act allows employers a right to cure and a long period for the agency to act, the statute is better tailored to wage and hour violations than health and safety violations, although the statute itself does not preclude such cases.

Like existing citizen suit provisions, the primary purpose of the notice of intent to sue in the workplace health and safety context would be to put the employer on notice and to allow the agency an opportunity to inspect and issue a citation—to "diligently enforce" the statute.

The appropriate deadline for OSHA to respond to a notice of intent to sue should be two-fold: OSHA should have a deadline for deciding whether to inspect and another for deciding whether to issue a citation. The two deadlines ensure that the agency is in fact "diligently prosecuting" the violation. OSHA cannot be allowed to help an employer escape liability by conducting an inspection and then never following through with a citation or a decision not to cite.

*If OSHA does not respond to the notice of intent to sue, or it declines to act by the expiration of the statutory deadlines for inspecting or issuing a citation, the complaining party may proceed with their case in court.*

The appropriate deadline in the typical case should be five days for OSHA to complete an inspection and 30 days to issue a citation. If OSHA has already inspected prior to the notice of intent to sue, but had not issued a citation, OSHA would have only 30 days to issue a citation following the receipt of the notice. OSHA's Field Operations Manual currently requires that inspectors issue citations within six months, the maximum time presently allowed under the OSH Act.<sup>14</sup> We have chosen to require inspectors to act more

quickly in the case of private citizen suits to encourage OSHA to act expeditiously because we think it likely that hazards sufficient to prompt employees to consult with lawyers are egregious. Further, by requiring faster inspection and citation times under the Act, OSHA may be encouraged to respond to employee complaints it receives so that employees do not feel a need to file a notice of intent to sue. If the agency does not intend to act, the employee should have the ability to proceed to court promptly to act in OSHA's stead.

If OSHA does not respond to the notice of intent to sue, or it declines to act by the expiration of the statutory deadlines for inspecting or issuing a citation, the complaining party may proceed with their case in court. The complaining party would have up to 90 days after the expiration of OSHA's failure to issue a citation to proceed with their case.

If a worker is complaining about a hazard that may present an imminent and substantial endangerment to worker health or safety, the waiting period for filing the lawsuit should be shorter because of the urgency of the circumstances. Congress should establish two days for OSHA to inspect and three additional days to issue a citation, and if no response, the complaining party would be able to file immediately in court. Again, if OSHA conducted an inspection prior to the filing of the notice of intent to sue, OSHA would have only three days to issue the citation following receipt of the notice.

Although workers are not likely to wait to file a lawsuit because of the imminence of the danger, the complaining party should have up to 90 days after the expiration of OSHA's failure to issue a citation to proceed with their lawsuit in court in case the worker has problems finding an attorney or other issues that delay filing a court case.

To protect workers better, whether OSHA or an employee brings an enforcement action, Congress should broaden the definition of "imminent danger" in Section 13 of the OSH Act. Congress currently defines an imminent danger as "any conditions or practices . . . such that a danger exists that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."<sup>15</sup> The Secretary of Labor may seek an injunction to restrain imminent danger violations; however, injunctions are rarely sought.<sup>16</sup> And workers or their representatives may petition a court to compel the Secretary to seek an injunction, but no such cases are known.<sup>17</sup> OSHA will only find an imminent hazard exists if death or serious harm is threatened and it is reasonably likely that a serious accident could occur immediately or, if not immediately, then before the danger could be abated.<sup>18</sup> Under these requirements, a danger *must* be present and the risk of harm must be so significant that there is more than a "mere possibility" that an employee may be injured in the future.<sup>19</sup> There must be a "real" risk of death or serious physical harm that would result from the danger.

Congress should amend the definition of imminent danger to lower the burden of proof required of workers alleging imminent hazard violations. One approach to revising the definition might be to consider language that defines imminent danger as "any conditions or practices . . . which are such that a danger *may* exist which could reasonably be expected to cause death or physical harm if remedial action is not taken through the enforcement procedures otherwise provided in this Act."

Figure 1: Notice of Intent to Sue & Waiting Periods





### ***Past, Present, and Continuing Violations***

Under many citizen suit statutes, a "continuing violation" is required for a case to proceed. If a violator stops its illegal acts before a lawsuit reaches a court, the plaintiff loses the right to secure a judgment in the lawsuit, leaving the violator the option of resuming the violations the following day. In the context of occupational safety and health, this judicial doctrine could make the private action impractical in many circumstances. For example, if an employer fails to install machine guards on dangerous equipment inside the workplace, requiring a continuing violation would mean that if the employer corrects the hazard and installs the proper guards, the plaintiff's case would terminate. If the employer then removed those same guards a day later, the plaintiff would have to start all over again by filing a notice of intent to sue. Accordingly, legislation should expressly state that a party bringing a civil case for a workplace health and safety violation would have the right to file a lawsuit for past, present, and continuing violations of a health or safety standard, regulation, or the general duty clause.<sup>20</sup>

### ***Posting Requirement***

Under a private right of action statute, when the agency and employer receive a notice of intent to sue, they should be required to post it for the public and employees to view. The agency should be required to post the notice of intent to sue publicly on its website. The Environmental Protection Agency (EPA) posts notices of intent to sue on its website when it receives them, and OSHA should look to EPA as a model. Further, the employer should be required to publish a physical copy of the notice at the worksite within 24 hours of receiving it. These posting requirements would put the public and other employees on notice of the alleged violations and potential litigation.



### ***Access to Materials***

In any case where a party has filed a notice of intent to sue and OSHA has already inspected or inspects in response to the notice, workers should have access to any materials that OSHA gathers. The section below on discovery discusses this in more detail. This would not interfere with the existing right in Section 8(f)(2) of the OSH Act for workers to seek informal review and a written statement of the reasons behind the Secretary's decision not to issue a citation following an inspection.<sup>21</sup> It also does not require a worker to exhaust this remedy prior to proceeding with a private right of action.

### **OSHA Enforcement and Settlements**

If OSHA chooses to issue a citation by the deadline specified in the legislation, the case would cease because OSHA is taking its proper place as the principal enforcer of the Act. This can be a benefit to the party seeking to file a lawsuit because it guarantees some action against the violator without having to spend time and money involved in litigation. However, it is important to guard against the possibility that OSHA might engage in a "sweetheart deal" with a violating employer, conducting an investigation but then failing to take appropriate steps to force employers to correct violations, thus blocking litigation while doing nothing meaningful to protect workers. To prevent sweetheart deals, legislation providing a private right of action should include a presumption that workers filing the lawsuit and their representatives can participate in the agency's settlement negotiations or administrative proceedings, including any appeal that the employer takes to the Occupational Safety and Health Review Commission (OSHRC).

Allowing parties to a citizen suit to intervene in settlement discussions is common in environmental statutes. This right is also included in unfair labor proceedings before the NLRB. Specifically, under the NLRB's current rules on unfair labor practice proceedings, the "charging party" is presumed to be involved in any settlement discussions.<sup>22</sup>

Having the right to intervene in negotiations or proceedings will guard against OSHA lowering its proposed penalty amounts substantially, as is current practice and policy at OSHA,<sup>23</sup> which diminishes the effectiveness of penalties in preventing future violations. Furthermore, a complaining party must have the right to file a motion with the court asking for a preliminary injunction against any ongoing violations so that the employer abates the hazards while the case, negotiations, or administrative proceedings progress.

Any settlement agreement between the parties in response to a notice of intent to sue should take the form of a judicially entered consent decree agreed upon by all parties—OSHA, the employer, and the complaining party. Congress should require the agency to conduct notice and comment on the proposed consent decree and meaningfully consider comments received before it can be finalized. Allowing workers and their representatives to comment on and object to consent decrees is another way to help hedge against OSHA and the employer entering into sweetheart deals.

### **Choice of Venue and Jurisdiction**

The choice of venue for filing a legal proceeding refers to which of several courts with jurisdiction can hear a lawsuit. In many cases, the statute will

dictate which court has jurisdiction. Some statutes provide for concurrent jurisdiction, meaning that either federal or state courts may hear a case. For example, under the Fair Labor Standards Act (FLSA), a complaining party alleging a violation by an employer can bring a case in any federal or state court of competent jurisdiction.<sup>24</sup> The Jones Act, a statute regulating maritime commerce, by extending the Federal Employers' Liability Act (FELA) to that context, allows a claim against an employer for an injury to be filed in federal or state court and bars a defendant from removing a case filed in state court to a federal court.<sup>25</sup>

Legislation to create a private right of action under the OSH Act should also provide concurrent jurisdiction like that found in the FLSA and Jones Act. Thus, the plaintiff should be able to file the lawsuit in federal court or any state court that would have jurisdiction over the defendant and the defendant should be barred from removing a state court case to federal court. The venue for bringing a private right of action for an occupational safety and health violation is particularly important and may affect the entire outcome of a case. Allowing the plaintiff to bring the case in either federal or state court can help open plaintiffs to a broader pool of attorneys—not just those who practice in federal courts. It would also help them choose a venue that is most convenient for them. Additionally, barring a defendant from removing to federal court could be important to plaintiffs facing federal courts that are more hostile to these claims than state courts—or who just do not want to be in federal court given concerns about complexity. In addition, the statute should eliminate any requirements that would limit plaintiffs' access to the courts based on the amount at stake, or the "amount in controversy," in the case.

*Legislation to create a private right of action under the OSH Act must specify the amount of time an employee has to initiate their claim by filing the notice of intent to sue—the statute of limitations. The standard statute of limitations in federal civil cases is five years.*

### Statutes of Limitation

Legislation to create a private right of action under the OSH Act must specify the amount of time an employee has to initiate their claim by filing the notice of intent to sue—the statute of limitations. The standard statute of limitations in federal civil cases is five years.<sup>26</sup>

The OSH Act private right of action should adopt the standard statute of limitations for workers or their representatives to file a notice of intent to sue. The statute of limitations would begin to toll when the employee knew or should have known of the existence of the hazardous health or safety condition. This would give workers and their representatives long enough to learn of an employer's violation, consult with an attorney, and decide whether they wish to file a notice of intent to sue and pursue a lawsuit against their employer. Having a sufficiently lengthy statute of limitations and a discovery rule for starting the limitations period is especially important in the occupational health context because health hazards may take a long

time to recognize. For example, a considerable amount of time may pass before a worker learns about chronic exposure to toxic chemicals, and thus it may be years after first being exposed that they learn of the hazardous condition and violations in their workplace.

In addition to adopting a statute of limitations for workers or their representatives to file a notice of intent to sue, the legislation should amend the OSH Act to expand OSHA's statute of limitations for issuing citations in private enforcement cases. OSHA's current statute of limitations for issuing citations is six months from the alleged violation, with limited exceptions, such as when an employer intentionally hid the violation to prevent a citation. New legislation should expand the six-month statute of limitations when OSHA is acting in response to a notice of intent to sue to allow the agency to cite violations that occurred up to five years earlier. This would be necessary to avoid all private lawsuits alleging past violations older than six months from going to trial even if OSHA wishes to step in to enforce the statute.

### Standing

The Constitution limits the authority of the federal courts to hear cases that present a "case and controversy."<sup>27</sup> Standing is the legal doctrine that the courts use to enforce this constitutional constraint on their authority to hear particular cases. It is intended to ensure that only parties with a legitimate interest in the outcome of a lawsuit can initiate it.

#### *Article III Standing*

According to the Supreme Court in *Lujan v. Defenders of Wildlife*, standing requires that the plaintiff has suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural or 'hypothetical;'" the injury is "fairly traceable to the challenged action of the defendant," and it is "'likely' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'"<sup>28</sup>

A worker suing to enforce an OSHA standard or regulation is at risk of a concrete and particularized injury because of the employer's failure to abide by the regulation or standard. The reason that OSHA establishes a standard is the risk of a physical injury to workers or the exposure to a toxic substance. Any injury will be the result of the employer's violation, and a favorable result will promote the employer's compliance with the OSHA standard, which will "redress" a risk of injury. The Supreme Court has found the deterrent effect of civil penalties paid to the government sufficient to satisfy the redressability element.<sup>29</sup>

Public interest and environmental groups are eligible for "associational" or "representational" standing. Under this doctrine, an association can sue in its own name on behalf of its members if: (1) one of its members would have

standing to bring the action, (2) the lawsuit relates to the purposes of the organization, and (3) neither the claim asserted nor the relief requested requires the participation of individual members (which in practical terms means the action is not for damages, but is for declaratory or injunctive relief).<sup>30</sup> This entitles a labor union, worker center, or legal clinic to sue on behalf of its members who are at risk because of an OSHA violation in a workplace.

The worker or a group claiming associational standing must have sufficient proof of the probability of a worker being injured that the worker's claim is "imminent" and not "conjectural" or "hypothetical." The Supreme Court has said that proof of a "substantial" risk of injury satisfies the standing requirement, but it did not indicate whether proof of a less likely risk will still establish standing. The Seventh Circuit has found that "even a small probability of injury is sufficient to create a case or controversy,"<sup>31</sup> the Second Circuit similarly requires only an "increased" risk of injury for standing,<sup>32</sup> but the D.C. Circuit requires proof of a "substantial probability" of injury to establish standing.<sup>33</sup>

Even if the Supreme Court ultimately requires proof of a "substantial" probability of risk to gain standing, workers should be able to meet this burden of proof. They can cite the OSHA rulemaking record showing where the agency proved the risk to employees in the absence of the standard that the agency adopted, and they can prove that they work in close proximity to the source of the danger that the standard addresses. It might be more difficult, however, for a worker to establish an imminent injury for violations of some regulations, such as paperwork requirements.



If the employee is suing an employer for failure to obey a health standard – that is, a standard aimed at preventing significant risk of exposure to health hazards in the workplace, the employee likewise can cite the rulemaking record, which will have evidence of the increased risk to workers absent the standard being in place. While it is not clear how likely the risk of disease must be, the D.C. Circuit has held that the Natural Resources Defense Council established a "substantial probability" of risk in a case challenging an Environmental Protection Agency (EPA) rule involving methyl bromide by proving its members had a "1 in 200,000 increased risk of contracting non-fatal skin cancer," which meant that two to four of its members were likely to contract a non-fatal skin cancer because of EPA's action.<sup>34</sup>

Finally, if the employee is asserting a violation of the general duty clause, which states that employers have a general duty to provide a workplace free from recognized hazards that cause or are likely to cause death or serious

physical harm, there will be no rulemaking record to cite to establish the imminent risk to the employee since OSHA has not developed a standard related to that particular hazard. However, the fact that other employers have chosen to protect their workers in some way not adopted by the employer being sued indicates the industry recognizes a significant risk to an employee. Similarly, the fact that the employer failed to adhere to a generally accepted guideline issued by an authoritative source (for example, Centers for Disease Control and Prevention (CDC) guidelines) indicates that the affected employees face a significant risk of harm. The plaintiff can also file affidavits from occupational health experts about the degree of risk and cite any literature concerning the risk.

Congress could establish a "bounty" that would be awarded to plaintiffs who prevail in a private action against their employer to fortify the standing of employees to bring lawsuits against their employers.<sup>35</sup> Congress has previously used this approach in "*qui tam* actions," which authorize a private citizen to sue on behalf of the government to enforce federal law and, if the plaintiff prevails, they collect a share of the civil penalties that the defendant pays to the government.<sup>36</sup> In *Lujan*, the Supreme Court noted the possibility of establishing standing where "Congress has created a concrete private interest in the outcome of the suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."<sup>37</sup> Although the Court did not explicitly hold that a bounty would create standing, a number of courts have read *Lujan* as approving of standing based on a bounty as long as the plaintiff also can prove the likelihood of personal injury due to the defendant's violation of federal law.<sup>38</sup> As long as the employee faces a reasonable risk of being injured, even if it is not as substantial as a court would require, the combination of the bounty and the risk of injury should satisfy standing.

### ***Cause of Action***

In addition to constitutional standing, a plaintiff must state a cause of action, which means, in essence, there is a statute granting the plaintiff some judicially enforceable right. When Congress adopts a private right of action to enforce OSHA standards, regulations, or the general duty clause, it will establish such an enforceable right for anyone who is an "employee" of an "employer" because Congress authorized OSHA to protect "employees." As explained below, to ensure all workers have access to the courts to exercise this new right, Congress should expand coverage of the OSH Act to the millions of workers the Act does not already cover by expanding the definition of "employee" and "employer." Congress should also ensure that OSHA's multi-employer policy reaches employees of another employer under the general duty clause.

The OSH Act currently defines an employee as "the employee of an employer who is employed in a business of his employer which affects commerce."<sup>39</sup> An employer is defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State."<sup>40</sup> Accordingly, the Act does not cover self-employed persons (i.e., independent contractors), most federal agencies, and public sector employees of state and local governments (in states under federal OSHA's jurisdiction).<sup>41</sup> Due to a congressional appropriations rider adopted every year since Fiscal Year 1977, the Act also excludes farms that employ only immediate family members or have fewer than 10 employees and no active temporary labor camp during the past twelve months.<sup>42</sup>

The limited scope of the OSH Act's coverage means that millions of workers are left with no protections at all. For purposes of a private right of action, it would also mean that, without an amendment from Congress, none of these workers would be able take advantage of the new right.

Under any legislation to create a private right of action, Congress should broaden the scope of the Act to ensure coverage for all public sector workers, farmworkers, and workers misclassified as independent contractors. Congress can achieve this by simply repealing the appropriations rider related to farmworkers and by amending the definition of employee to adopt the "ABC" test found in the PRO Act and in some state statutes.<sup>43</sup> Under the ABC test, an employee is defined as "[a]n individual performing any service . . . unless:

- (A) The individual is free from control and direction in connection with the performance of the service, both under the contract and for the performance of service and in fact;
- (B) The service is performed outside the usual course of the business of the employer; and
- (C) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."

The legislation should also amend the OSH Act definition of employer to state expressly that the Act applies to public sector employers and employees. This can be achieved by simply updating the definition of employer under the Act to remove the language excluding federal, state, and local public sector employees, as has been introduced in legislation dating back decades.<sup>44</sup>

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Another major challenge related to the way OSHA defines an employer is its existing multi-employer policy.<sup>45</sup> Under this policy, the agency may cite an employer for hazards affecting its own employees or those of another employer if: the employer exposed employees to a hazard, created the hazard, is responsible for controlling safety at the worksite, or has the ability to correct the hazard. If the employer is classified as an exposing, creating, controlling, or correcting employer, it has certain obligations and, depending on the circumstances, it can be cited. In every case, a creating employer—the one that caused a hazardous condition that violated an OSHA standard—can be cited for the violation, even if the only employees exposed are those of another employer.

One major oversight of the multi-employer policy is that it does not allow OSHA to cite an employer under the general duty clause related to hazards affecting another employer's employees. This is because the general duty clause states that employers must provide a place of employment free from recognized hazards that could harm the *employees of the employer*, but it is silent about employees of another employer. Instead, in general duty clause cases, OSHA looks to apply joint employer liability.<sup>46</sup>

Every employer on a worksite should be responsible for protecting its own employees, as well as the other employees, from hazards. All employers should be required to comply not only with OSHA standards, but also with the general duty clause.

To expand the reach of OSHA's multi-employer policy, Congress could amend the general duty clause to cover employees of another employer. Legislation has previously been introduced to this effect.<sup>47</sup> The new language would provide that an employer "shall furnish 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 the employees of the employer or to other employees at the place of employment."

Extending coverage to public sector workers and agricultural workers, ensuring workers currently misclassified as independent contractors are properly included under the Act, and closing the gaps on OSHA's multi-employer policy will guarantee health and safety protections to millions of workers who are currently unprotected for no rational reason. These are overdue updates to the OSH Act. Including these reforms in legislation creating a private right of action will not only provide this critical protection to millions more workers, but also allow them to step in and help OSHA enforce the law.



## Discovery: To Pursue the Truth

Another critical feature of a private right of action is the right to discovery. For workers to have a reasonable chance of success in their cases against employers for violating a health or safety standard, regulation, or the general duty clause, they will need proof of the alleged violations. Workers must be able to discover any information reasonably relevant to pursuing their rights under the Act. Such information may take the form of first-hand knowledge, eyewitness testimony, or documentary evidence. The right to subpoena documents, take depositions, and demand responses to interrogatories is a critical tool for ascertaining the truth in civil litigation. Because other workers in the establishment will be the most likely and most informed witnesses, it is important that they can come forward without fear of retaliation. Additionally, undocumented employee witnesses must be afforded witness status and protection against deportation.

To gather evidence, the worker filing the complaint should have the right to request related documents and testimony even before litigation commences. Under Rule 27 of the Federal Rules of Civil Procedure (FRCP),<sup>48</sup> any person who wishes to collect testimony about a cognizable matter may petition a district court where the adverse party resides to ask for an order to collect depositions of named persons expected to be adverse parties in a forthcoming action. In legislation for providing a private right of action under the OSH Act, the concept of pre-suit discovery as found in FRCP Rule 27 should apply.

Federal legislation creating a new right under the OSH Act should also provide that, in the event OSHA performs an inspection, whether in response to a notice of intent to sue or otherwise, all workers in the plant and their representatives should automatically have a right to the inspection file. Specifically, the legislation should provide that employers are required to post a notice of the full inspection report in a prominent place where notices are customarily posted. The employer must make available a complete copy of the full inspection report at no charge within 24 hours of an employee's request for the full file.

This will be especially valuable to employees when OSHA conducts an inspection but declines to pursue any enforcement action against an employer. The employees can then evaluate the agency's findings and determine if the enforcement decision is acceptable or if they believe a violation exists that OSHA declined to enforce. In such a case, the employees may decide to exercise the private right of action and file a lawsuit in place of the agency. Thus, if OSHA initiates an inspection that is not in response to a notice of intent to sue, Congress should require that the employer must

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comply with the posting and access requirements discussed above within five business days after the conclusion of the investigation.

If the inspection results from the filing of a notice of intent to sue, OSHA should turn over the inspection file to the complaining party immediately upon the expiration of the deadline under the statute. This would potentially provide employees the file before the employer has posted it. As noted above, OSHA would have five days to inspect in most cases, and a maximum of two days in an imminent danger case.

Workers must also be able to access information from the employer, the employer's injury and illness records, hazard communication materials, and other recordkeeping files. Disclosure of such information to designated representatives shall not form the basis for discipline for violation of an employer's confidentiality (or similar) policies.

If the plaintiff proceeds with litigation after pre-suit discovery, the plaintiff and defendant should also have all the usual rights of discovery in civil litigation. In addition to ensuring discovery rights for complainants, for many workers to feel comfortable filing a complaint, they may need to proceed anonymously and they should be able to do so without fear of the employer uncovering their names throughout the litigation. The defendant in a private right of action lawsuit should never be permitted to discover the names of employees who provide information to the plaintiffs.

For example, in April 2020, the Rural Community Workers Alliance and "Jane Doe" filed a public nuisance lawsuit against Smithfield Foods for failing to protect workers from coronavirus. Many speculate that "Jane Doe" chose to remain anonymous because of fear of retaliation by Smithfield or fear of adverse immigration proceedings for speaking up.<sup>49</sup> The case was dismissed on other grounds prior to the question of anonymity being discussed.<sup>50</sup> However, fear of retaliation by an employer or immigration authorities are two real concerns that arise in many employment contexts. Thus, for a private right of action lawsuit under the OSH Act to be a viable option for many workers, anonymity needs to be a guaranteed right when requested.

In practice, even when plaintiffs remain anonymous, there is a high probability that an employer can identify them based on the facts of the case. For example, if a complaint alleges that an employer failed to install machine guards on a machine used by only one employee, even if the employee's name is hidden from discovery during litigation, the employer can make an educated guess at which employee raised the concern.

### **Burden-Shifting Mechanisms**

If the worker is a "private attorney general," they are standing in OSHA's shoes in terms of enforcement. When OSHA finds a violation of a health or

safety standard, regulation, or the general duty clause, it is the agency's responsibility to prove the violation. The burden is not on the employer to prove it was acting in compliance with OSHA's standards or rules. In instances where employees have filed a lawsuit exercising their private right of action, once those employees demonstrate certain facts alleging a violation, employers should then bear the burden of demonstrating that their practices satisfy the OSHA standard or rules or was otherwise not feasible. In the case of a general duty clause violation, once the employee proves three elements of a violation, the burden of proof would shift to the employer. Thus, the employee must prove: (1) the employer failed to keep the workplace free of a hazard to which its employees were exposed; (2) that the hazard was a recognized hazard, and (3) that the hazard was causing or was likely to cause death or serious physical harm. Once proven, the burden would shift to the employer to show that there was no feasible method to correct the hazard.

### **Remedies and Settlements**

When a plaintiff succeeds in a "citizen suit," the result is either an injunction that requires the violating party to take or stop a particular action or civil penalties that require the violating party to pay a monetary fine to the U.S. Treasury.

Under an OSH Act private right of action lawsuit, the complaining party should have both options available. If the violation is continuing unabated, the complaining party should be able to ask the court for a preliminary injunction at the outset of the litigation to stop the violation. Allowing a workplace health and safety violation to continue likely poses significant health and safety risks to the workers inside the plant, and thus it is imperative that the employer abate the violation promptly.

Additionally, the worker must be able to recover civil penalties on OSHA's behalf. However, rather than paying the recovered penalties to the U.S. Treasury, as is currently the case when OSHA collects civil penalties paid by an employer for violations of the Act, 70 percent of the penalties should be paid directly to OSHA. Congress, with input from stakeholders, should consider appropriate limitations on this funding, whether by requiring OSHA to use it to enhance the agency's enforcement program, such as by hiring inspectors, creating targeted enforcement programs, and conducting more inspections, or by requiring the agency to use the funding to provide additional grants under the Susan Harwood Grant Training Program. The decision on how to spend penalties collected in response to a private right of action may depend on the amount of penalties that might flow from these actions and how best to put that money to use to prevent injuries and empower workers. As part of the decision, however, Congress should never reduce OSHA's budget or the Susan Harwood Grant Training Program.

To incentivize workers to bring these cases and take on the risk of retaliation by their employer, the legislation should also provide a monetary incentive or "bounty" for stepping up in OSHA's place. This bounty would be the remaining 30 percent of the civil penalty collected on OSHA's behalf. By providing workers this incentive, they will not only have the opportunity to secure the health and safety conditions they are already owed under the law, but they will receive a reward for speaking up and taking action to protect themselves and their coworkers from harm. Under the California

*Plaintiffs should have the right to participate in settlements with violators, and those settlements should allow relief beyond what OSHA could have sought in an enforcement action.*

Private Attorney General's Act, for example, the agency receives 75 percent of the civil penalty, which the agency must use for enforcement and education of employers and employees about their rights and responsibilities. Furthermore, none of the penalties collected may be used to supplant the agency's funding for those purposes. The aggrieved employees recover the remaining 25 percent of the civil penalty awarded.<sup>51</sup>

Finally, plaintiffs should have the right to participate in settlements with violators, and those settlements should allow relief beyond what OSHA could have sought in an enforcement action. This is currently the case in the environmental context, where citizen plaintiffs can reach settlements that include supplemental environmental projects, or SEPs. Allowing settlements that provide added relief could be useful in securing additional protective measures in the workplace. For example, a settlement could create a training fund to ensure all workers receive training on mitigating workplace hazards and their rights under the OSH Act. A settlement could also require a third-party health and safety audit of the workplace periodically for a specified amount of time.

### **Attorney's Fees**

Attorney's fees are critical to the success of a private right of action lawsuit under the OSH Act because these lawsuits can be complex and will require an attorney. If attorneys are required to invest substantial resources into a case with no guarantee they can recover their costs, they are unlikely to take the case. Thus, to incentivize attorneys even to consider taking a case, they must be able to recover a reasonable attorney's fee.

Accordingly, legislation to create a private right of action in the OSH Act must include a provision that awards reasonable attorney's fees to individuals or organizations that initiate successful cases. Attorney's fees should also be allowed even when the case settles.

One of the best models for providing attorney's fees is found in the Civil Rights Act.<sup>52</sup> Under the Act, in an action to enforce certain civil rights, the court has discretion to allow the prevailing party to recover a reasonable attorney's fee. Similarly, under the Fair Labor Standards Act (FLSA), a court

"shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."<sup>53</sup> Regardless of the amount of wages recovered, which in an individual case may be low relative to the attorney's fees, the recovery amount does not reduce the attorney's fees owed to the prevailing party. Thus, it is possible for attorney's fees to be upwards of \$100,000 for the recovery of \$5,000 in wages.

The FLSA and Civil Rights Act uses the "Lodestar method" for calculating attorney's fees. This simply means the attorney's fees are calculated based on the number of hours reasonably spent by the attorney multiplied by a reasonable hourly rate. The reasonable hourly rate is determined based on the prevailing market rate for attorneys who provide similar legal services in the surrounding jurisdiction.

With the potential for very large attorney's fees, the defendant employer has greater incentive to settle a claim earlier instead of dragging out a case it is likely to lose through the court system in the hope of exhausting the plaintiff's resources and patience. Similarly, the workers and their attorney have incentive to pursue the case and secure a healthier and safer workplace, even if the civil penalty award paid to the Treasury would be limited.

### **Whistleblower Protections**

In establishing a private action under the OSH Act, strong whistleblower protections are essential. Otherwise, a private right of action is merely a right on paper that workers will seldom utilize. Workers will only come forward to raise concerns about health or safety if they feel they can do so without their employers firing them or taking other adverse action that negatively affects their employment. Filing a lawsuit against an employer is not an action that anyone would lightly take, and they would need strong guarantees of protection before proceeding. At present, the existing whistleblower protections under the OSH Act, in Section 11(c) of the statute, are weak, outdated, and largely ineffectual. Congress must completely overhaul these provisions for a private right of action to be a meaningful enforcement tool.

Section 11(c) of the OSH Act provides workers with some protections against retaliation. Specifically, the Act states:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

The Act protects workers who have participated in a wide range of activities, from communicating with their employer about health and safety matters, to testifying at an OSHA proceeding. An employer may not take any adverse

action against an employee who has exercised these rights, including firing or laying off, blacklisting, demoting, denying overtime pay or promotion, disciplining, denying benefits, failing to hire or rehire, intimidating, making threats, reassigning affecting prospects for promotion, or reducing pay or hours.<sup>54</sup>

*An employer may not take any adverse action against an employee who has exercised these rights, including firing or laying off, blacklisting, demoting, denying overtime pay or promotion, disciplining, denying benefits, failing to hire or rehire, intimidating, making threats, reassigning affecting prospects for promotion, or reducing pay or hours.*

While these protections seemingly provide comprehensive protections from a wide-range of activities, in practice, the current procedures for handling whistleblower complaints makes the protections far from robust. Among many shortcomings of Section 11(c):

- Workers have only 30 days to file a complaint of retaliation with OSHA, which is not sufficient for a worker to determine that their employer acted unlawfully, consult with a representative or attorney, make a decision on whether to file, and file a complaint.
- OSHA often takes far longer than the 90-day statutory deadline for investigating complaints, contributing to the erosion of evidence, signaling to other workers that they should not speak up, and leaving the worker who was retaliated against in the lurch for months or years.
- When OSHA does not pursue a retaliation complaint or takes too long to resolve it, the workers have no right to pursue the case on their own – they cannot request an administrative hearing or file a private lawsuit against the employer for violating the Act's whistleblower protections.
- In the few cases in which OSHA does move forward, the agency has no ability to preliminarily reinstate employees to their position while the claim is pending before the agency.
- If the agency renders an unfavorable decision for the worker, the worker only has 15 days to appeal, and must appeal to OSHA – the same agency that made the unfavorable decision. The worker has no right to appeal if the agency does not move forward with prosecuting the complaint.
- An employee is required to prove the employer's retaliation was a motivating factor for the retaliatory act, meaning the employer can

overcome the complaint by simply stating another legitimate reason for the retaliatory act.

- When an employer is found to have committed unlawful retaliation, there is no fine for violating the law. The employer simply owes the amount the employee would have earned, minus any amount the employee received from another source of employment while the case was pending.

The OSHA whistleblower protection provision is only one of 23 whistleblower statutes that OSHA oversees. Many of the whistleblower statutes under OSHA's jurisdiction, especially those enacted over the past 20 years, provide far greater protections than does 11(c).

- The Surface Transportation Assistance Act (STAA), the Consumer Product Safety Improvement Act (CPSIA), and several other whistleblower statutes grants workers up to 180 days to file a complaint.
- All of the modern whistleblower statutes under OSHA's jurisdiction require the agency to complete the investigation of a retaliation complaint within 30 or 60 days. Only the OSH Act and one other older statute provide the agency 90 days.
- Several whistleblower statutes, including the STAA, the Sarbanes-Oxley Act (SOX), and the Pipelines Safety Improvement Act (PSIA) provide the option for preliminary reinstatement.
- Many whistleblower statutes allow workers to appeal OSHA's decision to an administrative law judge, rather than appealing to the agency.
- Many whistleblower statutes, including the STAA, SOX, and the Energy Reorganization Act (ERA), utilize a more reasonable burden of proof standard – the worker need only show that the protected activity was a *contributing factor*, meaning it was one factor for the employer's decision.
- Under the STAA, CPSIA, and several other statutes, if OSHA fails to act on a whistleblower complaint, the worker has 210 days to pursue a private action independently of the agency. The ERA provides up to one year for a private action. Additionally, the CPSIA and Affordable Care Act provide workers the right to pursue their cases independently if OSHA never takes a final action.

- Under modern whistleblower statutes, like the Taxpayer First Act of 2019, back-pay awards are paid at 200 percent and 100 percent of lost benefits.

Moreover, the proposed PRO Act would provide that, when an employee has been discharged or suffered serious economic harm in violation of the NLRA, the NLRB shall award the employee back pay (without any reduction based on the employee's interim earnings), front pay (when appropriate),<sup>55</sup> consequential damages, and "an additional amount as liquidated damages equal to 2 times the amount of damages awarded."<sup>56</sup> The PRO Act would also prohibit the NLRB from denying relief on the basis that the employee is undocumented.

For a comparison of the whistleblower statutes, visit OSHA's summary chart: <https://www.whistleblowers.gov/sites/wb/files/2019-12/WB-Statute-Summary-Chart-10.8-Final.pdf>.

To guarantee workers a private right of action under the OSH Act, Congress must update Section 11(c) protections to bring them into the modern era. This must include all of the improvements discussed above. The Act must also expressly state that relief cannot be denied because of the employee's immigration status.

### Avoiding Compulsory Arbitration and Waivers

Many, if not most, employment contracts require that disputes between individual employees and the employer be resolved through arbitration. Used in numerous contexts, these mandatory arbitration clauses are designed to protect the company that imposes them while denying victims of their misdeeds access to the courthouse. Many employees are required or induced to sign away their rights when starting a job, meaning they may have no way to know what hazards they are about to encounter. Once they sign, however, if a dispute arises, they must argue their case before an arbitrator that the defendant often selects.

Prohibiting arbitration, except in the cases of a collective bargaining agreement, is critical for workers. In a private right of action lawsuit, workers will speak up not just for themselves, but also for all of their coworkers exposed to the relevant workplace risks. An employer should not be able to force employees to sign away their right to litigate health and safety claims – claims that if proven in court would affect other employees' health and safety on the job. Simply put, all employees have an interest in workplace health and safety and an employer should not be able to undermine that interest by silencing individual workers.

The proposed PRO Act expressly states that the Federal Arbitration Act does not apply and prohibits employers from requiring employees to waive their right to collective and class action litigation. Specifically, employers cannot:



- Enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or related to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction
- Coerce an employee into undertaking or promising not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee
- Retaliate or threaten to retaliate against an employee for refusing to undertake or promise not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee: *Provided*, That any agreement that violates this subsection or results from a violation of this subsection shall be to such extent unenforceable and voided: *Provided further*, That this subsection shall not apply to any agreement embodied in or expressly permitted by a contract between an employer and a labor organization.<sup>57</sup>

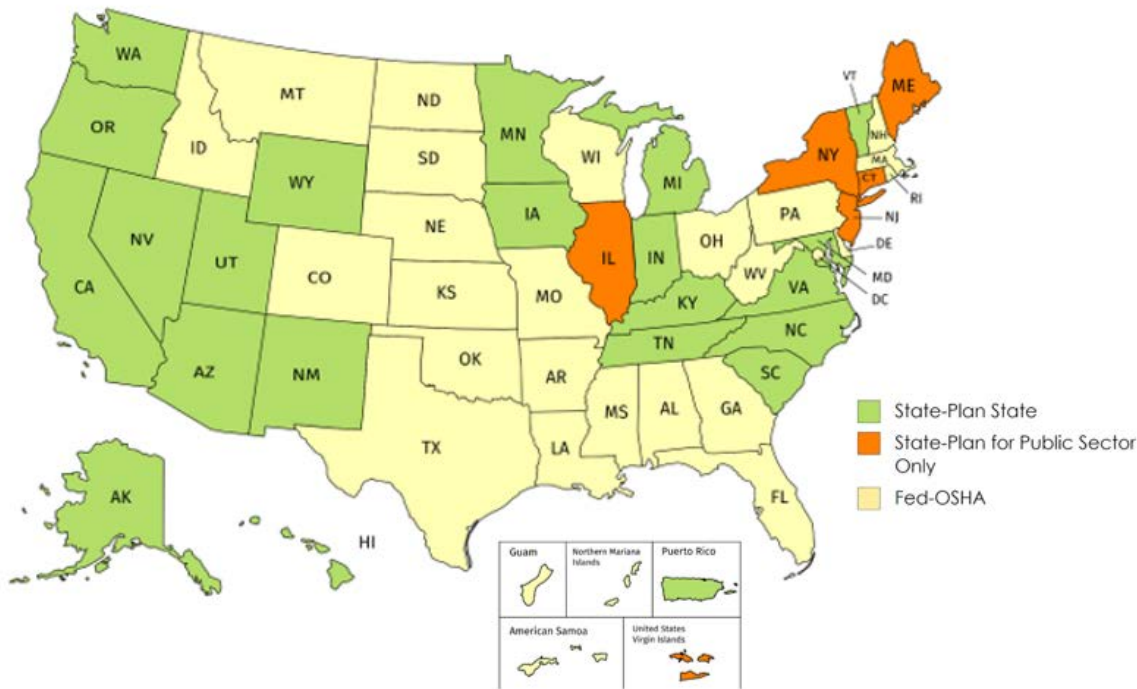
In creating an OSH Act private right of action, Congress must include language like the PRO Act's prohibition on arbitration in the bill. This would guarantee that employers could not undermine Congress's intent and the new right by forcing workers to sign arbitration and collective action waivers as a condition of employment.

## State Adoption of the Private Right of Action

### *State Plan States*

Enacting a private right of action under the OSH Act must apply to workers in all states for it to be as effective as possible. To achieve this, Congress must make clear in legislation that the new right extends to all "state plan states" – those states and territories that choose to operate their own occupational safety and health program in lieu of (and with approval from) federal OSHA. At present, 21 states and one territory operate state plans that cover both private sector and public sector government workers. Five other states and one territory operate state plans that apply only to public sector workers. Federal OSHA provides coverage for private sector workers in all Fed-OSHA states and in the six state plan states and territory that cover public sector workers only.

**Figure 2: OSHA and State Plan Jurisdiction**



To ensure the private right of action is incorporated into the state plans, Congress should amend OSH Act Section 18(c), which covers state plan jurisdiction, to expressly require states to include a private right of action in their state plans before OSHA approves the plan. Likewise, the bill should require existing state plans to adopt the private right of action within six months of enacting the federal right. Including this requirement would extend coverage to workers in all states without preempting the right of those states to go above and beyond the minimum federal requirements. Thus, if a state wanted to provide even greater rights to workers in exercising a private right of action, the state would be free to do so.

**Savings Clause**

Congress should also include a savings clause in the legislation to ensure the private right of action does not bar any state common law tort actions or workers' compensation actions, which are actions to recover for injuries and illnesses incurred on the job. Congress can achieve this by ensuring the existing savings clause in Section 4(b)(4) of the OSH Act is also applied to the new private right of action. That language provides: "Nothing in this Act shall be construed to supersede or in any manner affect and workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and

employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course, of employment."<sup>58</sup>

Because the private right of action does not compensate workers for losses, workers must continue to have the option of exercising other rights under workers' compensation, other statutes, or at common law.

## Overcoming Objections

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Creating a private right of action would go a long way toward making the OSH Act effective in protecting workers as Congress intended. While this may appear at first glance to be a radical move, the idea itself is not radical at all: It is premised on citizen suit provisions found in numerous other federal laws. It is a long overdue measure that would empower workers to secure safer and healthier workplaces when the agency tasked with protecting them is unwilling or unable to do so. For this reason alone, we can be certain that some employers, and possibly OSHA, will oppose the changes advocated here.

Employers may argue that short waiting periods violate their due process rights because they do not provide fair notice and an opportunity to respond to allegations against them. However, they do not have a constitutional right to have a certain amount of notice that a party intends to file a legal complaint against them. As with most civil tort litigation, the complaining party can initiate a lawsuit whenever it has a valid legal claim. Nothing about the length of a waiting period interferes with an employer's right to due process; it has every right to defend vigorously against any lawsuit.

Further, employers may argue that requiring OSHA to post notices of intent to sue online and employers to post the notices at the worksite is a violation of their due process rights because the allegations have not been fully litigated. Employers have made this argument before concerning press releases issued by OSHA that inform the public about enforcement activities related to proposed citations.<sup>59</sup> Again, there is no due process violation because providing notice about pending litigation to interested parties does not interfere with the employer's ability to defend itself in the litigation.

On policy grounds, employers are likely to argue that a private citizen suit provision will flood the courts with supposedly frivolous lawsuits. Employers made this claim in response to California's Private Attorney General's Act. It is worth noting, however, that those espousing this claim have never backed it up with any evidence that an onslaught of "frivolous" cases have been filed since the law's enactment. To the contrary, a review of private citizen suits filed under the California statute found that these cases "had a considerable and positive impact for workers by deterring violations through a relatively small number of high-impact suits."<sup>60</sup> Similarly, citizen suits under federal environmental laws are not so pervasive that they flood the courts. Workers and their representatives are unlikely to flood courts with frivolous cases for the simple reason that they will not recover fees or penalties if their cases are unsuccessful.

OSHA may also be resistant to creating a private right of action because the agency and personnel may feel that workers are encroaching on their enforcement authority, which has rested solely with the agency for 50 years. For instance, OSHA may argue that it will be challenging to review incoming notices of intent to sue, make decisions about whether to inspect and issue citations on shortened timelines, and deal with employers asking them to preemptively cite to avoid litigation. However, despite even the best-intentioned inspectors at OSHA, the agency's enforcement efforts have not kept pace with the growing number of workplaces and changing nature of work. Creating a private right of action will help the agency by utilizing its best resource when it comes to enforcement – the workers who can act as the agency's eyes and ears inside the workplace. Additionally, building worker power is instrumental to ensuring that our nation's regulatory system is more inclusive and responsive to the public it is supposed to protect.

## Conclusion

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As we near the 50th anniversaries of the Occupational Safety and Health Act and the establishment of the Occupational Safety and Health Administration, it is time to breathe new life into the Act and the agency for the next 50 years. Because of unsuccessful past efforts to modernize the Act, budget constraints, unfavorable court decisions, and a lack of political will, the law has not kept pace with changes in the sheer number of workers and workplaces or with the changing nature of work. Real and transformative change is necessary if OSHA is to have the authority and political will to tackle unaddressed existing hazards and emerging new ones, such as toxic chemicals, infectious diseases, ergonomics, and climate change.

While workplace injuries and deaths have declined over the past 50 years, thousands of workers still die, and millions suffer injuries every year. OSHA could do much more to protect the nation's workers, yet it chooses to sit on the sidelines. OSHA's absence is more evident now than ever as it sits passively by while workers endure the coronavirus pandemic without any meaningful action from the agency to enforce occupational health and safety standards. Workers across this nation deserve more. And they deserve the right to step in to enforce the law when OSHA is unable or unwilling to do so.

For 50 years, workers have had little alternative to depending on a debilitated and sometimes unsympathetic OSHA to protect them from workplace disease and injury risks. It is time to help workers help themselves by allowing them to enforce workplace health and safety standards in court. Creating a private right of action is a necessary reform that Congress should enact immediately. Of course, private lawsuits should not supplant strong federal and state enforcement, but these lawsuits can help bolster existing enforcement activities and help OSHA achieve its mission of providing safe and healthful working conditions to all workers across the United States.

## Endnotes

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<sup>1</sup> Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat 1590 (quoting the preamble), <https://www.osha.gov/laws-regs/oshact/completeoshact>

<sup>2</sup> See, e.g., THOMAS MCGARITY, ET AL., CTR. FOR PROGRESSIVE REFORM, WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA (2010), [https://cpr-assets.s3.amazonaws.com/documents/OSHA\\_1003.pdf](https://cpr-assets.s3.amazonaws.com/documents/OSHA_1003.pdf).

<sup>3</sup> AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 3 (2019), <https://aflcio.org/sites/default/files/2019-04/DOTJ2019nb.pdf>.

<sup>4</sup> *Id.* at 143.

<sup>5</sup> See, e.g., THOMAS MCGARITY, ET AL., CTR. FOR PROGRESSIVE REFORM, PROTECTING WORKERS IN A PANDEMIC: WHAT THE FEDERAL GOVERNMENT SHOULD BE DOING (2020), <https://progressivereform.org/our-work/workers-rights/protecting-workers-in-a-pandemic/>.

<sup>6</sup> HYE JIN RHO, ET AL., CTR. FOR ECON. & POLICY RESEARCH, A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>; SHAWN FREMSTAD, ET AL., CTR. FOR ECON. & POLICY RESEARCH, MEATPACKING WORKERS ARE A DIVERSE GROUP WHO NEED BETTER PROTECTIONS (2020), [https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:text=Almost%20one%2Dhalf%20\(44.4%20percent,and%2022.5%20percent%20are%20Black\).](https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:text=Almost%20one%2Dhalf%20(44.4%20percent,and%2022.5%20percent%20are%20Black).)

<sup>7</sup> Petition from Richard Trumka, President, AFL-CIO, to Eugene Scalia, Sec'y of Labor, Petition for Emergency Temporary Standard for Infectious Disease (Mar. 6, 2020), [https://aflcio.org/sites/default/files/2020-03/FINAL%20AFLCIO\\_Petition%20COVID-19.pdf](https://aflcio.org/sites/default/files/2020-03/FINAL%20AFLCIO_Petition%20COVID-19.pdf).

<sup>8</sup> *COVID-19 Response Summary*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/enforcement/covid-19-data> (last visited July 22, 2020).

<sup>9</sup> Letter from William Cochran, Acting Area Dir., Occupational Safety & Health Admin., to Winder Nursing Inc., Citation and Notification of Penalty (May 18, 2020), <https://aboutblaw.com/Q9u>; Tom Hals, *Labor Dept Cites Ohio Nursing Homes for COVID-19 Violations*, Reuters (July 22, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-nursing-homes-idUSKCN24N2DM>.

<sup>10</sup> In some states that choose to operate their own health and safety program in lieu of federal OSHA, state protections cover state and local government employees. At present, twenty-one states and one territory operate state plans that cover both private sector and public sector government workers. Five other states and one territory operate state plans that apply only to public sector workers. See [State Adoption of the Private Right of Action](#) for more on state-plan states. See also AFL-CIO, *supra* note 3, at 122.

<sup>11</sup> *National Agricultural Workers Survey, Public Data, Fiscal Years (FY) 1989-2016*, EMP'T & TRAINING ADMIN., <https://www.doleta.gov/naws/research/data-tables/> (download Table 1, U.S. demographic data) (showing only 17 percent of hired crop workers were not Hispanic or Latinx in 2015-2016).

<sup>12</sup> See THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION VIII, 324-29 (1993).

<sup>13</sup> 42 U.S.C. § 6972(c) (2018).

<sup>14</sup> 29 U.S.C. § 658(c) (2018); OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA DIRECTIVE NO. CPL 02-00-163, FIELD OPERATIONS MANUAL 5-10 (2019) [hereinafter OSHA FIELD OPERATIONS MANUAL],

[https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_02-00-163.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf). Note: Our proposed reform to the OSH Act would allow OSHA to cite violations that are older than six months when those violations are the subject of private citizen suit complaints.

<sup>15</sup> 29 U.S.C. § 662(a) (2018).

<sup>16</sup> OCCUPATIONAL SAFETY & HEALTH LAW 361 (Gregory N. Dale & Katherine A. Tracy eds., 4th ed. 2019).

<sup>17</sup> *Id.* at 698.

<sup>18</sup> OSHA FIELD OPERATIONS MANUAL, *supra* note 13, at 11-1.

<sup>19</sup> *Id.*; *see also* Reich v. Dayton Tire, 853 F. Supp. 376 (W.D. Okla. 1994).

<sup>20</sup> In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), the Supreme Court held that the complaining party did not have subject matter jurisdiction to bring a case for wholly past violations of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permits. The Court found that subject matter jurisdiction only exists for ongoing violations. Since *Gwaltney*, courts have routinely held that this standard applies to the application of subject matter jurisdiction to past violations in citizen suits under other federal environmental laws. In the context of workplace health and safety standards, the statute would need to make clear the *Gwaltney* standard does not apply.

<sup>21</sup> Workers currently have a right under Section 8(f)(2) of the OSH Act to seek informal review and a written statement of the reasons behind the Secretary's decision not to issue a citation following an inspection. *See also* 29 C.F.R. § 1903.14(c) (2019).

<sup>22</sup> NAT'L LABOR RELATIONS BD., NLRB CASEHANDLING MANUAL, PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS § 10128 (July 2020), <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/ulp-manual-july-2020.pdf>.

<sup>23</sup> *See* MARTHA MCCLUSKEY ET AL., CTR. FOR PROGRESSIVE REFORM, OSHA'S DISCOUNT ON DANGER: OSHA SHOULD REVISE ITS INFORMAL SETTLEMENT POLICIES TO MAXIMIZE THE DETERRENT VALUE OF CITATIONS (2016), <http://progressivereform.org/our-work/workers-rights/oshas-discount-danger/>.

<sup>24</sup> 29 U.S.C. § 216(b) (2018).

<sup>25</sup> 46 U.S.C. § 30104 (2018); 28 U.S.C. § 1445(a) (2018).

<sup>26</sup> 28 U.S.C. § 2462 (2018).

<sup>27</sup> U.S. CONST. art. III, § 2.

<sup>28</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>29</sup> *Laidlaw v. Friends of the Earth*, 528 U.S. 167 (2000).

<sup>30</sup> *See* *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975).

<sup>31</sup> *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993).

<sup>32</sup> *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003).

<sup>33</sup> *Natural Resources Defense Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006).

<sup>34</sup> *Id.*

<sup>35</sup> Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 142 (1994); Cass R.



Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 232 (1992); see also [Remedies and Settlements](#).

<sup>36</sup> See James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 OHIO N.U.L. REV. 35 (1991).

<sup>37</sup> 504 U.S. 555, 573 (1992).

<sup>38</sup> *United States v. United Technologies Corp.*, 777 F. Supp. 195, 199 (N.D.N.Y. 1991), *aff'd* 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, 113 S. Ct. 2962; see also *United States v. Northrop Corp.*, 728 F. Supp. 615, 618-19 (C.D. Cal. 1989); *United States v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607, 614-15 (N.D. Cal. 1989); *United States v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1098-99 (C.D. Cal. 1989).

<sup>39</sup> 29 U.S.C. § 652(6) (2018).

<sup>40</sup> 29 U.S.C. § 652(5) (2018).

<sup>41</sup> States and territories that choose to operate their own occupational safety and health programs in lieu of federal OSHA extend protections to state and local employees. About eight million state and local employees remain without protections in states under federal OSHA's jurisdiction.

<sup>42</sup> OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA DIRECTIVE NO. CPL 02-00-051, ENFORCEMENT EXEMPTIONS AND LIMITATIONS UNDER THE APPROPRIATIONS ACT (1998), <https://www.osha.gov/enforcement/directives/cpl-02-00-051> (updated with new appendix in Jan. 2020); see also OCCUPATIONAL SAFETY & HEALTH LAW 57-58 & n. 125, 128 (Gregory N. Dale & Katherine A. Tracy eds., 4th ed. 2019) (noting that the rider is renewed annually in modified form and the provision relating to temporary labor camps was added in Fiscal Year 1979).

<sup>43</sup> Protecting the Right to Organize (PRO) Act, H.R. 2474, 116th Cong. § 2(a)(2) (2019), <https://www.congress.gov/bill/116th-congress/house-bill/2474/text>; see also *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (2018) (upholding the ABC test for defining employees for purposes of California wage orders); see also CAL. LAB. CODE § 2750.3 (codifying *Dynamex*); MASS. GEN. LAWS ch. 149, § 148B (using ABC test under separate independent contractor law); N.J. STAT. ANN. § 43:21-19(i)(6)(A)-(C) (using ABC test for independent contractor classification).

<sup>44</sup> S. 575, 103d Cong. § 301 (1993), <https://www.congress.gov/bill/103rd-congress/senate-bill/575/text?q=%7B%22search%22%3A%5B%22S.+575%22%5D%7D&r=1&s=8>.

<sup>45</sup> See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA DIRECTIVE NO. CPL-02-00-124, MULTI-EMPLOYER CITATION POLICY (1999), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=2024&p\\_table=DIRECTIVES](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVES).

<sup>46</sup> See, e.g., RANDY RABINOWITZ, OCCUPATIONAL SAFETY & HEALTH LAW PROJECT, MISSED OPPORTUNITIES: HOW OSHA SHOULD ENSURE WORKER SAFETY IN THE FISSURED WORKPLACE, [https://www.coshnetwork.org/sites/default/files/uploads/Rabinowitz\\_Missed\\_Opportunities.pdf](https://www.coshnetwork.org/sites/default/files/uploads/Rabinowitz_Missed_Opportunities.pdf) (last accessed June 30, 2020).

<sup>47</sup> S. 1622, 102d Cong. (1991), <https://www.congress.gov/bill/102nd-congress/senate-bill/1622?q=%7B%22search%22%3A%5B%22S.+1622%22%5D%7D&s=5&r=1>; H.R. 3160, 102d Cong. (1991), <https://www.congress.gov/bill/102nd-congress/house-bill/3160?q=%7B%22search%22%3A%5B%22H.R.+3160%22%5D%7D&s=8&r=1>.

<sup>48</sup> FED. R. CIV. P. 27, [https://www.law.cornell.edu/rules/frcp/rule\\_27](https://www.law.cornell.edu/rules/frcp/rule_27).

<sup>49</sup> See Fatima Hussein & Genevieve Douglas, *Meatpackers Test Boundaries of Anonymity in COVID-19 Lawsuits*, BLOOMBERG NEWS (June 2, 2020), <https://bna.news.bna.com/safety/meatpackers-test-boundaries-of-anonymity-in-covid-19-lawsuits>.

<sup>50</sup> Rural Community Workers Alliance v. Smithfield Foods, Inc., No. 5:20-CV-06063-DGK (W. Dist. Mo., dismissed May 5, 2020), <https://aboutblaw.com/QFg>.

<sup>51</sup> CAL. LAB. CODE § 2699(i).

<sup>52</sup> 42 U.S.C. § 1988(b) (2018).

<sup>53</sup> 29 U.S.C. § 216(b) (2018).

<sup>54</sup> OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA FACT SHEET: FILING WHISTLEBLOWER COMPLAINTS UNDER SECTION 11(C) OF THE OSH ACT OF 1970 (2018), <https://www.osha.gov/Publications/OSHA3812.pdf>.

<sup>55</sup> Although the PRO Act does not define "front pay," in the employment context, the Equal Employment Opportunity Commission recognizes this as an equitable remedy that covers a future period of pay, in lieu of reinstatement. See *Front Pay*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal-sector/front-pay> (last visited July 14, 2020).

<sup>56</sup> H.R. 2474, 116th Cong. §§ 2(f), 12(d)(2)(B) (2019).

<sup>57</sup> H.R. 2474, 116th Cong. § 2(e) (2019).

<sup>58</sup> 29 U.S.C. § 653(b)(4) (2018).

<sup>59</sup> Eric J. Conn & Casey M. Cosentino, *Hot Off the Press*, EHS TODAY (Sept. 1, 2011), <https://www.ehstoday.com/standards/osha/article/21905418/hot-off-the-press>.

<sup>60</sup> RACHEL DEUTSCH, ET AL., UCLA LABOR CENTER ET AL., CALIFORNIA'S HERO LABOR LAW: THE PRIVATE ATTORNEYS GENERAL ACT FIGHTS WAGE THEFT AND RECOVERS MILLIONS FROM LAWBREAKING CORPORATIONS 6 (2020), [https://populardemocracy.org/sites/default/files/PAGA%20Report\\_WEB.pdf](https://populardemocracy.org/sites/default/files/PAGA%20Report_WEB.pdf).

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