

OSHA's Consultation Program in Wisconsin: A Look at the Past, Present, and Future of the Public/Private Collaborative Model of Safety Enforcement

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I. INTRODUCTION

The last six years in occupational safety and health regulation have witnessed a sea change, as OSHA places a growing emphasis on governance of worker safety through the use of collaborative consultation programs to supplement traditional enforcement

schemes. Questions remain, however, about the effectiveness of a program that aims to raise workplace safety and health across the whole economy by focusing its attention, rather counterintuitively, on those employers who use the best practices.

On the other hand, traditional OSHA enforcement can hardly be described as an unmitigated success. The process of promulgating a safety regulation has ossified to the extent that hazards arising from new manufacturing or construction technologies arise faster than the agency is able to respond with regulation. From the beginning, OSHA has been handicapped by underfunding, which has permitted only a very low level of inspection.

Orly Lobel describes these difficulties as “the ironies of OSHA, an omni-present bureaucracy with little power or presence.”¹ In many industries, the chronic underfunding of OSHA enforcement makes it possible for an employer to pretend that regulation doesn’t exist, or even to ignore safety regulation altogether, accounting for any citations he does receive as part of the cost of doing business.² Simultaneously, the hidebound nature of the rulemaking process makes it difficult for the agency to react to the realities of worker safety in a modern workplace.

What we are left with is a two-tiered safety system that in reality only recognizes the worst and the best employers, leaving the vast middle practically unregulated. While there may be some reasons for optimism about the future of the partnership model,³ a

¹ Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Worker Safety*, Unpublished article, at 4 (2004).

² Lobel, *supra* note 1 at 21 (“The result is a de-facto (sic) unrealistic threat of inspection for most industries.”). In interviews, OSHA Area Director Kimberly Stille was quick to point out that OSHA currently “conducts more inspections than ever,” noting that the enforcement activity is targeted at high-risk industries, like construction, allowing a more optimal use of agency resources.

³ *Infra* section V.

more plausible solution would be to amend the OSH Act in order to increase the incentives for compliance and collaboration as well as to increase inspections and sanctions for non-complying employers; in other words, an amended OSH Act needs both a carrot and a stick.

This paper aims to consider the strengths and weaknesses of the various approaches to encourage workplace safety and health and to propose some changes that could increase the effectiveness of OSHA activities. Part II will examine the traditional enforcement model under the 1970 OSH Act. Part III will briefly survey new governance principles by using OSHA as a prism. Part IV examines the specific example of the Wisconsin consultation project's collaboration with M.A. Mortenson, a general contractor known to have exemplary standards for safety. Part V will look to the future, and will aim to enumerate changes that should be included in any legislation to improve the effectiveness of OSHA.

II. The Traditional Enforcement Model in Occupation Safety and Health

Workplace safety was federalized in the 1970 Occupational Safety and Health Act (OSH Act).⁴ Generally, the Act empowers the Secretary of Labor, through the Occupational Safety and Health Administration (OSHA), to promulgate rules and standards for workplace safety.⁵ Rulemaking under the Act is notice and comment rulemaking under the Administrative Procedure Act.⁶ Notice and comment rulemaking

⁴ 29 U.S.C. § 651 *et seq.* (2004).

⁵ 29 U.S.C. § 657 (2004) (also known as section 8 of the Act: "Enforcement").

⁶ 5 U.S.C. § 551 *et seq.* (2004).

is noted for being an unwieldy method for devising rules.⁷ The basically adversarial nature of notice and comment rulemaking also tends to cause final rules to be a compromise between the multiple extreme positions submitted by various interested parties. The end result of the process is often a compromise rule with which none of the parties are satisfied and in which none of the parties feels invested.

The enforcement component of workplace safety was created in the OSH Act as a bifurcated structure, with states having the choice to opt out of federal enforcement in favor of designating a state agency to enforce standards that are at least equivalent to the federal standards.⁸ Twenty-one states have chosen to conduct their own enforcement, while 29, including Wisconsin, have federal enforcement regimes.⁹ Opinions vary about this bifurcation, with some arguing that it is bound to lower standards overall, and others arguing that it creates the possibility for more experimentation.¹⁰

Regardless of whether a particular state has state or federal enforcement, certain facts about enforcement prevail. Certain industries are inherently more dangerous, and are therefore more heavily regulated.¹¹ Other industries are very safe, and are therefore

⁷ See, e.g., Jack M. Beerhmann, *Presidential Power in Transitions*, 83 B.U.L REV. 947, 961 (2003) (noting the nearly 9 years between the Advanced Notice of Proposed Rulemaking and the promulgation of a final ergonomics standard). The difficulty of making rules under the traditional command and control regulatory framework is one of the central reasons for adopting new governance techniques. See *supra* Part I.

⁸ 29 U.S.C. § 667 (2004) (also known as section 18: “State Jurisdiction and State Plans”).

⁹ Alison D. Morantz, *Has Regulatory Devolution Injured American Workers?: A Comparison of State and Federal Enforcement of Construction Safety Regulations*, Unpublished draft at 4, fn. 4 (2005).

¹⁰ *Id.*

¹¹ According to 2003 Bureau of Labor Statistics data, construction had a fatality rate of 11.7 per 100,000 employees, more than four times the rate of manufacturing. In 2004, the Bureau of Labor Statistics reports that there were 1129 fatalities in “Construction and Extraction Occupations,” with 870 of those fatalities in the construction trades. See “Fatal Occupational Injuries by Occupation and Event or Exposure” available at <http://www.bls.gov/iif/oshwc/foi/cftb0200.pdf> (last checked Nov. 12, 2005).

regulated in theory only.¹² A catastrophic workplace injury or death makes an inspection a certainty. Criminal sanctions for willful safety violations that result in serious injury or fatality are almost never pursued.¹³

Enforcement via inspection under OSHA is the highly adversarial, as federal or state OSHA inspectors are forbidden by statute to provide advance notice of inspection, and every incentive throughout the process is for the employer to conceal potential violations or engage in quick-fix solutions rather than adopting any sort of total health and safety plan for the workplace. After all, such plans are costly to devise and costly to implement, especially when the employer uses a cost-benefit analysis to evaluate the probability of inspection and the potential cost exposure. The adversarial nature of traditional enforcement is also a major reason for a lack of transparency generally on workplace safety issues.¹⁴

Separate from enforcement, the OSH Act also empowers the Secretary of Labor to make certain cooperative agreements with the states to provide consultation services to employers.¹⁵ The Act provides that such consultation activities are to be conducted separately from enforcement activities, with no enforcement activity taken against

¹² For instance, a telephone call center. Much of the business community's objection to the ergonomics standard promulgated in 2001 can probably be traced to the prospect that heretofore-uninspected workplaces would suddenly have a greatly increased probability of inspection.

¹³ For example, a person is far more likely to be jailed for harassing a wild burro on federal land than she is for gross negligence in the workplace that results in a fatality. Lobel, *supra* note 1. Criminal prosecution is conducted at the discretion of the Department of Justice.

¹⁴ I address the importance of transparency *infra* section III.

¹⁵ 29 U.S.C. 670 (2004) (section 21 of the Act).

employers who timely correct violations observed by consultants.¹⁶ Consultation programs are voluntary and are initiated by the request of the business owner.¹⁷

Because of the voluntary nature of the consultation programs, a considerable statutory gap still exists between mandatory enforcement activities and voluntary consultation programs. Accordingly, nearly every imaginable constituency for workplace safety issues has strong reasons for wanting to change the way that OSHA works in terms of enforcement, rulemaking, and inspection, including workers, unions, employers, politicians, and regulators, but for varying reasons. Although legislative reform is appealing to many, the agreement among the stakeholders that a change is needed doesn't translate into any workable coalition for what changes to make.¹⁸ By contrast, many new governance alternatives have the ability to attract all the parties, since they are focused on collaborative deal making. Thus the focus shifted to new governance techniques in an attempt to raise the minimum safety level without undertaking costly and time-consuming command and control rulemaking.

III. A Brief Survey of New Governance Principles Generally

Above all, new governance seeks to be collaborative where traditional command and control enforcement is adversarial. Aside from being a positive outcome in itself, various desirable outcomes are encouraged by collaborative regulatory processes.¹⁹ A

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Despite these difficulties, legislative reforms to the OSH Act may be the best solution. *See infra* section V.

¹⁹ *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22 (1997) (laying out the characteristics of new governance regulatory systems).

truly collaborative regime creates incentives for the parties to share information so that they can broker the most efficient regulatory compromises possible.²⁰ Unlike in the adversarial command and control model, ineffective rules need not ossify due to agency reluctance to restart a costly and often hostile process; instead, the parties should have greater flexibility to adapt to changing circumstances.²¹ Parties will be more accountable to each other.²²

A. Stakeholder Involvement

Crucial to the success of any new governance model of regulation is the involvement of all the key stakeholders. New governance recognizes that expertise in a complex technical field is not concentrated in the hands of a central bureaucracy, but is distributed among the parties whose interests will be impacted by regulation.²³ The theory predicts that interested parties will be involved in policy formulation regardless of how it is accomplished, and therefore tries to give them a non-adversarial role that increases the probability of a favorable outcome.

In the context of OSHA, it is easy to see how increased collaboration might lead to better results. Employers have criticized OSHA for promulgating rules that are not economically feasible for them to implement.²⁴ From the other end of the spectrum,

²⁰ *Id.*

²¹ *Id.*

²² *Id.* In the specific context of Wisconsin's OSHA consultation partnership arrangements, some of the parties are contractually bound to one another, which makes the parties *significantly* more accountable to each other.

²³ See Orly Lobel, *The Renew Deal: The Fall of Regulation and The Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 343, 371 (2004).

²⁴ Steven Greenhouse, *Bush Plan to Avert Work Injuries Seeks Voluntary Steps by Industry*, N. Y. Times, Apr. 6, 2002, at A1.

unions have oftentimes been unresponsive and critical of OSHA efforts.²⁵ A collaborative program that successfully brought employers and their employees together at the table with regulators would have the potential to create a workplace safety regime that parties would be more likely to implement without the need for the heavy-handed threat of official sanctions.

B. Transparency and Information-forcing

New governance also has the potential to dramatically improve the flow of information between the parties and to the public. Under a command and control system, the adversarial nature of the rulemaking process creates an incentive to provide only information supporting one's own position and a disincentive to share information on cost reduction and innovative techniques.²⁶ A collaborative system, by contrast, may encourage parties to engage in a genuine debate with full information.²⁷

In the OSHA context, an employer has no incentive to provide internal data on workplace safety to the agency or to the public, since to do so only invites inspection or citation. A consultation partnership, on the other hand, increases information flow and transparency in several ways. First, the employer has an incentive to disclose obstacles to safety and health during negotiation, so that the agency consultants can address them.

²⁵ Interviews conducted for this project indicate that the biggest obstacle to implementation of M.A. Mortenson's partnership program has been the opposition of members of the steel erectors' trade union. *See infra* section IV.

²⁶ Lobel, *supra* note 1 at 19.

²⁷ *See* Freeman, *supra* note 21, at 50 (noting that the early phase of a regulatory negotiation on a revised standard for OSHA fall protection exhibited these traits, before the main negotiator steered the reg-neg back to the narrowly-defined context under which it was convened).

Second, disclosure of safety information in the partnership context does not trigger an inspection, so the employer can feel free to seek assistance from the consultants.²⁸

C. Regulatory Flexibility

Traditional command and control regulation is characterized by procedural and substantive inflexibility. Notice and comment rulemaking, as a process, moves too slowly to address the changing hazards of a modern workplace. Once a regulation is approved, the difficulty of the rulemaking process creates a barrier to revisiting an ineffective initial rule, as any modification of a rule would require the rulemaking process to start anew.

When the agency works out contractual collaborative agreements with the stakeholders, on the other hand, the parties can always come back to the table to address a procedure or contract item that is not working as intended.²⁹ A successful collaborative regime would combine command and control regulation (hard law) to provide a basic floor for standards with horizontally integrated collaborative regulation (soft law) to implement safety and health procedures higher than the minimum.³⁰ Without a hard law floor, a new governance regulatory regime might look more like deregulation or privatization of workplace safety, as individual stakeholders moved their operations

²⁸ This subject is addressed in more detail in section IV.

²⁹ This is not to suggest, however, that the process is necessarily less resource-intensive. In fact, the process of negotiating agreements with individual stakeholders on individual projects may ultimately require greater resources than broad industry regulation. Moreover, the resource burden of enforcing individual health and safety arrangements with differing standards is certainly higher. *See* Lobel, *supra* note 3, at 42 (“Administrative governance is a labor-intensive and resource-intensive approach.”).

³⁰ *See* Lobel, *supra* note 25 at 389-91 (discussing regulatory flexibility in terms of achieving complementarity between “hard law” and “soft law”).

wherever they could negotiate the safety regulations that offered them the most profit; in other words, a “race to the bottom” might very well ensue.

D. Collaborative Accountability

Traditionally, accountability is attributed to the employer by OSHA regulators, by premiums for worker compensation insurance, and, to a lesser extent, by the employees.³¹ Combined with the low probability of inspection, prosecution, and sanction, most employers are easily able to avoid accountability for preventable accidents and illnesses.³² New governance opens new avenues for accountability, through self-governance and disclosure, community oversight, third-party certification, or by contract.³³

E. “Rolling Rule Regimes” or “Ratcheting Up”

Perhaps one of the most important characteristics of a new governance regulatory regime is that it does not view an agreement between the stakeholders as a resolution of conflict, but as a starting point for a process of continuous adjustment and improvement of standards.³⁴ Of course, traditional OSHA regulation is adversarial in the classic sense,

³¹ Realistically, employees can only force accountability on their employers collectively; since a large majority of employees do not belong to labor unions, collective action is less prevalent than it could be. Workers compensation expenses are perhaps the most substantial regulating force currently acting on employers, but Mortenson Safety Director Scott Brooks has indicated in interviews that the way that carriers set premiums is ineffective for rewarding low-risk employers who operate in high-risk industries. Beyond parenthetically noting the role of worker compensation systems, a full evaluation of their effects is beyond the scope of this project, which seeks to evaluate the effectiveness of partnerships as a new governance program.

³² Lobell, *supra* note 1, at 14 (noting that only 200 of 1798 cases of workplace fatalities resulted in prosecution, and that serious violations of the OSH Act carried an average penalty in 2003 of less than \$900).

³³ See Freeman, *supra* note 23 at 22. Accountability by contract is addressed *infra* section IV.

³⁴ William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 Wm. & Mary L. Rev. 127, 187 (2004).

both at the rulemaking phase and the enforcement phase. In terms of regulation, there is a sense that when a rule is promulgated, it is finished. Amending a rule requires the agency to begin with a new advanced notice of proposed rulemaking, and to proceed through the entire cumbersome process as if it was creating a new rule, rather than amending an old one.³⁵ This creates a barrier that is practically insurmountable, which means that an imperfect regulation will likely remain on the books.

Similarly, enforcement is adversarial. An OSHA inspector drops in by surprise and does a top-to-bottom inspection. If she finds violations, the inspector issues citations. In some cases, the agency negotiates compliance in exchange for reduced sanctions. The employer corrects imperfections, and follow up inspections result. The emphasis of the process is on bringing an employer up to minimum standards. The process doesn't create incentives for employers to exceed standards.

A rolling rule regime in OSHA might create a scale of safety and health outcomes, with incentives for employers who reach levels above the federal minimum standard, rather than judging a workplace on a binary compliance/violation standard.³⁶ Such a scale would require a statistical metric of some sort that had two basic characteristics. First, the statistical measure would have to serve as a reasonable proxy for workplace safety; merely measuring workplace fatalities, for example, would fail to include a variety of safety and health problems that should be measured.³⁷ Second, there

³⁵ There is a possibility that the agency could *slightly* alter the impact of a promulgated rule through the use of policy statements and interpretive rulings, but that strategy has its difficulties (and are beyond the scope of this paper).

³⁶ Aspects of this idea appear in the Mortenson agreement. *See infra* section IV(B).

³⁷ Simon, *supra* note 35 at 190 (“Thus, a key rule of central institutions in a rolling rule regime is to devise and propagate common metrics.”)

would need to be a process for revision of the metric in light of changes in technology or science.³⁸

“Ratcheting up” or “scaling up” is the result of a rolling rule regime. A well-implemented rolling rule regime will tend to drive program outcomes up above the regulatory floor by virtue of a blend of incentives, sanctions, and collaborative planning. Even where the scaling metric of a rolling rule regime is not available, a new governance safety regime (in the construction industry, for example) should aim to cause a broad, gradual increase in baseline standards across the industry. Eventually, this will result in actual workplace health and safety levels above that required by rule.

IV. A Wisconsin Example: M.A. Mortenson’s partnership with OSHA

M.A. Mortenson is a Wisconsin general construction contractor founded in 1954. The company has made a commitment to worker safety, aspiring to zero injuries and demonstrating measurable safety superiority to its competitors. It was selected for a partnership with OSHA’s consultation project on the basis of its excellent safety record and its ongoing commitment to reduce or even eliminate workplace injury and sickness. M.A. Mortenson is not the only Wisconsin consultation partnership, but it is arguably one of the most innovative.

Before engaging in a lengthy discussion of what the Mortenson partnership is, it is important to note what it is not. It is not a broad-based regulatory program that has been shown to raise safety standards across the state. It is not a project that brings a recalcitrant contractor up to OSHA specifications, as M.A. Mortenson was selected to

³⁸ *Id.* at 191.

participate in this partnership project precisely because it already had an excellent record for workplace safety and health prior to the partnership's inception.

Nevertheless, the Mortenson partnership is a good project that makes a measurable safety difference for its employees, the employees of its subcontractors, and the public. In this section of the paper, I will examine the contract to try and ascertain what the parameters of the partnership are. Second, I consider the effects of the partnership on workplace safety, both at present and into the future.

A. Stakeholder Involvement in the Partnership Project

The stakeholders in the partnership project are who one might expect. They include OSHA, Mortenson, Mortenson's sub-contractors, Mortenson's and its subcontractors' employees, the person or business contracting for construction (in this case the State), and the public. The only stakeholders directly involved in the main contract are OSHA and Mortenson itself. Mortenson agrees in the initial contract that it will, in turn, bind its subcontractors to agree to the terms of the agreement.³⁹ By necessity, the partnership involves a multi-tiered contract system, with the main contract between Mortenson and OSHA, and sub-contracts between Mortenson and its subcontractors. Below the subcontractor level, Mortenson and its subcontractors have contracts with the employees.⁴⁰ Lower still is the site owner, in this case the State, which has a contractual arrangement with Mortenson for the construction project, but which does not concern itself with the separate safety arrangements made with the Consultation Service. On the bottom tier is the citizenry, which pays taxes that fund the building

³⁹ *Infra* section IV(C).

⁴⁰ All labor is at least constructively contractual, with individual contracts, collective contracts, and constructive contracts for at-will employment representing the spectrum of employment.

project and OSHA, but who are represented only indirectly through political accountability for the actions of government decisionmakers.

As a result of this multi-tiered system, the main contract arrangement only indirectly involves the public, the employees of Mortenson or its subcontractors, or the site owner. Of course, this is an inherent limitation of engaging in collaborative regulation by contract, which requires a discrete set of parties to reach a meeting of the minds. The public is represented indirectly by the agency, assuming that there is political accountability for the agency's actions.

Employees that work skilled trades in construction are typically organized into trade unions, such as carpenters, plumbers, or steel erectors. Contractors and subcontractors hire individual employees from the union for each project. As such, it would be very difficult to directly involve the employees or their union representatives indirectly in contract negotiations. Thus, one challenge for the consultation partnership project is finding a way to bring *all* stakeholders into the negotiation phase of the project. Since the skilled trades were not represented in any facet of the negotiations,⁴¹ they had less reason to strive to achieve the elevated safety standards called for by the agreement.

This leaves aside that workers, as the parties most likely to be directly harmed by a lack of workplace safety, should have a keen interest in their workplace being as safe as possible. Several reasons why workers from the trades might resist the heightened safety standards suggest themselves. First and strongest is a sense of inertia; increased safety

⁴¹ OSHA and Mortenson were directly involved in the negotiation and formalization of the agreement. Mortenson's subcontractors were indirectly involved, insofar as Mortenson agreed to bind its subcontractors within the agreed-upon standards. *See infra* section IV(c). OSHA indirectly represented the public, insofar as OSHA is a federal agency created by the elected branches of the federal government and subject to their supervision, and therefore politically accountable, albeit in some attenuated fashion.

restraints, such as fall arrest systems for heights greater than six feet, also restrict the worker's range of motion or personal comfort, and he may prefer an older method that he perceives as perfectly safe. Second, members of unions may resent being bound by an agreement that they didn't negotiate; they may feel that alterations to safety standards above the federal minimum are a proper subject of bargaining between the employer and the union.

B. The Contract between OSHA and Mortenson

The agreement between OSHA and M.A. Mortenson Company is an ambitious one, aiming to “implement all facets of job safety and achieve self compliance through cooperative efforts from labor, management, and OSHA.”⁴² The agreement sets out the commitments of the parties to maintain high safety standards at the project site.⁴³

In terms of specific safety strategies, the Agreement implements 6-foot fall protection,⁴⁴ requires thirty hours of training for on-site supervisors and ten hours of training for other employees, and mandates hearing conservation and airborne hazard monitoring activities, among other things. The Agreement also establishes that there will be a single unannounced annual inspection to be conducted “through normal enforcement inspection activity.”⁴⁵

⁴² “Strategic Partnership between the Occupational Safety and Health Administration, Wisconsin On-Site Consultation Programs, and the M.A. Mortenson Company” (hereinafter “the Agreement” or “the Contract”) at 1.

⁴³ The project is for the construction of a state administrative building, the “State of Wisconsin Office/Data Center Facility Project.” Contract at 3.

⁴⁴ The OSHA standard for fall protection is 8 feet.

⁴⁵ Contract at 7.

Mortenson's responsibilities under the contract are fairly simple: implement the company's already-written safety program, train and mentor subcontractors and employees, implement various safety measures,⁴⁶ and gather and report safety data.⁴⁷

The gathering and reporting of safety data is particularly important; it represents a massive increase in the transparency of internal safety operations of a general construction contractor and its subcontractors. Under the traditional command and control regime, the contractor would have no incentive to provide any such data to a regulator, who might, under such a regime, use it for enforcement purposes. Under the consultation program, data provided in furtherance of the partnership will not be provided to OSHA enforcement, so Mortenson can freely consult the partners on difficult safety issues.

As a result, the agency and the company get valuable data that helps to assess which facets of the company's safety plan are having an effect on the baseline injury metrics. In turn, the data helps identify parts of the safety plan that are not as effective as they need to be and gives the parties guidance on how they might alter the Agreement in order to maximize worker safety. OSHA and the Wisconsin Consultation Service, in turn, commit to participating in training and program design, and to consult with Mortenson and the subcontractors on technical challenges.

⁴⁶ To wit: six foot fall protection, "wet cutting", ground fault circuit interrupters to prevent electrocution, a prohibition on employees working beneath suspended loads, and, to the extent feasible, ergonomic corrections. Agreement at 8-9.

⁴⁷ "Mortenson's designated Site Safety coordinator will coordinate and conduct a comprehensive site audit on a monthly basis. Partnership Committee Members will participate in the site safety audit when needed. If non-compliant activity or hazards are discovered, immediate correction is required. Mortenson will document the corrective action taken and share this information during the monthly update meetings." Agreement at 9.

Mortenson Company also agrees to bind its subcontractors to the substance of the Agreement in its subcontracts.

C. Contracts between Mortenson and Subcontractors

One challenge of implementing an Agreement like this is that a modern construction project utilizes dozens of specialty subcontractors for various tasks, and some of them participate only during a very limited timeframe.

This Agreement actually lays out the responsibilities of subcontractors, even though they are not signatories.⁴⁸ In reality, this is because for a short duration project negotiating with each of dozens of individual subcontractors would drag the process of reaching an Agreement out to the point of impracticability. Instead, Mortenson is free to select subcontractors who can comply with the terms of the Agreement, and agrees to take various measures to ensure their compliance with its mandates.⁴⁹

These subcontracts provide one of the best arguments that this sort of Agreement will produce a system-wide ratcheting up of safety standards. Subcontractors and their supervisors and employees do not somehow become untrained after the termination of the project, and the hope is that some of them will adopt the safer practices used on this project for other projects, and will pass forward the acquired knowledge.⁵⁰ Nor do written safety policies become unwritten by virtue of the termination of a particular contract.

⁴⁸ See Contract at 10-11.

⁴⁹ For instance, Mortenson agrees to require each subcontractor to either have written safety and health plans or to agree to use Mortenson's written policy. Contract at 4-5. Mortenson also agrees to require its subcontractors to take part in training and monthly partnership meetings, among other things.

⁵⁰ This argument is further addressed *infra* section IV(D).

However, an individual subcontractor's employees tend to be fluid, drawing on members of the trade unions as needed for a particular job, inhibiting the effectiveness of the written safety policies of individual subcontractors. Barring some sort of uniformity of policy among safety subcontractors, it is possible that the acquired safety knowledge is bound to seep away at the termination of the Agreement.

D. The Effects of the Contract and its Penumbra Over State Workplace Safety

The Contract exhibits many of the traits of a new governance program, including regulatory flexibility, an attempt to include all the relevant stakeholders, transparency, and collaborative accountability. There is some question to what extent these partnerships will create a “ratcheting up” throughout the broader climate.

The Agreement promotes regulatory flexibility in the context of the agreement. Any party has the ability to withdraw from the contract with 30 days of notice to the other parties. Any party can seek modification of the program with the consent of the other parties. More importantly, many of the strategies that are enumerated in the Contract are aspirational, leaving Mortenson or the subcontractors the discretion to select strategies for achieving the goal.⁵¹

However, this sort of consultation partnership-by-contract regime has not been shown to increase regulatory flexibility throughout the state as a whole. The consultation project is limited in scope and resources, and selects only the best contractors for partnership agreements. For the majority of workplaces, the operative regulatory presence is the traditional command and control regime.

⁵¹ For example, the Contract calls for “[m]aintain[ing] lost time injuries and illnesses at a rate 25% (2.56) below the Wisconsin industry average (3.2).” Contract at 3.

The Agreement also provides enhanced accountability between the parties compared to traditional OSHA command and control regulation. In theory, the Contract could be enforced in court, although that is unlikely considering the high safety standards of the company.⁵²

In terms of “ratcheting up,” the Agreement demonstrates the flexibility for the parties to continue to increase safety standards as new hazards become apparent or new methods become available. However, in terms of a program that aspires to improve safety statewide, it is not clear how a partnership initiated with a contractor already known for its safety record will contribute to a ratcheting up of state construction workplace safety.

One theory is that “best practices” will be adopted horizontally by the ebb and flow of subcontractors and trade union employees. Under this theory, trade workers and subcontractors that have committed substantial personal time and effort to learn a best practice on a Mortenson project may carry that practice to jobs conducted by other general contractors, encouraging a viral spread of best practices. The obstacle to this theory is that best safety practices often have a monetary cost that other contractors probably will not be willing to pay.⁵³ For example, the Agreement calls for monitoring silica, lead, cadmium, or isocyanates and commits to the wearing of respiratory protection.⁵⁴ Such monitoring will undoubtedly cost money, as will providing employees functional and effective breathing protection.

⁵² There is also some question as to how enforceable some of the contract provisions would be in court, being, as they are, largely aspirational statements of safety goals.

⁵³ In fact, one of M.A. Mortenson Company’s chief concerns is that their commitment to safety is costly and may make them less competitive when bidding for contracts.

⁵⁴ Contract at 4.

Reinforcing this concern is the lack of what have been called “regulatory penalty defaults.”⁵⁵ A regulatory penalty default is a harsh baseline rule that drives the parties to bargain around its requirements.⁵⁶ However, since OSHA inspection under the traditional regulatory regime is so infrequent and with penalties that often fail to inspire more costly compliance behavior, there is no regulatory penalty default to motivate other contractors (i.e. those contractors not already adequately concerned with safety) to bargain around the regulatory regime. As the system is currently constituted, it may in fact be more financially lucrative for a contractor to allow competitors like Mortenson to shoulder the costs of worker safety while pocketing the increased profit that can be garnered by underbidding the services.⁵⁷

V. A Look to the Future

Before launching into specific reform proposals for workplace safety and health, it is important to mention that the simple answer to expanding safety and health is more resources. One way or another, we spend too little on workplace safety to effectively regulate everyone, whether we retain a traditional command and control model, or whether we move fully to collaborative regulation. Whether the answer is increased stakeholder participation, some form of subsidy or incentive, or additional Congressional funding, the government will spend more money if it wants better working conditions.

⁵⁵ See Bradley C. Karkkainen, *Information-Forcing Regulation: Penalty Defaults, Destabilization Rights and New Environmental Governance*, LAW AND NEW GOVERNANCE IN THE EUROPEAN UNION AND THE UNITED STATES, Hart (DeBurca and Scott eds.) (2006).

⁵⁶ *Id.* at 5.

⁵⁷ I argue that one possible legislative reform would be to grant preference in contracting to firms with low injury and death rates, essentially subsidizing sunk safety expenses.

That is not to suggest that we should not accept that certain forms of regulation are more effective than others. Workplace safety is too complex and evolves too fast for traditional command and control regulation through enforcement of rules promulgated after notice and comment to function alone. Such regulation can, at best, be relied upon to provide a minimum safety level and to work in concert with collaborative self-regulation.

A. Wisconsin Consultation Partnerships

There are good reasons to be optimistic about the future impact of Mortenson-style partnerships on state workplace safety and health, especially if the state consultation project and its partners continue to innovate in the drafting of contracts.⁵⁸

That said, the process could be improved in the future if the trade unions could be incorporated into negotiations over the agreement. Active and vigorous leadership from senior foremen on the job site might go a long way towards increasing worker acceptance of increased safety restraints.

Similarly, future negotiations should recognize the stake of the site owner and strive to incorporate them into the negotiations. Regardless of whether the site owner is a private or a public entity, it may be able to harness favorable publicity by encouraging this kind of safety partnership for its project, and by being involved in the negotiation of the details of that partnership.

The central difficulty is that neither of these parties is properly a party to a contract between the general contractor and the Wisconsin Consultation Service. As such, the challenge is to integrate those parties into the negotiations in a way that makes

⁵⁸ *Supra* section IV.

them feel a sense of ownership for the bargain, even if they are not themselves bound by it. A feeling of ownership by the project owner and the employees that are doing the work could be invaluable in reducing the cost concerns of the former and the resistance to implementation of the latter.

B. Altered State Contracting Practices and State Incentives

Companies that self-impose heightened workplace safety and health standards face a competitive disadvantage; safety costs money. The state could alter its practices in several ways to encourage the use of companies with good safety reputations like M.A. Mortenson's.

First, the state could alter its contracting practices to factor a company's health and safety history, as measured by a common metric, into the cost equation. Companies with excellent histories of safety might be considered equal to a lower-bid competitor without the same safety history. In effect, the state would be granting a form of subsidy or offset on state projects performed by companies with good safety records, in order to level the economic playing field and increase worker safety.

Second, and similarly, the state could offer tax incentives to site owners to encourage the same sort of subsidy behavior. For example, the state could allow the site owner to offset the contractor's safety costs against their own tax liability, provided the state, using a common metric, has determined that the particular contractor has a good safety record.

The state could also take certain steps to lower the entry costs for contractors that wish to volunteer for the project. One possibility is the use of form contracts or even contract modules to make it less costly to negotiate enhanced safety agreements.

C. Federal and Legislative Changes to the OSH Act

It is difficult to understate the political resistance to adding funding for OSHA or to amending the Act. However, it might be possible to frame amendments to the Act as a compromise. On one hand, the focus of the Act would be shifted to collaborative regulation of workplaces, with traditional enforcement activities setting a lower boundary for working conditions. On the other hand, some additional funding to increase both the collaborative and the command-control aspects of the regulation, which would be used to narrow the gap between enforcement and collaboration by increasing both inspections and partnerships. Simultaneously, the amendments would create a substantial regulatory penalty default as an incentive to collaboration, and increase the availability of collaboration resources.

Another alternative is to increase the agency's flexibility to identify and respond to workplace safety hazards. Notice and comment rulemaking is simply too cumbersome, as a procedure, to adequately respond to workplace safety challenges. One possibility would be for the Secretary of Labor to draft policy statements that recognize hazards, raising the possibility of violations under the general duty clause of the OSH Act.⁵⁹ Congress would need to approve such a practice by statute, however, since Courts have a history of striking down such "stealth" regulations.

⁵⁹ 29 U.S.C. § 654.

Conclusion

Ultimately, OSHA is an agency working within the very strict constraints of the OSH Act. Increased funding for an agency devoted to workplace safety is very unlikely in a political climate of massive budget deficits and possible massive cuts to core entitlement programs.

Instead, OSHA is another agency being forced to do more with less. The Consultation Partnerships are a good program in this environment because they have the potential to spread the improved safety practices and technology that are developed beyond what could be accomplished through traditional inspection and enforcement alone. The final effectiveness of the program to materially affect the safety climate in Wisconsin and around the country, however, remains to be seen.