

The Washington Industrial Safety and Health Act: WISHA's Twentieth Anniversary, 1973-1993

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I. INTRODUCTION

Occupational safety and health did not begin in 1973 in the State of Washington. Although the historical roots of the Washington Industrial Safety and Health Act of 1973 (WISHA)¹ run deep, the adoption of the Act significantly affected the lives of all working men and women in the state. This Article will examine that historical perspective, covering both state and federal law, and will comprehensively detail the current law relating to occupational safety and health in the State of Washington.

Because the Washington Constitution provided specific legislative authority to address worker safety and health,² the legislature passed many laws relating to industrial safety and health that not only predated WISHA, but also provided much of its foundation.

In 1899, the legislature limited the hours that could be worked by the establishment of the eight-hour work day.³ In 1901, the legislature imposed a duty on all employers to keep records related to worker safety and health by creating a Bureau of Labor, which would not only prescribe the records to be kept,⁴ but also had the authority to enter and inspect employers' premises.⁵

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1. Washington Industrial Safety and Health Act, ch. 80, 1973 Wash. Laws 212 (codified as amended at WASH. REV. CODE § 49.17 (1992)).

2. WASH. CONST. art. II, § 35.

3. Act of Mar. 13, 1899, ch. 101, § 1, 1899 Wash. Laws 163, 163 (codified at WASH. REV. CODE § 49.28.030 (1992)).

4. Bureau of Labor Creation Act, ch. 74, § 3, 1901 Wash. Laws 132, 133 (codified as amended at WASH. REV. CODE § 43.22 (1992)).

5. *Id.* § 5, 1901 Wash. Laws at 134.

The 1903 Factory Act mandated safeguards for equipment, ventilation, and sanitation in factories, mills, and workshops.⁶ Later statutes added requirements for other businesses, such as coal mining⁷ and users of compressed air,⁸ and delegated authority to establish specific rules to an administrative agency.⁹ The delegation specifically directed that standards "shall be guided by the most modern published studies and researches."¹⁰

An amendment to the Factory Act in 1905 granted workers the right to notify their employer of unsafe conditions and to request inspection by the Bureau.¹¹ This inspection authority included the right to issue and withhold certificates of approval.¹² In 1907, the authority to inspect was augmented by the power to issue stop work orders.¹³

The passage of a worker compensation law in 1911 added several facets to occupational safety and health.¹⁴ Besides authorizing compensation to workers for job-related injuries and illnesses, the law levied on employers both general assessments based on hours worked and special assessments based on safety experience.¹⁵ Specifically, the statute required employer contributions when any worker was "injured because of the absence of any safeguard or protection required to be provided or maintained by . . . any statute, ordinance, or any departmental regulation."¹⁶ Although the original legislation mandated Bureau review of assessments and compensations, an independent quasi-judicial agency called the Board of Industrial Insurance Appeals (BIIA) was created in 1949 to review Bureau orders.¹⁷

6. Factory Act, ch. 37, 1903 Wash. Laws 41 (repealed 1973).

7. Coal Mining Code, ch. 36, 1917 Wash. Laws 109 (codified as amended at WASH. REV. CODE § 78.40 (1992)).

8. Act of Mar. 15, 1937, ch. 131, 1937 Wash. Laws 485 (codified as amended at WASH. REV. CODE § 49.24 (1992)).

9. Act of Mar. 24, 1941, ch. 194, § 32, 1941 Wash. Laws 552, 564 (codified as amended at WASH. REV. CODE § 49.24 (1992)).

10. *Id.*

11. Factory Act Amendments, ch. 84, §§ 5-6, 1905 Wash. Laws 164, 165-66 (repealed 1973).

12. *Id.* § 7, 1905 Wash. Laws at 166.

13. Act of Mar. 15, 1907, ch. 205, 1907 Wash. Laws 448 (repealed 1973).

14. Act of Mar. 14, 1911, ch. 74, 1911 Wash. Laws 345 (codified as amended at WASH. REV. CODE § 51 (1992)).

15. *Id.*

16. *Id.* § 9, 1911 Wash. Laws at 363.

17. Industrial Insurance Act, ch. 219, 1949 Wash. Laws 714 (codified as amended at WASH. REV. CODE § 51.52 (1992)). The present BIIA membership includes one labor-

In 1913, the legislature created the Industrial Welfare Commission with the stated purpose of protecting all women and minor employees from conditions that have a pernicious effect on their health.¹⁸ The legislature identified two such conditions as inadequate wages and unsanitary conditions.¹⁹ The act provided for gathering data from employers related to injuries²⁰ and created misdemeanor protection for workers who faced retaliation for cooperating with the Commission.²¹

In 1921, the legislature created the Department of Labor and Industries (Labor and Industries) with responsibility for worker safety and health,²² industrial insurance,²³ and industrial relations.²⁴ In 1927, the Coal Mining Code established several requirements that are recognized today as fundamental components of any comprehensive safety and health program: labor and management safety committees to review accidents and propose improvements;²⁵ mandatory first aid training;²⁶ safety education for all workers;²⁷ and safety bulletin boards at all levels of the mines to update workers on developments in safety and health.²⁸

With the delegation of rule-making authority to Labor and Industries in 1941, most new developments came administratively rather than legislatively until the passage of the federal Occupational Safety and Health Act in 1970 (OSH Act).²⁹ In 1973, with the passage of WISHA, the State of Washington took a gigantic step forward in providing workers safe and healthful working conditions.³⁰

nominated member, one management-nominated member, and a chair, who is nominated jointly by labor and management and must be a member of the state bar association. All three members are appointed by the Governor and serve six-year terms if confirmed by the state senate. *Id.*

18. Act of Mar. 24, 1913, ch. 174, § 3, 1913 Wash. Laws 602, 602-03 (repealed 1973).

19. *Id.* § 2, 1913 Wash. Laws at 602.

20. *Id.* § 7, 1913 Wash. Laws at 604.

21. *Id.* § 16, 1913 Wash. Laws at 606-07.

22. Administrative Code Act, ch. 7, § 76, 1921 Wash. Laws 12, 41 (codified as amended at WASH. REV. CODE § 43.22 (1992)).

23. *Id.* § 75, 1921 Wash. Laws at 41.

24. *Id.* § 77, 1921 Wash. Laws at 41-42.

25. Coal Mining Code Act, ch. 306, §§ 12-13, 1927 Wash. Laws 748, 757-59.

26. § 14, 1927 Wash. Laws at 759-60.

27. *Id.*

28. *Id.* § 15, 1927 Wash. Laws at 760-61.

29. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1988)).

30. WASH. REV. CODE § 49.17.010 (1992) provides the purpose of WISHA as follows:

The remainder of this Article will explain the workings of WISHA, its component parts, its impact on occupational safety and health in this state in the past twenty years, and what may be in store for the next twenty years. By explaining WISHA's component parts, the Article hopes to help practitioners understand how the statute works and how their clients, whether business or labor, are affected by the Act's regulatory structure. This Article first examines the OSH Act upon which much of the state act was built. Then, the Article will take you through the key components of the state act.

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The OSH Act is a complex piece of legislation that established an extensive, multifaceted regulatory scheme to achieve the broad goal of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."³¹ The Act declared the need for national standards that assure "the greatest protection of the safety and health of affected employees,"³² established an employer's duties to its workers,³³ entrusted workers with rights to assist them in assuring themselves safe and healthful workplaces,³⁴ created three separate and distinct federal agencies,³⁵ and encouraged state participation in a scheme of preventative measures to provide occupational safety and health.³⁶

The legal centerpiece of the Act involved the codification of a two-fold employer duty related to workers: a general duty to protect against recognized hazards and a duty to comply with workplace standards adopted by the Occupational Safety and Health Administration (OSHA).³⁷

[T]o assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman in working in the state of Washington, the legislature . . . declares its purpose . . . to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970.

31. 29 U.S.C. § 651(b) (1988).

32. *Id.* § 655(a).

33. *Id.* § 654(a)(1)-(2).

34. *Id.* § 657(e).

35. The agencies created include (1) the Occupational Safety and Health Administration, *id.* § 656(c); (2) the National Institute for Occupational Safety and Health, *id.* § 671; and (3) the Occupational Safety and Health Review Commission, *id.* § 661.

36. *Id.* § 667.

37. *Id.* § 654(a).

The Act created a federal regulatory agency (OSHA) supervised by the Secretary of Labor with broad powers including the following: (1) authority to promulgate rules and regulations;³⁸ (2) authority to inspect;³⁹ (3) power to keep records;⁴⁰ (4) power to issue an order that classifies a hazard discovered during inspection by its relationship to injury or illness that might result;⁴¹ (5) authority to request that a federal court issue an order shutting off a hazardous piece of machinery or equipment until made safe;⁴² (6) authority to approve grants related to occupational safety and health;⁴³ (7) power to monitor state plans;⁴⁴ and (8) authority to investigate and prosecute persons who discriminate against a worker because the worker exercises rights provided by the Act.⁴⁵

The Act created a complementary federal agency, the National Institute for Occupational Safety and Health (NIOSH), to research occupational safety and health and placed the agency under the Secretary of Health, Education, and Welfare.⁴⁶ Congress endowed OSHA with the authority to seek both civil and criminal penalties against employers for failing to meet the duties imposed by the Act.⁴⁷ The Act also established funding for consultation, education, and training programs in the arena of occupational safety and health.⁴⁸ The statute also created a quasi-judicial agency, the Occupational Safety and Health Review Commission (OSHRC),⁴⁹ to review civil orders

38. *Id.* § 655(a).

39. *Id.* § 657(a).

40. *Id.* § 657(c).

41. *Id.* § 658(a).

42. *Id.* § 662(a).

43. *Id.* § 666(e)-(g).

44. *Id.* § 667(c)(2); *see also* 29 C.F.R. § 1902 (1993) (listing criteria and procedures for the development, approval, and monitoring of state plans).

45. 29 U.S.C. § 660(c) (1988).

46. *Id.* §§ 669-671. NIOSH currently resides in the Department of Health and Human Services (formerly Health, Education, and Welfare).

47. *Id.* § 666(a), (f), (g). The Act establishes civil and criminal penalties for employer noncompliance with codified duties and infringement of worker rights. Civil penalties range from \$5,000 to \$70,000 per instance of a hazardous condition to which an employee is exposed, and the criminal penalty is a fine of not more than \$10,000 or imprisonment for not more than six months, or both. If it is a second or subsequent violation, punishment is a fine of not more than \$20,000 or imprisonment for not more than one year, or both. *Id.*

48. *Id.* § 670(a).

49. *Id.* § 661(a).

issued by OSHA.⁵⁰ Finally, Congress established a framework for state participation in regulatory activities and encouraged such partnership by providing funding.⁵¹

The framework for state participation includes OSHA review and approval of proposed plans, developmental approval, and certification.⁵² The plan itself must provide for personnel sufficient to operate according to established federal bench marks, authority to promulgate standards, authority to inspect, power to issue citations, an appeals system, authority to investigate and remedy discrimination, and record-keeping responsibilities.⁵³ Once developmentally approved, a state plan can operate while being closely monitored by OSHA for no less than three years at which time it becomes eligible for operational approval.⁵⁴

OSHA approval removes federal preemption,⁵⁵ allowing a state to exercise its own sovereign powers over occupational safety and health.⁵⁶ Twenty-one states and two territories have approved state plans that cover both private and public sector employers.⁵⁷ In addition, two states have public sector plans only.⁵⁸ The State of Washington was one of the first states to receive approval from OSHA in 1976.⁵⁹

In the operational stage, a state plan must continue to meet the minimum standards of OSHA while being monitored by the federal agency.⁶⁰ At this stage, the state and OSHA enter into

50. *Id.* § 659(c). An aggrieved party can appeal final orders of the OSHRC to the United States Court of Appeals for the district in which the inspection underlying the order occurred. *Id.* § 660(a).

51. *Id.* § 672(g).

52. *Id.* § 667(b), (c).

53. *Id.* § 667(c).

54. *Id.* § 667(e); 29 C.F.R. § 1902.33 (1993).

55. 29 C.F.R. § 1901.2 (1993).

56. *Inlandboatman's Union of the Pacific v. Department of Transp.*, 119 Wash. 2d 697, 836 P.2d 823 (1992); *see also Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992) (finding state regulation of occupational safety and health is preempted if not pursuant to a federally approved state plan). *Gade* involved an Illinois law requiring training and certification of hazardous waste workers. *Id.* at 2374. Although the law exceeded OSHA regulations, it was not adopted pursuant to a federally approved state plan. *Id.* Consequently, the Court struck the Illinois law as being preempted by OSHA. *Id.* In contrast, while Washington's hazardous waste worker training requirements of 80 hours exceed those of OSHA, they would not be preempted because they were adopted as part of the federally approved state plan.

57. *State Plans-Mini-Osh Acts*, SAFETY UPDATE, Spring 1992, at 5.

58. *Id.*

59. *The State of Occupational Safety in Washington State*, SAFETY UPDATE, Spring 1992, at 4.

60. 29 U.S.C. § 667(f) (1988).

an agreement with respect to the performance of obligations within the geographic boundaries of the state.⁶¹ The operational contract, called a status agreement, has a provision for either joint or unilateral reassertion of full or partial federal jurisdiction.⁶² The operational agreement does not confer upon the state any authority that it did not previously have.⁶³ Upon approval of operations, OSHA reduces the monitoring level of the state plan so long as the state continues to perform at least as effectively as OSHA.⁶⁴ Withdrawal of state plan approval must occur upon petition, hearing, and approval by the Secretary of Labor.⁶⁵

III. WASHINGTON'S SAFETY AND HEALTH ACT

WISHA entrusts to Labor and Industries full responsibility for occupational safety and health in the state.⁶⁶ This responsibility includes authority to promulgate rules and standards;⁶⁷ to provide for the frequency, method, and manner of making inspections of workplaces without advance notice;⁶⁸ to issue civil orders including abatement⁶⁹ and fines;⁷⁰ to refer criminal violations to the local prosecuting authority;⁷¹ to require employers to keep records;⁷² to issue orders shutting down unsafe and unhealthy equipment or work practices;⁷³ to investi-

61. 29 C.F.R. § 1901.3 (1993).

62. *Id.* § 1901.5.

63. *See, e.g.*, Department of Labor and Indus. v. Dirt & Aggregate, Inc., 120 Wash. 2d 49, 51-52, 837 P.2d 1018, 1020-21 (1992) (disallowing WISHA's assertion of jurisdiction over a company doing business in Mt. Rainier National Park because the state had ceded the area to the federal government in 1901).

64. 29 C.F.R. § 1902.42(c) (1993).

65. 29 U.S.C. § 667(f) (1988). Judicial review of the Secretary of Labor's decision is available in the United States Court of Appeals for the circuit in which the state is located upon petition and can be overturned if not supported by substantial evidence. *Id.*

66. WASH. REV. CODE §§ 49.17.020(2), .040 (1992). Authority to enter into interagency agreements permits other agencies to act in relation to occupational safety and health. *Id.* § 49.17.270. Agreements exist with the University of Washington, the Department of Agriculture, the Health Department, the Mine Safety and Health Administration, and other agencies. DIVISION OF INDUS. SAFETY AND HEALTH, DEP'T OF LABOR AND INDUS., WISHA OPERATIONS MANUAL ch. XVIII (1993) [hereinafter WISHA OPERATIONS MANUAL].

67. WASH. REV. CODE § 49.17.050 (1992).

68. *Id.* § 49.17.070.

69. *Id.* § 49.17.120.

70. *Id.* § 49.17.180.

71. *Id.* § 49.17.190(6).

72. *Id.* § 49.17.220.

73. *Id.* § 49.17.130.

gate and prosecute discriminatory actions against workers;⁷⁴ to conduct research into occupational injury and illness related matters;⁷⁵ to provide consultative services to employers;⁷⁶ and to provide for the publication and dissemination of informational, educational, or training materials.⁷⁷ WISHA also authorizes the BIIA to review contested orders issued by the Director of Labor and Industries (the Director) under the Act⁷⁸ and authorizes further appeal to superior court.⁷⁹ The Act establishes criminal violations, both misdemeanors and gross misdemeanors, for designated actions.⁸⁰ Moreover, WISHA establishes the two-fold duty of every employer⁸¹ not only to comply with promulgated regulations⁸² but also to "furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees."⁸³

In addition, WISHA continued the symbiotic relationship between accident compensation and accident prevention by situating the state plan within Labor and Industries,⁸⁴ which provides benefits to injured workers covered by the workers' compensation system.⁸⁵ Finally, WISHA authorizes the state

74. *Id.* § 49.17.160.

75. *Id.* § 49.17.210.

76. *Id.* § 49.17.250.

77. *Id.* § 49.17.050(7). Labor and Industries' consultation and education program produces three newsletters in the most hazardous industries (construction, logging, and agriculture). These materials are available by calling the WISHA hotline at 1-800-4BE-SAFE.

78. *Id.* § 49.17.140(3).

79. *Id.* § 49.17.150.

80. *Id.* § 49.17.190.

81. *Id.* § 49.17.020(3) (including public sector as well as private sector businesses in the definition of employer). A decision of the Washington State Supreme Court affirmed that authority to include state workers in coverage under WISHA applies even upon the navigable waters of Puget Sound. *Inlandboatmen's Union of the Pacific v. Department of Transp.*, 119 Wash. 2d 697, 836 P.2d 823 (1992). The court held the State Ferry System responsible for compliance with the obligations imposed by the Act, including submission to inspection and citation by Labor and Industries. *Id.* at 710, 836 P.2d at 831.

82. WASH. REV. CODE § 49.17.060(2) (1992). An employer's obligation to comply with regulations applies to hazards to which the employees of others are exposed as well as those to which an employer's own employees are exposed. *Stute v. P.B.M.C., Inc.*, 114 Wash. 2d 454, 460, 788 P.2d 545, 548 (1990); *Goucher v. J. R. Simplot Co.*, 104 Wash. 2d 662, 672, 709 P.2d 774, 780 (1985); *Bayne v. Todd Shipyards Corp.*, 88 Wash. 2d 917, 920, 568 P.2d 771, 773 (1977).

83. WASH. REV. CODE § 49.17.060(1) (1992).

84. *Id.* § 49.17.020(2).

85. *Id.* § 51.28.020.

industrial insurance fund as the source of revenue for the plan.⁸⁶

IV. COMPLIANCE

This Section describes the operations of Labor and Industries with respect to the methods by which a workplace is selected for inspection and how that inspection is conducted. In addition, this Section discusses the range of civil penalties possible under the Act. Finally, the Section concludes with a brief look at criminal sanctions available under the Act.

A. Inspection

1. Priorities

Although the Director's authority permits entry into any location where work is performed by an employee of an employer,⁸⁷ inspections are performed according to a predetermined set of priorities.⁸⁸ The priorities for inspection by Labor and Industries are as follows: imminent danger;⁸⁹ worker complaints that allege imminent danger;⁹⁰ fatalities or catastrophes;⁹¹ complaints alleging hazards other than imminent danger;⁹² "high hazard" industries;⁹³ and inspections scheduled

86. *Id.* § 49.17.030. The operating budget of Labor and Industries relating to industrial safety and health for fiscal year 1993 was \$20,369,524. The federal portion of this budget was just \$5,469,656. DIVISION OF INDUS. SAFETY AND HEALTH, DEPT OF LABOR AND INDUS., BRIEFING BOOK 13 (1993) [hereinafter BRIEFING BOOK].

87. WASH. REV. CODE § 49.17.070 (1992).

88. WASH. ADMIN. CODE §§ 296-27-16018, -16020, -16026 (1992) (detailing the parameters for Labor and Industries' inspection scheduling systems).

89. *Id.* § 296-27-16001(5). Dangerous machinery or dangerous conditions at the workplace may be ordered immediately restrained. WASH. REV. CODE § 49.17.130(3) (1992). WISHA differs from the OSH Act in this respect because the federal scheme requires approval from a federal court prior to the issuance of such an order. 29 U.S.C. § 662 (1988). Labor and Industries will, however, attempt to obtain voluntary compliance at the work site prior to the issuance of an order restraining a condition or piece of equipment. WISHA OPERATIONS MANUAL, *supra* note 66, ch. IX.

90. WASH. ADMIN. CODE § 296-27-16003(13) (1992). Although the statute provides a worker the right to request an inspection by filing a complaint, the law allows no recourse should Labor and Industries choose not to inspect or not to issue a citation. Jay Holloway, B.I.L.A. Dec., 91 3679 (Wash. 1991).

91. WASH. ADMIN. CODE § 296-27-16018(3)(b) (1992). Every employer is required to report actual or probable fatalities or catastrophes that consist of the hospitalization of two or more workers to Labor and Industries within 24 hours of occurrence. *Id.* § 296-27-090.

92. *Id.* § 296-27-16018(3)(c).

93. *Id.* § 296-27-16018(3)(d).

according to programmed criteria.⁹⁴ The criteria for inspection are designed to distribute limited resources "as efficiently as possible to ensure that the maximum protection is effectively provided to the working men and women of this state."⁹⁵

Current inspection-scheduling architecture is fully automated and capitalizes on the relationship between our state plan and the industrial insurance program by using claims data for individual accounts to direct limited inspection resources to businesses most in need of assistance.⁹⁶ Claims information is only one of many characteristics that can be used to identify an employer account for selection.⁹⁷ Other characteristics such as violation history, Standard Industrial Classification (SIC), risk class, size, agricultural crop code, and geographic area may also be used.⁹⁸ These characteristics can be weighted and lists created based on any or all of the aforementioned characteristics.⁹⁹ The lists can also be narrowed to a designated number of accounts selected for inspection.¹⁰⁰ As lists are refreshed, an employer account may be removed from the targeted pool to eliminate inactive accounts and add new accounts.¹⁰¹ Finally, a monitoring component tracks the change in selection weighting factor values at regular intervals and compares accounts that have had an intervention, whether an inspection or consultation, with those that have not.¹⁰²

2. Conduct of Inspections

WISHA confers upon the Director the rights of entry to inspect and to subpoena witnesses.¹⁰³ Although the federal act did not require inspectors to have a search warrant when employers refused to allow entry, the U.S. Supreme Court held that inspectors must obtain administrative search warrants.¹⁰⁴ WISHA permits inspection warrants whenever the Secretary or

94. *Id.* § 296-27-16026. Labor and Industries has recently built the architecture for, and is piloting, an automated system of scheduling inspections of employer work sites, which is unique in the country.

95. *Id.* § 296-27-16020(1)(a).

96. BRIEFING BOOK, *supra* note 86, at 36-43.

97. *Id.* at 37.

98. *Id.* at 36.

99. *Id.* at 37.

100. *Id.* at 38-43.

101. *Id.* at 37.

102. *Id.* at 37-38.

103. WASH. REV. CODE § 49.17.070(1)-(3) (1992).

104. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978).

the Director has reasonable suspicion to believe that a hazardous workplace condition exists.¹⁰⁵ Labor and Industries seeks its warrants in the superior court of the county wherein the workplace is located.¹⁰⁶

Inspections are conducted during normal business hours of the workplace being inspected, except when the inspection is of a fatality, catastrophe, complaint alleging imminent danger, or when necessary to assure effectiveness of the inspection.¹⁰⁷ For example, an inspection of an assembly plant may be scheduled while the line is being changed by maintenance staff. Labor and Industries maintains an operations manual, which sets forth and explains the procedures involved in a compliance inspection.¹⁰⁸

Every inspection begins with an opening conference in which Labor and Industries explains to both management and workers, or the workers' representative, the purpose and intended scope of its inspection.¹⁰⁹ Upon approval to inspect, a walkaround of the workplace is conducted with both management and workers.¹¹⁰ An inspection may take hours or months. For example, in the case of potential exposure to airborne toxins such as lead or asbestos, the inspection cannot be completed until laboratory analysis of samples obtained during the walkaround. The compliance officer completes every inspection with a closing conference with management and workers that can either be joint or separate.¹¹¹

If the compliance officer finds a violation, Labor and Industries generates a written order, called a Citation and Notice, which must be issued with reasonable promptness but no later than six months after the completion of the inspection.¹¹² The Citation and Notice must be posted by the employer in the workplace.¹¹³ Any employer or its designated representative may appeal the Citation and Notice by notifying the Director in

105. WASH. ADMIN. CODE § 296-27-16011 (1992).

106. WISHA OPERATIONS MANUAL, *supra* note 66, ch. XVII.

107. WASH. ADMIN. CODE § 296-27-16002 (1992).

108. WISHA OPERATIONS MANUAL, *supra* note 66, ch. V.

109. WASH. REV. CODE § 49.17.100 (1992); WASH. ADMIN. CODE § 296-27-16003(2) (1992).

110. WASH. ADMIN. CODE § 296-27-16003(3) (1992).

111. *Id.* § 296-27-16003(12).

112. WASH. REV. CODE § 49.17.120 (1992).

113. *Id.*

writing of its intent to appeal.¹¹⁴ The Citation and Notice becomes final, requiring the hazards identified to be brought into compliance and the penalties to be paid, unless appealed within fifteen working days of receipt.¹¹⁵ However, the employer may request an extension of an abatement date without appealing.¹¹⁶

B. Civil Penalties

The civil penalties under WISHA mirror the federal penalties that Congress raised in 1990.¹¹⁷ The penalties include (1) a maximum of \$70,000 for either willful or repeated violations with a mandatory minimum of \$5,000 for willful violations;¹¹⁸ (2) a mandatory penalty not to exceed \$7,000 for a serious violation;¹¹⁹ (3) a discretionary penalty for general violations not to exceed \$7,000;¹²⁰ (4) a discretionary penalty of up to \$7,000 for each day an employer fails to abate a violation;¹²¹ and (5) a mandatory penalty not to exceed \$7,000 for failing to comply with a required posting.¹²²

114. *Id.* § 49.17.140. The Notice of Appeal should include the following: (1) the name and address of the appealing party and any representative; (2) the location of the violation(s) being contested, including the citation report number and the violation item number; (3) the reasons for the appeal as to each violation; (4) a brief statement of the facts that support the appeal; (5) a statement of the relief sought; and (6) an affirmation that the person signing the appeal has read it and knows it to be correct and supportable to the best of their knowledge. The notice must be either received or postmarked within 15 days of receipt of the Citation and Notice being appealed. WASH. ADMIN. CODE § 296-350-040 (1992).

115. WASH. REV. CODE § 49.17.140(1) (1992).

116. WASH. ADMIN. CODE § 296-350-350 (1992).

117. Compare 29 U.S.C. § 666 (Supp. IV 1992) with WASH. REV. CODE § 49.17.180 (1992).

118. WASH. REV. CODE § 49.17.180(1) (1992). A willful violation involves a voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the applicable safety and health standard. WASH. ADMIN. CODE § 296-27-16001(10) (1992).

119. WASH. REV. CODE § 49.17.180(2) (1992). A serious violation exists upon a showing that the employer had actual or constructive knowledge of the hazardous conduct or condition to which the worker was exposed and "there is a substantial possibility that death or serious bodily harm could result." WASH. ADMIN. CODE § 296-27-16001(a) (1992).

120. WASH. REV. CODE § 49.17.180(3) (1992). A general violation occurs when the accident or injury from the violation would not cause death or serious bodily injury but would have a direct relationship to the safety and health of employees. WASH. ADMIN. CODE § 296-27-16001(3) (1992).

121. WASH. REV. CODE § 49.17.180(4) (1992).

122. *Id.* § 49.17.180(5). This includes, for example, posting of the Citation and Notice, notice of appeal, Corrective Notice of Redetermination, and the employee rights poster. *Id.*

C. Appeals of Citation and Notice

A timely appealed Citation and Notice may be either reassumed by Labor and Industries or transmitted directly to the BIIA.¹²³ In the event that Labor and Industries reassumes jurisdiction of an appeal, notice of such action is sent to the employer and its representative, and to the employees' representative.¹²⁴ The Notice of Reassumption must be posted in the workplace, and workers may attend the reassumption.¹²⁵

The reassumption itself is an informal proceeding designed to afford all parties an opportunity to present relevant information and opinions on the Citation and Notice and the right to ask questions of the parties present.¹²⁶ All evidence presented is recorded, either manually or electronically.¹²⁷ Although the hearing is informal, any decision made must be based on evidence entered in the record, and such evidence is considered only if otherwise admissible under the state's rules of evidence.¹²⁸

To sustain any violation, Labor and Industries must establish by a preponderance of the evidence that the employer has actual or constructive knowledge of a hazard to which workers are exposed and for which a regulation exists.¹²⁹ In the absence of a regulation, Labor and Industries may cite violations under the general duty clause of the statute,¹³⁰ provided that it can establish that the employer failed to provide a workplace free from recognized hazards likely to cause death or serious physical harm.¹³¹ The most common defense to a cited violation, other than to dispute its factual basis, involves the assertion of the "employee misconduct defense." To establish this defense, an employer must show that it has established workplace rules designed to prevent the violation, has adequately communicated those rules to its employees, has taken steps to discover

123. *Id.* § 49.17.140(3).

124. WASH. ADMIN. CODE § 296-350-060 (1992).

125. *Id.* §§ 296-350-050 to -060.

126. *Id.* § 296-350-070(3).

127. *Id.* § 296-350-060.

128. *Id.* § 296-350-070(3).

129. See Atkinson-Dillingham, No. 88 W091, at 5 (Wash. B.I.I.A. Aug. 23, 1990).

130. WASH. REV. CODE § 49.17.060(1) (1992).

131. City of Seattle, B.I.I.A. Dec., 89 W136 (Wash. 1991) (citing Kelly Springfield Tire Co. v. Donovan, 729 F.2d 317 (5th Cir. 1984)).

violations, and has effectively enforced the rules when violations have been discovered.¹³²

After receiving the appeal, Labor and Industries has thirty working days to hold the informal hearing and to issue a decision, called a Corrective Notice of Redetermination.¹³³ The redetermination is final if no appeal is timely filed.¹³⁴ The redetermination can affirm, vacate, or modify any and all items contained in the original Citation and Notice.¹³⁵ The redetermination must be supported by a hearing report explaining the issues, the evidence, and the final determination, or by a settlement agreement signed by all parties.¹³⁶

A Corrective Notice of Redetermination may be appealed by the employer or its representative so long as a notice of appeal is filed with the BIIA within fifteen working days of actual receipt.¹³⁷ The contents of the notice of appeal to the BIIA and the rules applicable to the adjudicative proceedings held by the BIIA can be found in the Washington Administrative Code (WAC).¹³⁸ The proceedings before the BIIA may include all parties¹³⁹ and are conducted by an industrial appeals judge with the authority to rule on all procedural matters, objections, and motions.¹⁴⁰ The judge issues a proposed decision and order in every case.¹⁴¹ If no petition for review is filed and accepted, the proposed decision and order is deemed adopted by the BIIA,¹⁴² and no appeal to the courts is available.¹⁴³ Judicial review is available only upon the BIIA's disposition of a contested

132. Jeld-Wen, B.I.I.A. Dec., 88 W144 (Wash. 1990); Erection Co. (II), B.I.I.A. Dec., 88 W142 (Wash. 1990).

133. WASH. REV. CODE § 49.17.140(3) (1992).

134. WASH. ADMIN. CODE § 296-350-090 (1992).

135. WISHA OPERATIONS MANUAL, *supra* note 66, ch. XVII-A.

136. WASH. ADMIN. CODE § 296-350-080(1) (1992).

137. WASH. REV. CODE § 49.17.140(3) (1992).

138. WASH. ADMIN. CODE §§ 263-12-056, -057, -060, -080 to -180 (1992).

139. See Weyerhaeuser Co., No. 89 W111, at 1 (Wash. B.I.I.A. Nov. 15, 1990) (remanding a case for further hearing before an industrial appeals judge because the authorized representative of employees was not afforded the opportunity to participate as a party in prior hearings).

140. WASH. ADMIN. CODE § 263-12-115(1) (1992). The BIIA has held that any citation or redetermination appealed may be amended by Labor and Industries at any time to conform to the evidence, absent a showing of prejudice by the employer. Jeld-Wen, B.I.I.A. Dec., 88 W144 (Wash. 1990); see also Northwest Metal Fabrication & Pipe, No. 91 W041 (Wash. B.I.I.A. June 30, 1992) (permitting an amendment to refer to an alternative legal theory and to raise the penalty assessment).

141. WASH. ADMIN. CODE § 263-12-140 (1992).

142. *Id.* § 263-12-145(4).

143. *Id.* § 263-12-150(2), (3).

appeal.¹⁴⁴ Any party aggrieved by the BIIA's disposition may appeal to the superior court of the county in which the workplace is located.¹⁴⁵

D. Criminal Penalties

Under WISHA, criminal violations include giving advance notice of inspection,¹⁴⁶ providing false statements in a required reporting to Labor and Industries,¹⁴⁷ willfully violating any standard that causes a worker's death,¹⁴⁸ knowingly destroying or removing a safety device,¹⁴⁹ and failing to comply with an order of immediate restraint.¹⁵⁰ Upon discovery of a criminal violation, Labor and Industries refers the case to the local prosecuting attorney.¹⁵¹ Other criminal code violations may also be brought by the local prosecuting authority. These can range from obstructing a public servant to manslaughter.¹⁵²

The Los Angeles County District Attorney has been the vanguard of this type of prosecution.¹⁵³ However, the OSH Act has neither the criminal teeth of environmental legislation,¹⁵⁴ nor has it captured the interest of law enforcement authorities.¹⁵⁵ Nonetheless, criminal prosecutions driven by victim demand will increase even if sanctions do not.¹⁵⁶ For instance, as a result of the 1991 fire at a chicken-processing plant in Hamlet, North Carolina, the plant owner Emmett Roe pleaded

144. WASH. REV. CODE §§ 49.17.140(3), .150(1) (1992).

145. *Id.* § 49.17.150.

146. *Id.* § 49.17.190(1).

147. *Id.* § 49.17.190(2).

148. *Id.* § 49.17.190(3).

149. *Id.* § 49.17.190(5).

150. *Id.* § 49.17.190(4).

151. *Id.* § 49.17.190(6).

152. *See generally id.* §§ 9A.04.010-.98.020.

153. Jon Johnson, *L.A. Law: Prosecuting Workplace Killers*, A.B.A. J., Jan. 1993, at 48.

154. Although environmental crimes occupy a section in the federal determinate sentencing guidelines, occupational crimes do not. *See UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL* § 3 E1.1, pt. Q (1992).

155. *OSHA Cases Referred to Justice Department Dipped Sharply in Fiscal 1992, Agency Data Show*, 22 O.S.H. Rep. (BNA) 1395 (Jan. 13, 1993).

156. At the 1992 American Bar Association's annual meeting, Special Assistant Attorney Jan Chatten-Brown from the Los Angeles County District Attorney's office described the efforts of her section since 1985, including prosecution of 50 criminal cases in the seven years since the passage of the state's 1990 Corporate Criminal Liability Act. Johnson, *supra* note 153, at 48.

guilty to twenty-five counts of involuntary manslaughter and accepted a twenty-year sentence.¹⁵⁷

V. DISCRIMINATION

Discrimination against workers engaging in activities or exercising rights provided by WISHA is prohibited.¹⁵⁸ Worker complaints are investigated and prosecuted by Labor and Industries if filed within thirty days of the alleged discriminatory act.¹⁵⁹ However, failure to file an administrative complaint within thirty days, or even a complete failure to file, does not deprive an individual employee of his common law right to file a private action for wrongful discharge in superior court.¹⁶⁰

Worker rights under the Act include the following: the right to request an inspection of the workplace for unsafe or unhealthy conditions;¹⁶¹ the right to testify in favor of workplace standards;¹⁶² the right to appeal a civil order issued against the worker's employer and to contest any extension of an original abatement date;¹⁶³ the right to complain to the employer about unsafe or unhealthy conditions;¹⁶⁴ the right to file complaints alleging safety and health problems with other government entities;¹⁶⁵ and the right to refuse to work in unsafe or unhealthy conditions.¹⁶⁶

The right to refuse to work, however, is not unfettered. A worker's refusal to work is protected only if the refusal is made in good faith, the hazard is one which a reasonable person would consider to cause death or serious bodily injury, and there is insufficient time to eliminate the hazard through resort to other statutory options.¹⁶⁷ An improper refusal to work, like

157. Jon Johnson, *Dying for Work*, A.B.A. J., Jan. 1993, at 46, 47.

158. WASH. REV. CODE § 49.17.160(1) (1992).

159. *Id.* § 49.17.160(2).

160. *Cf. Wilmot v. Kaiser Aluminum*, 118 Wash. 2d 46, 821 P.2d 18 (1991) (holding that a discharged employee alleging retaliatory discharge for having exercised rights under the Industrial Insurance Act does not need to use administrative remedies prior to filing a law suit). Although *Wilmot* involved application of RCW 51.48.025, a section addressing discrimination by an employer against a worker filing an industrial insurance claim, the language is nearly identical to the WISHA discrimination section.

161. WASH. ADMIN. CODE § 296-360-100(1) (1992).

162. *Id.* § 296-360-120.

163. *Id.* § 296-360-110.

164. *Id.* § 296-360-100(3).

165. *Id.* § 296-360-100(2).

166. *Id.* § 296-360-150.

167. *Id.* § 296-360-150(3)(a)-(c).

any other unprotected activity, may be the basis of a nondiscriminatory disciplinary or corrective action.¹⁶⁸

According to the *WISHA Operations Manual*, the elements of a meritorious discrimination complaint include: (1) engaging in protected activity, which is broadly interpreted to include complaints to the employer, OSHA or Labor and Industries, and other agencies; (2) employer knowledge, either actual or constructive, that the worker engaged in protected activity; (3) animus or the intent to retaliate, if not the sole motivation, must be at least a substantial factor in the decision to act; and (4) a retaliatory action, which may include termination, suspension, shift change, or letter of discipline.¹⁶⁹

If Labor and Industries finds a complaint meritorious after a full investigation, which must be completed within ninety days,¹⁷⁰ Labor and Industries first attempts voluntary resolution.¹⁷¹ Resolution may include any or all of the following: reinstatement to the position or status held prior to the retaliatory action, reimbursement of lost benefits and wages, and purging of the worker personnel file.¹⁷² In the event voluntary resolution is unsuccessful, Labor and Industries refers the case to the Office of the Attorney General for civil prosecution.¹⁷³

VI. SAFETY AND HEALTH STANDARDS

A critical component of WISHA is the authority of the Director to promulgate rules and regulations that establish standards of conduct and practice in the workplace.¹⁷⁴ The Administrative Procedures Act¹⁷⁵ governs the process by which these rules are adopted in the same manner as all other administrative rules. This Section provides a brief overview of a few of the major rules currently applicable in this state and some recent and anticipated rule changes.

The term safety and health standard means a regulation that "requires the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary

168. *Id.* § 296-360-090.

169. *WISHA OPERATIONS MANUAL*, *supra* note 66, ch. XIX.

170. WASH. REV. CODE § 49.17.160(3) (1992).

171. *WISHA OPERATIONS MANUAL*, *supra* note 66, ch. XIX.

172. *Id.*

173. WASH. REV. CODE § 49.17.160(2) (1992).

174. *Id.* § 49.17.040.

175. The Administrative Procedure Act, WASH. REV. CODE § 34.05 (1992); *see also* The Regulatory Fairness Act, WASH. REV. CODE § 19.85 (1992).

or appropriate to provide safe and healthful employment and places of employment."¹⁷⁶ WISHA's safety and health standards are located in Title 296 of the WAC.¹⁷⁷

The cornerstone of the safety and health regulations under WISHA is the Accident Prevention Program (APP).¹⁷⁸ Every employer must have an APP program, which at the minimum must be in writing¹⁷⁹ and must address hazards existing in the workplace¹⁸⁰ by providing training.¹⁸¹ If the employer employs more than ten workers, the APP program must also include a joint labor-management safety and health committee.¹⁸² The committee must meet regularly to review accidents that occurred at the workplace and to address methods and means by which the workplace could be made safer.¹⁸³

Labor and Industries routinely establishes ad hoc committees composed of both labor and management representatives to advise on standards. Two current committees include the Construction Advisory Committee and the Logging Emphasis Team. These committees have assisted Labor and Industries in the development of several rules that exceed OSHA standards. Examples of this type of rule include Labor and Industries' table of permissible exposure limits (PEL)¹⁸⁴ for chemicals, fall protection standards,¹⁸⁵ and the previously mentioned mandatory APP.¹⁸⁶

During 1993, Labor and Industries adopted several amended or new sections to the WAC. In February, Labor and Industries adopted a new section pertaining to methylenedianiline.¹⁸⁷ In March, it adopted a new section pertaining to cad-

176. WASH. REV. CODE § 49.17.020(6) (1992).

177. WASH. ADMIN. CODE §§ 296-24-001 to -985, 296-62-005 to -40027 (1992).

178. *Id.* § 296-24-040.

179. *Id.* § 296-24-040(2).

180. *Id.* § 296-24-040(1).

181. *Id.* § 296-24-020(1)(c).

182. *Id.* § 296-24-045(1).

183. *Id.* § 296-24-045(5).

184. *Id.* § 296-62-07515; *cf.* 29 C.F.R. § 1910.1000, tbl. Z-1-A (1992) (OSHA's PEL table).

185. WASH. ADMIN. CODE §§ 296-155-24501 to -24525 (1992); *cf.* 29 C.F.R. § 1926.500-.502 (1992) (OSHA's construction standards for fall protection).

186. WASH. ADMIN. CODE § 296-24-040 (1992); *cf.* 54 Fed. Reg. 3908 (1989) (OSHA's voluntary standards).

187. *See* Wash. St. Reg. 93-04-111 (to be codified at WASH. ADMIN. CODE §§ 296-62-076, 296-155-173).

mium.¹⁸⁸ Both of these rules came in response to federal changes in the same areas.

By mid-1994, Labor and Industries will have developed, and taken to hearing, several new rules: lead in the construction industry,¹⁸⁹ confined spaces,¹⁹⁰ indoor air quality (office environments),¹⁹¹ agriculture,¹⁹² and explosives.¹⁹³ Although the lead in construction standard is federally mandated¹⁹⁴ and the revisions to the confined space standard will incorporate portions of the OSHA standard, the majority of the envisioned future regulations involve state initiatives.

WISHA permits individual workplaces to have conditions or practices that vary from the mandated safety and health standards by requesting and receiving approval from Labor and Industries for a variance.¹⁹⁵ Variances are of two types: A temporary variance is an order for relief from a new standard and is effective no longer than 180 days.¹⁹⁶ A permanent variance allows noncompliance with a standard because equivalent or

188. Wash. St. Reg. 93-07-044 (to be codified at WASH. ADMIN. CODE § 296-62-074).

189. Wash. St. Reg. 93-22-054 (to be codified at WASH. ADMIN. CODE § 296-155-176). Labor and Industries intends to revise the standard to include current lead registry requirements and incremental lowered PELs for lead to reach a target of eliminating occupational exposures in all industries by the year 2000.

190. Wash. St. Reg. 93-10-101. Labor and Industries held a public hearing in Tumwater on June 9, 1993, on the proposed change to the current standard in WAC 296-62-145. The revised standard parallels the federal standard adopted after 17 years of development. The enormity of public comment convinced the Director that Washington's current standard is not only as effective as the recently adopted OSHA rule but also clearer and more understandable. Labor and Industries has withdrawn the original proposal (Wash. St. Reg. 93-19-141) and intends to revise its current standard to include only OSHA paperwork requirements.

191. Wash. St. Reg. 93-22-108. The model indoor air quality standard was developed by a governor's task force last year. It was filed in November. Interview with Steve Levette, Standards and Information Program Manager, Dep't of Labor and Industries, in Olympia, Wash. (July 17, 1993).

192. At least five public hearings were held in early December around the state on a proposed revision to the Agricultural Code, (Wash. St. Reg. 93-07-012) which would eliminate the long-standing exemption from the general safety standards (WAC 296-24-061 to -955) for agriculture. Other amendments could include changes to Rollover Protection Systems (ROPS) for pre-1976 tractors. WASH. ADMIN. CODE § 296-306-200 (1992).

193. See Act of July 25, 1993, ch. 293, 1993 Wash. Laws 1139 (amending WASH. REV. CODE § 70.74 (1992)).

194. 29 C.F.R. § 1926.62 (1992).

195. WASH. REV. CODE § 49.17.090 (1992); WASH. ADMIN. CODE § 296-350-240 (1992).

196. WASH. REV. CODE § 49.17.080 (1992); WASH. ADMIN. CODE § 296-350-250 (1992).

greater protection is achieved by alternative means.¹⁹⁷ The permanent variance is revocable after notice and a hearing any time after six months of issuance.¹⁹⁸ Labor and Industries keeps a record of all variances approved, and each employer must post a copy of the approval at the workplace where it has been permitted.¹⁹⁹

VII. EDUCATION AND RESEARCH

WISHA also grants Labor and Industries the authority to assist employers in their efforts to achieve safe and healthful workplaces. Two such efforts are the Consultation and Education Program and the Safety and Health Assessment and Research for Prevention Program (SHARP). Both programs work voluntarily with employers to analyze problems involving safety and health and to develop and propose solutions.

Any employer may utilize the services of the Consultation and Education Program.²⁰⁰ However, if a work site inspection has been requested by an employer, it must be done with the understanding that any serious hazard or condition will be abated within the time frames set by the consultant.²⁰¹ Furthermore, the request for, or the provision of, consultative services does not grant immunity from a compliance inspection upon a worker complaint.²⁰²

Labor and Industries is authorized to conduct research²⁰³ and has traditionally attempted to use research compiled on injury and illness as a trigger for its inspection scheduling systems. Labor and Industries has conducted several important studies into topics such as ergonomics and lead. In addition, in 1991 the legislature passed legislation designed to encourage increased participation in consultations and research by providing that the identity of an employer, employee, or voluntary participant in research, as well as confidential information

197. WASH. REV. CODE § 49.17.090 (1992); WASH. ADMIN. CODE § 296-350-255 (1992).

198. WASH. REV. CODE § 49.17.090 (1992).

199. WASH. ADMIN. CODE § 296-24-010 (1992).

200. WASH. REV. CODE § 49.17.250(1) (1992). During the calendar year 1992, Labor and Industries received 1,201 on-site consultation requests and completed 1,118. In addition to on-site visits, the Consultation and Education Program served 16,020 employers by off-site technical assistance. BRIEFING BOOK, *supra* 86, at 15.

201. WASH. REV. CODE § 49.17.250(2) (1992).

202. *Id.* § 49.17.250(3).

203. *Id.* § 49.17.210.

gathered during these activities, must be kept confidential by Labor and Industries.²⁰⁴

VIII. ADDITIONAL STATE LAWS RELATED TO OCCUPATIONAL SAFETY AND HEALTH

Since 1973, the legislature has continued to expand the responsibilities of Labor and Industries in the field of occupational safety and health. These expansions include (1) the Explosives Act,²⁰⁵ which established rules for the use, handling, storage, and purchase of explosives by licensed blasters;²⁰⁶ (2) the Worker and Community Right to Know Acts of 1984 and 1986,²⁰⁷ which mandated the establishment of regulations and programs designed to increase the awareness of chemicals and to educate citizens on chemical use in the home, community, and workplace;²⁰⁸ (3) asbestos legislation,²⁰⁹ which mandated the training and certification of workers, supervisors, and contractors involved in the removal of asbestos;²¹⁰ (4) the Late Night Retail Act,²¹¹ which mandated the training of workers engaged in retail establishments open past eleven o'clock at night and established minimum facilities' requirements;²¹² (5) the Washington Pesticides Applications Act,²¹³ which directed Labor and Industries and the Department of Agriculture jointly to adopt and enforce provisions relating to application records, posting of agricultural areas, and documentation of storage in

204. Act of May 9, 1991, ch. 89, 1991 Wash. Laws 515 (codified at WASH. REV. CODE § 49.17.210 (1992)).

205. Explosives Act, WASH. REV. CODE §§ 70.74.010-.390 (1992).

206. WASH. ADMIN. CODE § 296-52-040 (1992).

207. Worker and Community Right to Know Act, WASH. REV. CODE § 49.70 (1992). This program is supported by an assessment on employers within selected Standard Industrial Classification (SIC) codes at a rate of \$2.50 per full time employee provided that 10,400 or more hours worked are reported. The assessment not only supports Labor and Industries Right to Know program, but also the Community Right to Know program administered by the Department of Ecology. See WASH. ADMIN. CODE §§ 296-63-001 to -015 (1992).

208. WASH. ADMIN. CODE § 296-62-054 (1992).

209. WASH. REV. CODE § 49.26 (1992).

210. See generally WASH. ADMIN. CODE § 296-65-050 (1992).

211. Late Night Retail Act, WASH. REV. CODE § 49.22 (1992).

212. The actual training requirements are contained in a specific note to the general safety standard accident prevention program requirements contained in WAC 296-24-102. WASH. ADMIN. CODE § 296-24-102 (1992).

213. Washington Pesticides Applications Act, WASH. REV. CODE § 17.21 (1992).

agricultural work sites;²¹⁴ and (6) the Charter Boat Safety Act,²¹⁵ which extended coverage of safety and health regulations to vessels operating on inland waterways.²¹⁶

IX. THE FUTURE—THE NEXT TWENTY YEARS

WISHA will change over the next twenty years. Many of the changes will be federally initiated. Other changes will be initiated by Labor and Industries or by the legislature.

Several major changes are pending at the federal level. Congress is considering reforming the original OSH Act.²¹⁷ Such reform may mandate that all employers develop and implement safety and health programs within their places of employment,²¹⁸ and increase employee participation in these programs.²¹⁹ Such reform might allow greater employee involvement in the agency adjudicative process, if not in the actual prosecution of violations of workplace standards.²²⁰

At the state level, changes to departmental rules will be driven both internally and externally. At the present time, Labor and Industries is emerging from a major reorganization effort designed to provide greater customer service at the local

214. WASH. ADMIN. CODE § 296-306-400 (1992); see also DIVISION OF INDUS. SAFETY AND HEALTH, DEP'T OF LABOR AND INDUS., WISHA REGIONAL DIRECTIVE WRD90-6A (1993).

215. Charter Boat Safety Act, WASH. REV. CODE § 88.04.900 (1992). These boats were not subject to the jurisdiction of the United States Coast Guard and thus did not have any established regulatory authority prior to the enactment of this legislation in 1989.

216. WASH. ADMIN. CODE §§ 296-115-001 to -120 (1992).

217. During the last session of Congress, both the House and the Senate had bills progressing through committees that would significantly change portions of the OSH Act. See *Special Supplement: The Occupational Safety and Health Reform Act*, 22 O.S.H. Rep. (BNA) 1871 (March 24, 1993) (providing full text of S. 575, 103d Cong., 1st Sess. (1993) and H.R. 1280, 103d Cong., 1st Sess. (1993)).

218. Dean Foust, *Stepping Into the Middle of OSHA's Muddle*, BUS. WK., Aug. 2, 1993, at 53.

219. Currently, the participation of employees under the OSH Act is limited to objecting to the abatement dates set by OSHA. This process itself is yet poorly outlined, as the challenges by the employee unions to the settlements reached by OSHA with both Phillips 66 and IMC indicated. *Labor Secretary, Union, Employer Argue Over Union Participation in Settlement*, 22 O.S.H. Rep. (BNA) 1238 (Nov. 25, 1992). By contrast, workers representatives in Washington have the right to not only fully participate in settlements, but also to challenge the settlement proposed and potentially to litigate if Labor and Industries chooses not to do so. See *Ledcor Indus.*, No. 91 W058 (Wash. B.I.I.A. April 1, 1993).

220. In a case last year, the BIIA upheld an employee representative's challenge to a proposed settlement put forth by Labor and Industries and the employer. Both the superior court and the court of appeals refused to overturn the BIIA's holding. *Ledcor Indus.*, No. 91 W058.

level.²²¹ One expected result is better coordination of enforcement efforts. WISHA inspections may be coordinated with building and contractor safety inspection services,²²² employment standards compliance,²²³ or with industrial insurance auditing efforts.²²⁴ For example, by scheduling an employer for a WISHA inspection because of high injury or illness records, Labor and Industries may trigger an audit of premiums, a collection of unpaid wages, or an action for failing to register as a contractor.

Other efforts may include the adoption of advanced safety and health standards. One such example is the creation of a lead registry in the state and the announcement that Labor and Industries will attempt to eliminate occupational lead poisoning by the turn of the century.²²⁵ This effort will result in the development of a standard that may become a model for the country.

WISHA will continue to be at the forefront of change as it capitalizes on its existing relationship with the industrial insurance program and involves both labor and management in collaborative efforts in occupational safety and health.²²⁶ As prevention of workplace injury and illness becomes a higher priority, the level of enforcement both civilly and criminally may ultimately increase and necessitate greater involvement in this arena by the legal profession. The field is already more complex, more costly, and more litigious than it was twenty years ago.

221. *Organizational Review*, LAB. & INDUSTRIES WKLY., June 9, 1993, at 1.

222. WASH. REV. CODE § 43.22.053 (1992).

223. *Id.* § 43.22.070.

224. *Id.* § 51.48.040.

225. Department of Labor and Indus., Registry to Help Prevent Lead Poisoning in Workplace (May 13, 1993) (press release).

226. In 1989, for example, Labor and Industries initiated an ad hoc labor management advisory committee in the construction industry that performed several tasks designed to eliminate fatalities in the state's construction industry, including the drafting of a fall protection standard that is the most comprehensive and progressive in the nation. WASH. ADMIN. CODE § 296-155-225 (1992).