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SAFE AND SOUND: THE CASE FOR SAFETY AND HEALTH COMMITTEES UNDER OSHA AND THE NLRA

Gregory R. Watchman[†]

I. INTRODUCTION

A. IMPERIAL FOOD AND EQUITY MEATS: FATAL DIFFERENCES

On the morning of Tuesday, September 3, 1991, the residents of Reidsville, North Carolina, awoke after a three-day Labor Day weekend of parades, barbecues, and softball games. For many of the town's residents, that Tuesday marked the end of summer, the beginning of a new school year, and a return to their jobs at the town's poultry processing plant owned by Equity Meats.

Roughly one hundred miles to the south, workers in the rural community of Hamlet, North Carolina returned that morning to a similar poultry processing plant owned by Imperial Food Products. Hamlet, a sleepy small town with a four-block Main Street, had been designated the previous year as an All-American city.¹ The poultry plant, which paid workers between \$4.25 and \$5.50 an hour, had been a source of employment in Hamlet for over a decade.²

Despite their outward similarities, major differences existed between the two plants — indeed, fatal differences. Employees of Equity Meats in Reidsville participated in a joint employer-employee safety and health committee (SHC), required by the company's collective bargaining agreement with Local 204 of the

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¹ Paul Taylor, *25 Die as Fire Hits N.C. Poultry Plant; Locked Doors Are Said to Add to Toll*, WASH. POST, Sept. 4, 1991, at A1.

² *Comprehensive Occupational Safety and Health Reform Act, and the Fire at the Imperial Food Products Plant in Hamlet, North Carolina: Hearing on H.R. 3160 before the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 27, 55 (1991) [hereinafter *1991 House Hearing on Imperial Food Products Fire*] (testimony of Margaret Seminario, Director of Occupational Safety and Health, AFL-CIO; testimony of Bobby Charles Quick).

United Food and Commercial Workers Union.³ The SHC's membership included five rank-and-file employees and five management representatives.⁴ Equity Meats' SHC conducted periodic fire drills to familiarize employees with escape routes,⁵ regularly checked for locked or blocked exit doors, and ensured routine maintenance of hydraulic lines to prevent fire-producing ruptures.⁶

At Imperial Food in Hamlet, however, no SHC existed. Furthermore, federal and state safety and health officials never inspected the plant.⁷ The company did not maintain a fire safety plan, fire alarm, or sprinkler system,⁸ and had never conducted safety training or fire drills.⁹ Imperial Food kept the plant doors locked and did not equip them with panic bars to allow them to be opened in emergencies.¹⁰ Workers knew of these dangerous conditions but believed that they would be fired if they complained.¹¹ In short, the Imperial Food plant was a disaster waiting to happen.

At 8:20 that Tuesday morning, a rupture occurred in a hydraulic line that powered a conveyor belt through a deep fat fryer. The spilled fuel ignited, triggering a flash fire and filling the plant with thick, black smoke. Workers rushed to the one-story plant's nine exits, but found many of them blocked or locked.¹² Passersby outside the plant heard their screams for help but could not open the doors.¹³ Many workers died trying to find their way out of the plant through the thick black

³ *Id.* at 46 (testimony of Tom LaNier, Member, United Food and Commercial Workers Union Local 204).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 49, 53 (statement and testimony of Tom LaNier).

⁷ *Id.* at 30 (testimony of Margaret Seminario, Director of Occupational Safety and Health, AFL-CIO).

⁸ *Id.* at 56 (testimony of Loretta Goodwin and Bobby Charles Quick).

⁹ *Id.* at 52, 57.

¹⁰ *Id.* at 52 (testimony of Bobby Charles Quick).

¹¹ Paul Taylor, *Ashes and Accusations*, WASH. POST, Sept. 5, 1991, at A1, A9; see also *1991 House Hearing on Imperial Food Products Fire*, *supra* note 2 at 55, 58 (testimony of Loretta Goodwin and Bobby Charles Quick).

¹² *1991 House Hearing on Imperial Food Products Fire*, *supra* note 2, at 39-40, 101 (testimony of Loretta Goodwin and Bobby Charles Quick).

¹³ *Id.* at 39 (testimony of Loretta Goodwin).

smoke.¹⁴ One firefighter pulled out a victim who turned out to be his father.¹⁵ The fire killed twenty-five workers and injured another fifty-five in a matter of minutes, making it the worst industrial accident in North Carolina's history.¹⁶

B. SAFETY ON THE JOB: A BURGEONING PUBLIC POLICY CRISIS

The fire at Imperial Food Products triggered a flurry of federal and state government activity. Federal and state occupational safety and health officials descended on Hamlet and launched an immediate investigation the day of the fire.¹⁷ In Washington, D.C., the House Education and Labor Committee initiated a congressional inquiry. The Committee held a hearing nine days after the fire and later produced a report on the disaster.¹⁸ The Governor of North Carolina testified before the Committee, expressing support for safety and health committees and concluding that SHCs "clearly . . . would have helped" save lives at Imperial Food.¹⁹ The U.S. Occupational Safety and Health Administration announced its assumption of joint jurisdiction over North Carolina employers, who until then had been covered exclusively by North Carolina's state occupational safety and health agency.²⁰

North Carolina's Commissioner of Labor levied \$808,000 in civil fines against Imperial Food for eighty-three safety and

¹⁴ *Id.* at 40 (testimony of Loretta Goodwin).

¹⁵ *Id.*

¹⁶ STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 102D CONG., 2D SESS., THE TRAGEDY AT IMPERIAL FOOD PRODUCTS 2 (Comm. Print 1991).

¹⁷ See 1991 House Hearing on Imperial Food Products Fire, *supra* note 2, at 139 (testimony of Gerard F. Scannell, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor). Federal OSHA officials also inspected another Imperial Food plant in Georgia, and assessed \$144,500 in fines. OSHA cited the company for not maintaining a fire extinguishing system, not conducting fire drills or training, and locking exit doors. OSHA Cites Imperial Plant in Georgia for Alleged Fire Safety Violations, [1992] Daily Lab. Rep. (BNA) No. 19, at A-2 (Jan. 29, 1992).

¹⁸ See 1991 House Hearing on Imperial Food Products Fire, *supra* note 2; STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 102D CONG., 2D SESS., *supra* note 16.

¹⁹ 1991 House Hearing on Imperial Food Products Fire, *supra* note 2, at 126 (testimony of James G. Martin, Governor of North Carolina).

²⁰ Press Release from U.S. Dep't of Labor (Oct. 23, 1991).

health violations.²¹ The plant's owner, director of plant operations, and manager were indicted for involuntary manslaughter.²² The plant's owner plead guilty to two counts of involuntary manslaughter in 1992 and was sentenced to nineteen years and eleven months in prison.²³ North Carolina enacted legislation requiring employers with poor safety records to establish SHCs.²⁴ Workers and their families brought numerous civil suits against Imperial Food.²⁵ The lawsuits ultimately settled in 1992 for \$15.1 million.²⁶

After the Imperial Food tragedy, federal and state officials and the national media closely scrutinized the plant's dangerous conditions. In light of all the attention, most assumed such working conditions to be unusual. In reality, however, conditions at the Hamlet plant typified thousands of U.S. workplaces. The Hamlet fire illuminates the nation's neglect of workplace safety and health issues and underscores the growing incapacity of federal and state agencies to enforce the law.

A quarter century ago, the Occupational Safety and Health Act of 1970 (OSH Act)²⁷ marked the first comprehensive federal effort to regulate workplace safety and health. It sought "to

²¹ See *Three Indicted for Fatal Fire at North Carolina Poultry Plant*, [1992] Daily Lab. Rep. (BNA) No. 48, at A-2 (Mar. 11, 1992) (citing *North Carolina v. Roe*, No. 92-CRS-1799 (N.C. Super. Ct. filed Mar. 9, 1992)).

²² *Id.*

²³ *North Carolina Chicken Plant Owner Pleads Guilty to Manslaughter Charges*, [1992] Daily Lab. Rep. (BNA) No. 179, at A-11 (Sept. 15, 1992). Charges against the director of plant operations and the plant manager were dismissed. *Id.*

²⁴ *N.C. General Assembly Enacts Bills on Workplace Safety, Health*, [1992] Daily Lab. Rep. (BNA) No. 138, at A-12 (July 17, 1992) (discussing passage of H.B. 1388).

²⁵ *Imperial Poultry Plant Will Not Reopen*, [1991] Daily Lab. Rep. (BNA) No. 200, at A-20 (Oct. 16, 1991); see, e.g., *Imperial Foods Accused of Gross Negligence in Civil Suit Filed on Behalf of 23 Workers*, [1991] Daily Lab. Rep. (BNA) No. 203, at A-3 (Oct. 21, 1991) (citing *Albright v. Imperial Food Prods. Inc.*, No. 3:91-CV-00523 (M.D.N.C. filed Oct. 17, 1991)); *Families of Imperial Fire Victims Agree to Tentative Settlement of \$15.1 Million*, [1991] Daily Lab. Rep. (BNA) No. 218, at A-15 (Nov. 10, 1992) (citing *Saunders v. Imperial Food Prods. Inc.*, No. 91-CVS-826 (N.C. Super. Ct. filed Nov. 5, 1992)).

²⁶ *Families of Imperial Fire Victims Agree to Tentative Settlement of \$15.1 Million*, *supra* note 25, at A-15.

²⁷ 29 U.S.C. § 651 (1988).

assure so far as possible every working man and woman in the Nation safe and healthful working conditions."²⁸

While the United States may have achieved some progress since 1970 in the reduction of job-related fatalities,²⁹ the numbers remain staggeringly high and the OSH Act's promise remains largely unfulfilled. Despite tremendous advances in technology and medical science, thousands of Americans die from work-related causes each year.³⁰ The number of lives lost to safety accidents and occupational illnesses on an average working day in this country dwarfs the twenty-five lives lost in the Hamlet fire. An additional 3.3 million American workers suffer disabling injuries on the job each year,³¹ while occupational illness and injury rates continue to rise.³²

Each workplace fatality represents a tragedy for the worker involved and for his or her family. Each injury or occupational

²⁸ *Id.* § 651(b).

²⁹ See, e.g., *The Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (Feb. 9, 1994) (testimony of Robert B. Reich, U.S. Secretary of Labor).

³⁰ See NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 1 (1993) (estimating 8,500 deaths in 1992 from work-related accidents) S. REP. NO. 453, 102d Cong., 2d Sess. 2 (1992) ("Each year, 10,000 workers are killed in workplace accidents, and as many as 100,000 more die from workplace illnesses"); 2 *The Comprehensive Occupational Safety and Health Reform Act, 1991: Hearings on H.R. 3160 Before the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 8 [hereinafter 1991-92 House Hearings] (testimony of Dr. Philip J. Landrigan, Chair, Department of Community Medicine, Mount Sinai School of Medicine) (estimating 50,000 to 70,000 deaths annually from exposure to toxic substances in the workplace); NATIONAL SAFE WORKPLACE INST., BEYOND NEGLIGENCE: THE PROBLEM OF OCCUPATIONAL DISEASE IN THE U.S. 8 (1990) (estimating between 47,377 and 95,479 American deaths from occupational disease in 1987); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, NO. OTA-H-256, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 37 (1985) ("The most commonly quoted estimates are that up to 100,000 deaths" occur each year due to occupational illness; citing estimates ranging from 10,000 to 210,000 deaths annually); Phillip J. Landrigan & Dean B. Baker, *The Recognition and Control of Occupational Disease*, 266 JAMA 676, 676 (1991) (estimating 100,000 deaths annually from occupational disease) (citing PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH (1972)).

³¹ NATIONAL SAFETY COUNCIL, *supra* note 30, at 1.

³² See U.S. DEPT OF LABOR, REPORT ON THE AMERICAN WORKFORCE 95-97 (1994); *Job-Related Injuries, Illnesses Increase*, [1993] Daily Lab. Rep. (BNA) No. 240, at A-10 (Dec. 16, 1993) (noting that rise in work-related injuries and illnesses rate from 8.4 to 8.9 cases per 100 full-time workers represents largest increase in two decades).

illness produces devastating consequences as well, ranging from pain and suffering to permanent disability. These incidents also exact a huge toll on the U.S. economy. The National Safety Council estimates that the direct costs of work-related accidents — not including occupational illnesses and associated fatalities — amounted to \$115.9 billion in 1992.³³ As a nation facing increasingly stiff global competition, the United States cannot afford these costs.

These statistics have begun to attract the attention of federal policymakers. In 1991, the National Institute for Occupational Safety and Health (NIOSH) convened a task force on occupational injury prevention. The task force assessed the impact of workplace accidents and illnesses on workers, businesses, and the economy, and concluded that "[o]ccupational injury [in the United States] is a public health crisis that demands immediate attention."³⁴

The NIOSH task force's report received scant attention, but the Hamlet fire has sounded the alarm. The image of dozens of workers trapped behind locked fire exits — choking on thick, black smoke and unable to escape — struck a deep chord with members of Congress and the national media. The tragedy at Imperial Food demonstrated the limits of federal and state

³³ NATIONAL SAFETY COUNCIL, *supra* note 30, at 2. NSC's estimate includes wage and productivity losses, medical expenses, administrative expenses, motor vehicle damage, fire loss, and other employer costs. *Id.*; see also *Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 1622 Before the Senate Comm. on Labor and Human Resources*, 102d Cong., 2d Sess. 151 (1992) [hereinafter *1992 Senate Hearings*] (testimony of Susan Marquis, Senior Economist, Rand Institute for Civil Justice) (estimating that workplace injuries cost employers, workers and taxpayers \$83 billion in 1989); *Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (July 14, 1993) (testimony of Dr. J. Donald Millar, Director, National Institute for Occupational Safety and Health) (total workers' compensation payments exceeded \$42 billion in 1991); *1992 Senate Hearings, supra* at 181 (testimony of Stacy Hennessy Moot, Associate Counsel, American Insurance Association) (citing indirect costs such as lower productivity, damaged equipment and materials, disrupted schedules, loss of customers and public goodwill, and the hiring and training of new employees; noting that "any work-related accident . . . cuts into a company's profit margin").

³⁴ See *Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 1622 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 347 (1991) [hereinafter *1991 Senate Hearings*] (Position Paper, Panel on Occupational Injury Prevention).

enforcement efforts, and confirmed the need for a new public policy approach to protect American workers.

C. COSHRA'S LEGISLATIVE SOLUTION: SAFETY AND HEALTH COMMITTEES

The Comprehensive Occupational Safety and Health Reform Act (COSHRA), a proposed legislative overhaul of the OSH Act recently under consideration in Congress,³⁵ embodies a new approach to workplace safety and health. Forming the heart of COSHRA's new approach is the requirement that all employers with eleven or more employees establish joint SHCs comprised of both management and employee representatives. COSHRA empowers the SHC to review the employer's safety and health program and records, to investigate incidents resulting in illness, injury, or death, to conduct inspections, and to recommend improvements in worker protection to the employer.

This article evaluates the benefits of SHCs from the standpoint of both workplace safety and health and labor-management relations. While COSHRA's SHC requirement represents a new public policy approach to workplace safety and health issues, SHCs are by no means new. SHCs represent perhaps the most prevalent form of employee involvement in the American workplace today. Twelve states currently require some or all employers to establish SHCs.³⁶ Thousands of other employers have established SHCs voluntarily or pursuant to collective bargaining agreements.³⁷

A review of this broad-based experience with SHCs yields substantial evidence — both systemic and anecdotal — that

³⁵ 137 CONG. REC. S11,833 (daily ed. Aug. 1, 1991) (introduction of S. 1622 by Sens. Kennedy & Metzenbaum); 137 CONG. REC. H6316 (daily ed. Aug. 1, 1991) (introduction of H.R. 3160 by Rep. Ford). During the 102d Congress, both the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor favorably reported COSHRA. See S. REP. NO. 453, *supra* note 30, at 8, 10; H.R. REP. NO. 663, 102d Cong., 2d Sess. 24 (1992). The same sponsors reintroduced the legislation at the beginning of the 103rd Congress. See 139 CONG. REC. S2805-20 (daily ed. Mar. 11, 1993) (introduction of S. 575); 139 CONG. REC. H1163 (daily ed. Mar. 10, 1993) (introduction of H.R. 1280). The House Education and Labor Committee favorably reported H.R. 1280 on March 10, 1994. H.R. REP. NO. 825, 103d Cong., 2d Sess. 39 (1994). The 103rd Congress adjourned without further action on the legislation in either body.

³⁶ See *infra* part II.C.2.

³⁷ See *infra* parts II.C.3-4.

SHCs can be adapted to a wide range of workplaces and that they reduce workplace fatalities, injuries, and illnesses. SHCs also improve labor-management relations by allowing workers and management to work together toward a mutual goal and by offering a more cooperative alternative to OSHA inspections and enforcement.

Claims that COSHRA's SHCs would run afoul of Section 8(a)(2) of the National Labor Relations Act³⁸ as employer-dominated employee representation committees are unfounded. The proposed SHCs are fully consistent with the NLRB's recent interpretations of Section 8(a)(2). COSHRA's statutory scheme sets forth specific requirements for the SHC's purpose, structure, composition, and functions. By providing for joint determination of the SHC's agenda, COSHRA protects SHCs from employer domination or interference. This article ultimately concludes that COSHRA's proposed SHC requirement represents a valuable new weapon in the fight for safer workplaces. As a tool of public policy, SHCs are both safe, since they reduce workplace injuries, illnesses, and fatalities, and sound, since they foster employee involvement and improved labor-management relations.

II. THE CASE FOR SHCs AS A MEANS OF IMPROVING WORKPLACE SAFETY AND HEALTH

A. THE NEED FOR NEW DIRECTIONS

The OSH Act's promise of a safe and healthy workplace for all Americans must be viewed in light of practical realities. Although no level of corporate resources and government enforcement will eliminate all work-related fatalities, injuries, and illnesses, the majority of them can be prevented simply by using existing practices and technology.³⁹ As U.S. Secretary of Labor Robert B. Reich testified to Congress, "OSHA's experience of more than two decades has shown us that most workplace

³⁸ 29 U.S.C. § 158(a)(2) (1988).

³⁹ See, e.g., Susan P. Baker et al., Position Paper, National Institute for Occupational Safety and Health and Center for Disease Control Panel on Occupational Injury Prevention (1991) ("Most occupational incidents that result in injury to the worker are avoidable and could be prevented if known strategies were implemented widely."), reprinted in 1991 Senate Hearings, *supra* note 34, at 337-38.

injuries and illnesses are not unavoidable accidents. They are predictable and preventable."⁴⁰

Many countries are doing a much better job of ensuring safe workplaces for their citizens. The U.S. occupational fatality rate has declined significantly since 1970,⁴¹ but it remains six times that of the United Kingdom, over four times that of Japan, three times those of Denmark and Norway, more than twice those of Sweden, Finland, and Switzerland, and significantly higher than those of Canada, France, Germany, Poland, Austria, and New Zealand.⁴² The experiences of these nations suggest that American employers could vastly improve conditions for their workers.

However, federal policymakers could better fulfill OSHA's promise. Although a strong OSHA enforcement program certainly plays a role,⁴³ OSHA cannot do the job alone. OSHA has neither the staffing nor the statutory authority to make a substantially greater contribution to the reduction of workplace safety and health hazards. In fact, the agency faces increasing difficulty in maintaining its existing enforcement program. For example, during the 1980s, while U.S. employment rose from seventy-six million to ninety-four million, OSHA staffing was cut approximately twenty percent to 2,400 staff members.⁴⁴ Today, OSHA has only 890 front-line inspectors responsible for 3.7 million establishments, while the states have 1,200 inspec-

⁴⁰ *The Comprehensive Occupational Safety and Health Reform Act: Hearing on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (Feb. 9, 1994) (testimony of Robert B. Reich); see also *Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (July 14, 1993) (testimony of Dr. J. Donald Millar).

⁴¹ The National Safety Council estimates that occupational fatalities declined from 14,300 in 1969, the year before the OSH Act was enacted, to 8,500 in 1992, representing a decline in the occupational fatality rate from 18 to 7 fatalities per 100,000 workers. NATIONAL SAFETY COUNCIL, *supra* note 30, at 37.

⁴² *Id.* at 41 (1993) (basing comparison on NSC's estimated U.S. rate).

⁴³ Studies show "a measurable injury reduction" in workplaces following an OSHA inspection. OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEPT OF LABOR, A STUDY OF THE EFFECTS OF THE COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT (H.R. 1280) 21 (1994).

⁴⁴ OCCUPATIONAL HEALTH AND SAFETY ADMIN, U.S. DEPT OF LABOR, SAVING LIVES, PREVENTING INJURIES, PROTECTING THE HEALTH OF AMERICAN WORKERS (1994).

tors covering an additional 2.5 million establishments.⁴⁵ As one commentator observed,

Compliance with the [OSH Act] can not be achieved by government inspection of workplaces. . . . OSHA targets inspections for industries which have the highest [injury] rates. As a result, 83% of the inspections are in construction and manufacturing. Even in these target industries, inspections are only every five or six years. Workplaces in other industries are almost never inspected unless an employee files a formal complaint.⁴⁶

In the foreseeable future, OSHA will face continued dwindling resources and a growing list of covered establishments and protected employees. Given these limitations, federal policymakers have begun to look elsewhere for new ways to save lives.

B. THE IMPORTANCE OF EMPLOYEE INVOLVEMENT

Many in the occupational safety and health community believe that employee involvement offers the best hope for progress. As Secretary Reich stated, "[i]t is inconceivable that major improvement in workplace health and safety can occur without the active involvement of workers."⁴⁷ Employee involvement complements government enforcement efforts by offering a means of identifying and correcting workplace hazards through localized, worksite-based efforts. As one commentator concluded, "[m]aintenance of safe and healthful workplaces requires that the main burden of identifying violations and making the initial efforts to obtain compliance must come from within the workplace, not from government inspections from outside the workplace."⁴⁸ The U.S. General Accounting Office suggested SHCs as a vehicle for such initial efforts, stating that

⁴⁵ *Id.*

⁴⁶ 1991 Senate Hearings, *supra* note 34, at 319-20 (statement of Prof. Clyde W. Summers, University of Pennsylvania).

⁴⁷ *The Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (Feb. 9, 1994) (statement of Robert B. Reich).

⁴⁸ 1991 Senate Hearings, *supra* note 34, at 320 (statement of Prof. Clyde W. Summers).

"[j]oint labor-management safety and health committees could encourage local problem-solving and prevention activities, thus decreasing the reliance on OSHA's limited inspection force alone to seek out and order abatement of all worksite hazards."⁴⁹

Similarly, Vermont state officials endorsing COSHRA observed that "[s]afety and health committees will expand limited OSHA and State Plan resources by empowering people in the workplace with the authority to identify and correct workplace hazards and prevent injuries through a cooperative rather than adversarial process."⁵⁰ In Washington, where SHCs have been required for decades, officials report that SHCs simplify enforcement. By examining SHC meeting minutes and talking with SHC members, an inspector quickly can learn much about the worksite and the employer's commitment to safety and health.⁵¹

Employee involvement also allows employers to tap into workers' expertise. As one workers' advocate explained to Congress, "workers themselves are the true experts about what goes on in their workplaces. They know their workplace, and their work, like no one else. . . . Workers have time and time again been the first ones to recognize the symptoms of occupational disease often before doctors, scientists, employers or the government."⁵²

⁴⁹ U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-90-66BR, OCCUPATIONAL SAFETY AND HEALTH: OPTIONS FOR IMPROVING SAFETY AND HEALTH IN THE WORKPLACE 49 (1990).

⁵⁰ Memorandum from Barbara G. Ripley, Commissioner, Vermont Department of Labor and Industry, to Kathleen Hoyt, Chief of Staff for Governor Howard Dean (Dec. 15, 1993) (on file with author). Similarly, the Director of Washington's Department of Labor and Industries has concluded that "[t]he only alternative to the use of [safety and health] plans and committees is a large increase in the resources devoted to compliance — an increase that is probably beyond political and fiscal feasibility." 2 1991-92 House Hearings, *supra* note 30, at 226 (testimony of Joseph Dear).

⁵¹ U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 49.

⁵² 1991 Senate Hearings, *supra* note 34, at 12 (statement of Nancy Lessin, Director, Massachusetts Coalition for Occupational Safety and Health); see also *Comprehensive Occupational Safety and Health Reform Act: Hearings on H.R. 1280 Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education and Labor*, 103d Cong., 1st Sess., at 178 (1993) [hereinafter 1993 House Subcommittee Hearings] (testimony of Dr. Ian A. Greaves, Minnesota Education Resource Center, University of Minnesota School of Public Health, on behalf of the Association of University Programs in Occupational Safety and Health) ("Appropriately trained employees,

Federal policymakers recognize the value of employee participation in addressing workplace safety and health issues. In 1989, for example, OSHA concluded that "employee involvement in decisions affecting their safety and health results in better management decisions and more effective protection."⁵³ In fact, applicants to OSHA's Voluntary Protection Program, established to recognize worksites with exemplary safety and health practices, must include employee participation in their safety and health programs.⁵⁴ Similarly, in 1991 Congress directed OSHA to promulgate a standard regulating petrochemical plant safety, and to include a provision for employee participation.⁵⁵

Employers also recognize the importance of employee involvement in the effectiveness of safety and health programs.⁵⁶ The American Bakers Association, for example, ac-

through their experience, may recognize existing and potential hazards arising out of current work methods or planned changes in these methods, and may have unique insights on ways to address such hazards.").

⁵³ 54 Fed. Reg. 3904, 3907 (1989) (OSHA Safety and Health Program Management Guidelines) (emphasis omitted).

⁵⁴ 50 Fed. Reg. 43,804, 43,806, 43,814 (1985) ("[T]he two most critical ingredients common to all VPP participants are . . . management commitment . . . and active employee involvement."). *Id.* at 40,806. Notably, OSHA reports that VPP participants experience injury rates 67% to 80% lower than industry averages. 54 Fed. Reg. 3904, 3910 (1989).

⁵⁵ Clean Air Act, Amendments, Pub. L. No. 101-549, § 304(b)(3), 104 Stat. 2399, 2577 (1990) (codified at 29 U.S.C. § 655 (Supp. V 1993)). In response to this directive, OSHA required employers to consult with employees regarding the required safety programs. *See* 29 C.F.R. § 1910.119(c) (1994).

⁵⁶ *See, e.g., 1992 Senate Hearings, supra* note 33, at 318-19 (statement of Horace A. Thompson on behalf of National Association of Manufacturers) ("Employee participation programs, in their many forms, have been shown to be effective in a broad range of situations. NAM is generally supportive of the objectives set forth in COSHRA regarding . . . employee participation . . . so long as the requirements are stated in broad performance-based terms"); *id.* at 381 (statement of National Association of Home Builders) (recognizing that "without meaningful employee input, an effective safety and health program is impossible to achieve"); *id.* at 294 (statement of Gerard F. Scannell, Vice-President for Corporate Safety Affairs, Johnson & Johnson) (recognizing that an effective safety and health program "is not possible" without employee participation); *id.* at 188 (statement of General Electric Company) (recognizing that "[e]mployee participation can promote effective safety and health programs"); *id.* at 346 (statement of American Bakers Association) (recognizing that "cooperative efforts between management and [workers] in the safety area can enhance adherence to newly devised safety rules or programs, and strongly influence a facility's attitude toward safety compliance efforts"); *id.* at

knowledges that "the views and input of employees who work in a given job, process or area can, in many instances, provide valuable information regarding safety and health concerns that rivals that of the highest-priced, most expert consultant."⁵⁷

A 1993 survey conducted for Industrial Safety and Hygiene News asked 1,662 corporate safety and health officials to state their top goals for 1994.⁵⁸ Seventy-two percent of the respondents sought to "increase employee involvement in safety."⁵⁹ Surprisingly, that response ranked above "keep up with OSHA, EPA and State regulations."⁶⁰

In sum, employee participation is universally regarded as an essential element of a successful corporate safety and health strategy. Employee participation promises obvious benefits for workers, and yields substantial benefits for employers, because "effective management of safety and health protection improves employee morale and productivity, as well as significantly reducing workers' compensation costs and other less obvious costs of work-related injuries and illnesses."⁶¹

C. THE WIDESPREAD USE OF SHCS

Today, SHCs represent the most prevalent form of employee involvement in workplace safety and health matters. Many of our principal foreign competitor nations require some or all employers to establish such committees. In the United States, twelve states already require some or all employers to establish SHCs. Many additional U.S. employers participate in SHCs pursuant to the terms of collective bargaining agreements. Finally, many U.S. employers have established SHCs voluntarily. Together, these SHCs provide a broad base of experience from which to assess their effectiveness.

354 (testimony of American Industrial Hygiene Assn.) (organization "strongly supports the concept of employee participation"); *1993 House Subcommittee Hearings*, *supra* note 52, at 509 (Statement of Weyerhaeuser Company) ("We support the concept of employee participation in safety and health committees.").

⁵⁷ *1992 Senate Hearings*, *supra* note 33, at 346.

⁵⁸ See CHILTON RESEARCH SERVICES, 1994 WHITE PAPER SURVEY (1993).

⁵⁹ *Id.* at tbl. 4.

⁶⁰ *Id.* (latter response given by 71% of respondents).

⁶¹ 54 Fed. Reg. 3904, 3908 (1989) (OSHA Safety and Health Program Management Guidelines).

1. *Other Countries*

Many industrialized countries require SHCs for some or all employers. These nations include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, India, Ireland, Norway, Spain, and Sweden.⁶²

Canada provides a useful comparison to the United States based on its geographic proximity and similar economic and industrial practices. Each of Canada's provinces and territories, and its federal government, require at least some employers to have SHCs.⁶³ For example, since the 1970s, British Columbia, New Brunswick, the Northwest Territory, Saskatchewan, and the Yukon Territory have all required employers with a minimum number of employees (ranging between ten and fifty workers) to establish SHCs.⁶⁴

In many Canadian jurisdictions, SHCs are empowered to receive complaints, conduct inspections, inspect records, and make recommendations to the employer.⁶⁵ Most Canadian jurisdictions require worker representatives to comprise at least half of the SHC, provide for committee meetings at least three or four times each year, and require employers to pay committee members for time spent on SHC activities.⁶⁶

2. *U.S. State Laws*

Twelve states require SHCs pursuant to their occupational safety and health or workers' compensation laws. Washington, for example, has required joint safety and health committees for employers with eleven or more employees since 1945,⁶⁷ and

⁶² 2 1991-92 House Hearings, *supra* note 30, at 277-79 (attachment 5 to testimony of Lynn Williams, Chair, Standing Committee on Safety and Occupational Health, AFL-CIO); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 48.

⁶³ *See* PAUL K. FORDER & ROBERT D. MCMURDO, WORKPLACE HEALTH & SAFETY AGENCY, WORKING TOGETHER ON HEALTH AND SAFETY: THE IMPACT OF JOINT HEALTH AND SAFETY COMMITTEES ON HEALTH AND SAFETY TRENDS IN ONTARIO, CANADA 5 (1994).

⁶⁴ *See id.*

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 9.

⁶⁷ WASH. ADMIN. CODE § 296-24-020 (1992); 1991 Senate Hearings, *supra* note 34, at 222 (testimony of Joseph A. Dear, Director, Washington State Department of Labor and Industries).

has allowed employees to elect their own representatives since 1973.⁶⁸ Oregon enacted legislation requiring safety and health committees in 1973. As amended in 1990, the law applies to employers with eleven or more employees, and to smaller employers with high workers' compensation premium rates or high lost workday injury rates.⁶⁹ Meanwhile, Alaska targets its SHC requirement to its most dangerous workplaces. The requirement covers the state's pulp, paper and paperboard industries.⁷⁰

Many states have enacted SHC requirements in recent years. In 1992, three states amended their workers' compensation laws to require SHCs. In response to the Imperial Food disaster, North Carolina established a SHC requirement for employers with eleven or more employees and a high workers' compensation experience rating.⁷¹ Minnesota now requires SHCs for employers with more than twenty-five employees and for smaller employers with lost workday rates in the top ten percent.⁷² Tennessee's SHC requirement applies to employers with the highest injury rates.⁷³

Six more states enacted SHC requirements in 1993. Nebraska's new SHC provision applies to all employers subject to its workers' compensation law.⁷⁴ West Virginia amended its

⁶⁸ WASH. ADMIN. CODE § 296-24-045(1) (1992).

⁶⁹ OR. REV. STAT. § 654.176 (1991); 1 1991-92 *House Hearings, supra* note 30, at 249, 258 (testimony of John A. Pompei, Administrator, Oregon Occupational Safety and Health Division, Department of Insurance and Finance). The Oregon law grants SHC members the right to receive training, hold meetings, keep records, review the employer's records, conduct inspections, and make recommendations. OR. REV. STAT. § 654.182.

⁷⁰ ALASKA ADMIN. CODE tit. 8, § 61.010.07.310(a)(8) (1994).

⁷¹ N.C. GEN. STAT. § 95-252 (1993). The North Carolina law grants SHCs the right to review safety and health programs, conduct inspections, and investigate work-related accidents. *Id.*

⁷² MINN. STAT. ANN. § 176.231 (West 1993); *Further Perspectives on OSHA Reform: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (Mar. 22, 1994) (statement of John B. Lennes, Commissioner, Minnesota Department of Labor).

⁷³ TENN. CODE ANN. § 50-6-501(a) (Supp. 1994).

⁷⁴ NEB. REV. STAT. § 48-443 (Supp. 1993). The Nebraska law provides for an equal number of management and worker representatives in non-union settings; in unionized shops, committees are to be established through collective bargaining. Employers must compensate SHC members for time spent on committee activities. *Id.*

workers' compensation law to authorize the state workers' compensation commissioner to require SHCs in workplaces with a high workers' compensation experience rating.⁷⁵ Montana established a SHC requirement for all employers with more than five employees⁷⁶; Nevada requires SHCs for employers with more than twenty-five employees.⁷⁷

As part of its workers' compensation reform effort, Florida enacted legislation requiring SHCs for employers with more than ten employees and for smaller employers with a high "frequency or severity of work-related injuries."⁷⁸ Similarly, Connecticut amended its workers' compensation law to impose a SHC requirement on employers with twenty-five or more employees and smaller employers with higher than average injury and illness rates.⁷⁹ Although California has no SHC requirement, the state requires employers with ten or more employees to establish "a system for communicating with employees" on safety and health issues.⁸⁰ Employers who establish a SHC in compliance with certain statutory criteria "shall be presumed to be in substantial compliance" with the statutory employee communication requirement.⁸¹

3. *Collective Bargaining Agreements*

Safety and health committees probably originated through the collective bargaining process. According to the AFL-CIO, SHCs date back to at least 1914, when the United Mine Workers negotiated contracts in Washington State requiring one such committee at each mine.⁸² Today, approximately half of all

⁷⁵ W. VA. CODE § 23-2B-2 (1994). The commissioner may promulgate regulations regarding committee membership, meetings, record-keeping, compensation of members, and committee functions (including inspections, investigations, and safety and health program evaluations). *Id.*

⁷⁶ MONT. CODE ANN. § 39-71-1504 to 1505 (Supp. 1993).

⁷⁷ NEV. REV. STAT. ANN. § 618.383(2)(b) (Michie Supp. 1993).

⁷⁸ Act of Nov. 24, 1993, 1994 Fla. Laws ch. 93-415.

⁷⁹ Worker's Compensation Act § 28(a), 1993 Conn. Acts 228, Pub. Act No. 93-228. The law requires the state workers' compensation commissioner to issue regulations regarding committee membership, committee meetings, inspections, investigations, recordkeeping, compensation for time spent on committee activities, and training. *Id.*

⁸⁰ CAL. LAB. CODE § 6401.7(a)(5) (West Supp. 1994).

⁸¹ *Id.* at § 6401.7(f)(2).

⁸² 1991 Senate Hearings, *supra* note 34, at 46 (statement of Thomas R.

collective bargaining agreements provide for the establishment of SHCs.⁸³ For example, Ford Motor Co. and the UAW maintain SHCs at all major Ford facilities.⁸⁴

4. *Individual Employers*

Thousands of U.S. employers have established SHCs,⁸⁵ even where SHCs are not required by state law or by the terms of a collective bargaining agreement. The National Safety Council's 1993 study of SHCs found that seventy-five percent of firms with fifty or more employees had set up SHCs, while thirty-one percent of the firms with fewer than fifty employees had set up SHCs.⁸⁶

Many U.S. employers have established SHCs, from small businesses to large companies such as Hewlett-Packard and Monsanto.⁸⁷ SHCs are particularly prevalent in manufactur-

Donahue, Secretary-Treasurer, AFL-CIO).

⁸³ See *id.* (citing 1986 Bureau of National Affairs finding that SHCs exist in 49% of collective bargaining agreements); see also *id.* at 171 (testimony of Michael J. Wright, Director, Health, Safety and Environment Department, United Steelworkers of America) (noting that most worksites represented by United Steelworkers maintain safety and health committees).

⁸⁴ *Id.* at 200 (testimony of Anthony Ruggiero, Union Relations Coordinator, Ford Motor Company, North American Automotive Operations) (including committees comprised of one safety engineer and one UAW full-time representative implementing management directives).

⁸⁵ RUTH RUTTENBERG, U.S. DEP'T OF LABOR, THE ROLE OF LABOR-MANAGEMENT COMMITTEES IN SAFEGUARDING WORKER SAFETY AND HEALTH i (1990).

⁸⁶ THOMAS W. PLANEK & KENNETH P. KOLOSH, NATIONAL SAFETY COUNCIL, SURVEY OF EMPLOYEE PARTICIPATION IN SAFETY AND HEALTH 6 (1993) (analyzing 249 responses to national sample of 2,500 firms), reprinted in 1993 House Subcommittee Hearings, *supra* note 52, at 39.

⁸⁷ See 1 1991-92 House Hearings, *supra* note 30, at 314 (testimony of Walter G. Rostykus, Environmental Health and Safety Specialist, Hewlett-Packard Company) ("[HP] requires that each plant maintain safety committees or similar organizations of employee involvement."); 1992 Senate Hearings, *supra* note 33, at 290 (testimony of Thomas Evans, Director of Safety and Environmental Health, Monsanto Chemical Company, on behalf of the Chemical Manufacturers Association) ("Monsanto has safety and health committees in virtually every plant."); see also *id.* at 284-85 (testimony of Peter Cornelison, President, Condar Company, on behalf of the National Federation of Independent Business) (small business owners' safety committee conducts monthly inspections of businesses); *id.* at 290 (testimony of William Steinmetz, Jr., Loss Control Manager, Midland Engineering Co., on behalf of

ing industries such as the steel, electronics, and automobile industries.⁸⁸ Additionally, a vast majority of plants in the petrochemical industry have established SHCs.⁸⁹

D. THE PROVEN EFFECTIVENESS OF SHCS

Through the widespread use of SHCs, the occupational safety and health community has learned much about their effectiveness. As one Washington state employer observed, "[t]he safety committee is one of [the] cornerstones of a healthful and prosperous workplace."⁹⁰

SHCs have improved workplace safety and health for a number of reasons: First, as the U.S. Office of Technology Assessment has recognized, SHCs represent "an avenue for sharing and conveying information about hazards and controls."⁹¹ Through regular inspections, meetings, and advisory recommendations, SHCs ensure a continuous opportunity for workplace safety and health risks to be identified and corrected.⁹²

the National Roofing Contractors Association); *id.* at 346 (statement of American Bakers Association) ("Many ABA-member companies have a range of labor-management safety committees or other mechanisms in place in some of their unionized facilities."); *id.* at 196 (statement of American Gas Association).

⁸⁸ See, e.g., 1992 Senate Hearings, *supra* note 33, at 358 (statement of American Iron and Steel Institute) ("Safety and health committees already exist at major steelmaking facilities."); *id.* at 377 (statement of Electronic Industries Association) ("[M]any of our members maintain their own health and safety committees consisting of employees from all levels of their organizations."); see also *supra* note 84 and accompanying text.

⁸⁹ JOHN GRAY INST., LAMAR UNIV. SYS., MANAGING WORKPLACE SAFETY AND HEALTH: THE CASE OF CONTRACT LABOR IN THE U.S. PETROCHEMICAL INDUSTRY 133 (1991) (reporting SHCs in facilities of 84% of plant managers surveyed). The report was produced under a grant from the U.S. Department of Labor, Occupational Safety and Health Administration.

⁹⁰ Letter from Cynde Harris, Risk Manager, Keith Uddenberg, Inc., to Greg Watchman (Nov. 1, 1994) (on file with author).

⁹¹ OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 30, at 22; see also U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 49 ("Opening lines of communication may increase participation in safety and health, providing both an opportunity for an employer to use its expertise as well as increasing the role of workers in overseeing their own day-to-day safety practices.").

⁹² See, e.g., *Meeting of the Commission on the Future of Worker-Management Relations, U.S. Department of Labor* 80 (July 28, 1993) [hereinafter *Department of Labor Commission Meeting*] (testimony of Lisa Trussell, Human Resource Manager, Norpac Foods) ("[M]ost employers find [that] the safety

Second, SHCs foster a more cooperative relationship between workers and managers on safety and health issues.⁹³ While many workplace issues are seen as a "zero sum" game, both labor and management can work together towards the singular goal of making a safer workplace. Moreover, SHCs provide an effective alternative to the more adversarial processes provided for under the current OSH Act. Instead of filing a complaint with OSHA, prompting an investigation and possibly leading to citations, monetary penalties, and enforcement actions, workers can discuss safety and health problems with their SHC representatives.⁹⁴ After Oregon established a statutory SHC requirement in 1990, the state OSHA administrator found that "with the inception of the safety and health committees, . . . workers and companies are tending to work more together, thus filing [fewer] complaints."⁹⁵

Third, SHCs often permit faster abatement of hazards. As the U.S. General Accounting Office explained,

Reporting hazardous work conditions to an on-site [SHC] could more fully and immediately take advantage of worker knowledge than would reporting the hazard to OSHA and waiting for an inspection to be done if OSHA thinks a problem exists. If the employer does not abate the hazard, the worker would still have the option of requesting an inspection from OSHA.⁹⁶

committees have heightened awareness on safety and provided an opportunity to sit down and communicate regularly with their workforce.").

⁹³ See, e.g., *1991 Senate Hearings, supra* note 34, at 205 (testimony of Anthony Ruggiero, Union Relations Coordinator, North American Automotive Operations, Ford Motor Company) ("The establishment of joint committees within Ford facilities has promoted a spirit of teamwork . . . that improves working conditions for all employees. . . . In a work atmosphere where there has traditionally been an adversarial working relationship, joint health and safety committees have helped reduce conflict by demonstrating that our objectives are the same — an accident-free working environment").

⁹⁴ See U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 49 (submitting complaints to a SHC "would be a less adversarial action than requesting an OSHA inspection").

⁹⁵ *Department of Labor Commission Meeting, supra* note 92, at 77 (testimony of John A. Pompei, Administrator, Oregon Occupational Safety and Health Division, Department of Insurance and Finance).

⁹⁶ U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 49.

States requiring SHCs have found that "[r]eporting hazardous work conditions to an on-site safety and health committee may get quicker correction than reporting the hazards to OSHA."⁹⁷ For example, a United Auto Workers representative described a typical problem-solving exercise at a Michigan foam-producing plant: "[O]n a routine walkaround, [SHC members] discovered a new recovery system that was releasing dangerous solvents into the work air. The committee jumped on the case and recommended that management get ventilation for it before it would injure anyone."⁹⁸ The problem was thus addressed much faster than if a worker had lodged a formal complaint with OSHA.

Fourth, where a SHC exists, employees are more likely to report hazards, and to have less fear of reprisal for doing so.⁹⁹ Although in organized workplaces the union often provides an adequate avenue for workers to raise safety and health concerns, roughly eighty-nine percent of private sector workers in this country lack union representation.¹⁰⁰ A consensus has emerged, recognizing SHCs as the best means of providing meaningful employee involvement in workplace safety and health issues, and SHCs have achieved widespread support throughout all segments of the occupational safety and health community.

In its 1993 study of SHCs, the National Safety Council found "general agreement" between business and labor representatives "that [SHCs] have been at least moderately successful" in improving worksite safety.¹⁰¹ More specifically, ninety-

⁹⁷ 1991 Senate hearings, *supra* note 34, at 196 (statement of U.S. General Accounting Office).

⁹⁸ 1 1991-92 House Hearings, *supra* note 30, at 168 (statement of Al Przydzial, Chairperson, UAW Local 985).

⁹⁹ See, e.g., *id.* at 240 (statement of Prof. Thomas A. Kochan, M.I.T. Sloan School of Management) (describing study of safety and health committees in the petrochemical industry).

¹⁰⁰ COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPT OF LABOR, FACT-FINDING REPORT 24 (1994) (referring to private sector, non-agricultural workers); see 1993 House Subcommittee Hearings, *supra* note 52, at 243 (testimony of Jim Moran, Director, Philadelphia Area Project on Occupational Safety and Health) ("Fear of retaliation is heavy among workers especially in bad economic times, when jobs that pay decent wages are nearly extinct.").

¹⁰¹ PLANEK & KOLOSH, *supra* note 86, at ii, reprinted in 1993 House Subcommittee Hearings, *supra* note 52, at 32.

four percent of the employers responding to the survey believed that SHCs had been greatly or moderately successful in improving worksite safety.¹⁰² In addition, overwhelming majorities of the survey respondents (representatives of both management and labor) agreed that a SHC is essential for a successful safety and health program, and that it improves employee morale, leads workers to take more responsibility for their own safety, and improves trust between workers and management.¹⁰³

In a 1993 survey of corporate safety and health officials for *Industrial Safety and Hygiene News*, thirty percent of the 1,662 respondents agreed that Congress should "pass a law requiring employers to have labor-management safety committees."¹⁰⁴ The American Center for the Quality of Work Life also found that SHCs contribute to increased visibility of safety and health issues among both managers and rank-and-file employees.¹⁰⁵ According to the United Steelworkers of America, "the single most reliable predictor of the safety of a plant . . . is the strength and commitment of the [SHC]."¹⁰⁶

Substantial anecdotal and systemic evidence attests to the effectiveness of SHCs. In a 1994 report, Canada's Workplace Health and Safety Agency assessed the impact of SHCs on safety and health in Ontario workplaces by undertaking three different inquiries. The Agency surveyed three major studies of SHCs in Ontario and concluded that "[i]n the aggregate, these studies provide evidence that effective [SHCs] are associated with better [safety and health] performance and practice."¹⁰⁷ The Agency then analyzed fatality, accident, and lost workday

¹⁰² *Id.* at 13, reprinted in 1993 House Subcommittee Hearings, *supra* note 52 at 46.

¹⁰³ *Id.* at 21, 23, reprinted in 1993 House Subcommittee Hearings, *supra* note 52 at 54, 56.

¹⁰⁴ CHILTON RESEARCH SERVICES, *supra* note 58.

¹⁰⁵ AMERICAN CTR. FOR THE QUALITY OF WORK LIFE, A FEW HIGHLIGHTS FROM THE PRELIMINARY FINDINGS OF A NATIONAL OCCUPATIONAL SAFETY AND HEALTH SURVEY CONDUCTED BY THE AMERICAN CENTER FOR THE QUALITY OF WORK LIFE IN APRIL 1984, cited in RUTTENBERG, *supra* note 85, at 43.

¹⁰⁶ 1991 Senate Hearings, *supra* note 34, at 171 (testimony of Michael J. Wright, Director, Health and Safety Environment Department, United Steelworkers of America).

¹⁰⁷ See FORDER & McMURDO, *supra* note 63, at iii. In a 1991 poll, 78% of respondent employers reported that SHCs make an important contribution to safety and health in the workplace. 7 OH&S CANADA No.4 July/Aug. 1991, cited in 2 1991-92 House Hearings, *supra* note 30, at 518-19.

rates between 1972 and 1989, and found its results to be "consistent with the hypothesis that the implementation of the OSHA [which includes a SHC requirement] has contributed to a reduction of injury rates in Ontario."¹⁰⁸ Finally, the Agency cited four case studies in which employers took measures to improve their SHCs and subsequently observed decreases in accident rates, lost time injury rates, and workers' compensation costs.¹⁰⁹

SHCs have also achieved success at U.S. worksites. While most state SHC requirements are too new to have demonstrated success, Washington and Oregon have had positive experiences with their SHC provisions. For example, according to the head of Oregon's occupational safety and health agency, "[t]he establishment of the committees has raised the level of consciousness for the field of occupational safety and health throughout the state and has had a very positive effect on the work climate in Oregon."¹¹⁰ A representative of Oregon industry agreed, reporting that "the creation of a program involving mandatory safety committees is a vital ingredient of loss prevention."¹¹¹

More specifically, Oregon has reported a substantial decline in fatality and incidence rates after the SHC requirement was enacted along with other OSHA reforms.¹¹² The decline was accompanied by an estimated \$1.5 billion in savings to Oregon employers, in direct and indirect costs of work-related accidents and illnesses.¹¹³ These savings prompted one Oregon employer to describe the state's new SHC requirement as a "smashing success."¹¹⁴

¹⁰⁸ FORDER & MCMURDO, *supra* note 63, at 27.

¹⁰⁹ *Id.* at 29.

¹¹⁰ 1 1991-92 House Hearings, *supra* note 30, 117, at 250 (testimony of John A. Pompei, Administrator, Oregon Occupational Safety and Health Division, Department of Insurance and Finance).

¹¹¹ Letter from Karl Frederick, Vice President and Director of Legislation, Associated Oregon Industries, to Bill Lockyer, California State Senator (July 6, 1993) (on file with author).

¹¹² *Comprehensive Occupational Safety and Health Reform Act: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. (July 14, 1993) (testimony of John A. Pompei).

¹¹³ *Id.*

¹¹⁴ *Businesses Fall in Love With Workplace Safety Teams*, WALL ST. J., Mar. 16, 1994, at B2.

After the creation of an effective SHC, many employers have experienced declines in injury, illness, and fatality rates, as the following accounts demonstrate:

- The president of a Seattle construction firm testified that "our [SHCs] have played a significant role in the identification and elimination of hazards on our job sites and in the dramatic reduction in our accident rate."¹¹⁵
- The Xerox Corporation established a joint committee at one of its facilities to review injury records, conduct regular inspections, and meet on a quarterly basis. Workers reported a forty percent decrease in injury rates over a five-year period.¹¹⁶
- A United Auto Workers representative reported that the joint safety and health committee at Mallinckrodt Chemical Company in St. Louis increased workers' awareness of OSHA standards and management's awareness of its role in ensuring health and safety, resulting in more effective procedures for confined spaces, lockouts, and employee training.¹¹⁷
- The Hewlett-Packard Company found that a SHC "strongly influences safe behavior in the workplace."¹¹⁸
- In the 1980s, Occidental Chemical Corporation instituted safety committees as well as other employee involvement mechanisms, and subsequently experienced "a dramatically decreased cost for accidents."¹¹⁹

¹¹⁵ 1 1991-92 *House Hearings*, *supra* note 30, 117, at 278 (testimony of Christopher L. Clark, President, W.G. Clark Construction Co.).

¹¹⁶ Letter from Anthony J. Costanza, Manager, Rochester Joint Board, Amalgamated Clothing and Textile Workers Union, to Jack Sheinkman, President, ACTWU (May 15, 1992), *reprinted in 1992 Senate Hearings, supra* note 33, at 305-06.

¹¹⁷ 1 1991-92 *House Hearings, supra* note 30, 117, at 160-61 (testimony of John Johnson, Vice President, UAW Local 1887).

¹¹⁸ *Id.* at 317 (testimony of Walter G. Rostykus, Environmental Health and Safety Specialist, Hewlett-Packard Company).

¹¹⁹ S.L. Smith, *Occidental Chemical: Making Changes for the Better*, OCCUPATIONAL HAZARDS, 65, 65-66 (May 1992).

- An Oregon manufacturer of industrial equipment reported that its SHC heightened awareness of safety issues, improved communications between labor and management, and reduced accidents.¹²⁰
- The Armco Steel Company established a SHC in its Kansas City, Missouri facility in 1988; the plant's recordable accident rate fell almost fifty percent over the ensuing two years, and the company saved nearly \$1.5 million as a result.¹²¹

SHCs have proven particularly successful in the petrochemical industry, according to a 1991 report by the John Gray Institute.¹²² A substantial majority of plants have SHCs, and the Institute found that "the more frequently committees met the lower the . . . injury rates in the plant."¹²³ Similarly, eighty percent of workers in such plants rated their SHC's work as "excellent" or "good."¹²⁴ The Institute concluded that SHCs "offer an excellent potential vehicle for contributing to continual monitoring and improvement of safety," and recommended that OSHA require an effective SHC at each petrochemical plant.¹²⁵

Based on the proven track record of SHCs in U.S. workplaces, the Clinton Administration has endorsed COSHRA's SHC requirement. As Secretary of Labor Reich wrote:

[COSHRA] introduces new ways to "reinvent" regulation of workplace health and safety through comprehensive health and safety programs and joint safety and health committees. Empowering workers to participate in safety and health activities and encouraging employees and management to cooperate to improve the places in which they work will save lives and tax

¹²⁰ *Occupational Safety and Health Reform Act: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources, supra* note 112 (testimony of John A. Pompei).

¹²¹ See H.R. REP. NO. 825, *supra* note 35, at 50.

¹²² See generally JOHN GRAY INST., *supra* note 89.

¹²³ *Id.* at 189.

¹²⁴ *Id.* at 136.

¹²⁵ *Id.* at 189, 202-03.

dollars, and will make government regulation less burdensome.¹²⁶

E. OPPOSITION TO MANDATORY SHCS

Most employers agree that SHCs effectively foster labor-management cooperation and reduce workplace injuries and illnesses.¹²⁷ Nevertheless, many of these same employers oppose the enactment of a statutory SHC requirement. Ironically, these critics have expressed opposition to COSHRA's proposed SHC requirement even while acknowledging their own use of SHCs.¹²⁸ For example, the National Federation of Independent Business opposed COSHRA's SHC requirement while acknowledging that it "tries to duplicate policies many small employers have already implemented."¹²⁹ Indeed, many even recognized the effectiveness of their own SHCs while simulta-

¹²⁶ Letter from Robert B. Reich, U.S. Secretary of Labor, to Sen. Edward M. Kennedy (Dec. 22, 1993) (on file with author).

¹²⁷ See *supra* notes 101-103 and accompanying text.

¹²⁸ See, e.g., 1992 *Senate Hearings*, *supra* note 33, at 290 (testimony of Thomas Evans, Director of Safety and Environmental Health, Monsanto Chemical Company, on behalf of Chemical Manufacturers Association) (opposing COSHRA's SHC requirement although "Monsanto has [SHCs] in virtually every plant"); *id.* at 284-85 (testimony of Peter Cornelison, President, Condar Company, on behalf of the National Federation of Independent Business) (small business owner opposing COSHRA's SHC requirement although his business has a SHC); *id.* at 290 (testimony of William Steinmetz, Jr., Loss Control Manager, Midland Engineering Company, on behalf of the National Roofing Contractors Association) (opposing COSHRA's SHC requirement although company has a SHC); *id.* at 358 (statement of American Iron and Steel Institute) (opposing COSHRA's SHC requirement although SHCs "already exist at major steelmaking facilities"); *id.* at 346 (statement of American Bakers Association) (opposing COSHRA's SHC requirement although "[m]any ABA-member companies have a range of labor-management safety committees or other mechanisms in place in some of their unionized facilities"); 1 1991-92 *House Hearings*, *supra* note 30, at 341, 344 (statement of Chemical Manufacturers Association) (opposing Congressional mandate although many employers rely on SHCs); 1992 *Senate Hearings*, *supra* note 33, at 377 (statement of Electronic Industries Association) (opposing COSHRA's SHC requirement although "many of our members maintain their own [SHCs] consisting of employees from all levels of their organizations"); *id.* at 196 (statement of American Gas Association) (opposing COSHRA's SHC requirement although some members already have SHCs).

¹²⁹ *Further Perspectives on OSHA Reform: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 2d Sess. (March 22, 1994) (statement of the National Federation of Independent Business).

neously opposing the OSHA reform legislation.¹³⁰ Others strongly supported the concept of employee participation, while opposing COSHRA's specific requirements.¹³¹

¹³⁰ See, e.g., *1992 Senate Hearings*, *supra* note 33, at 360 (statement of the American Paper Institute) ("While most companies in our industry have had positive experiences with committees, they should not be mandated."); *id.* at 377 (statement of Electronic Industries Association) (admitting that "voluntary efforts [involving committees] have contributed to safer and healthier workplaces," but opposing COSHRA's SHC requirement); *id.* at 326 (statement of American Petroleum Institute) ("API members have found value in the voluntary [SHCs] prevalent in the industry . . . However, API is opposed to legislative requirements that would mandate [SHCs]."); *id.* at 366 (statement of Amoco Corporation) (acknowledging that "[s]ome [Amoco] facilities have successfully utilized voluntary joint labor-management committees," but opposing COSHRA's SHC requirement); *1 1991-92 House Hearings*, *supra* note 30, at 300-02 (statement of John M. Baitzell, Mobil Corporation and Chairman, Employment Policy Foundation) (opposing mandatory SHCs while acknowledging success of SHCs at Mobil); see also *1991 Senate Hearings*, *supra* note 34, at 78 (statement of Morton Corn, former Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor) (maintaining that although SHCs are "essential," Congress should not mandate them).

¹³¹ See, e.g., *1992 Senate Hearings*, *supra* note 33, at 318-19 (statement of Horace A. Thompson, on behalf of National Association of Manufacturers) ("NAM is generally supportive of the objectives set forth in COSHRA regarding . . . employee participation . . . so long as the requirements are stated in broad, performance-based terms Employee participation programs, in their many forms, have been shown to be effective in a broad range of situations, including safety and health, [on a voluntary basis]. NAM, however, opposes the requirements of COSHRA that would mandate labor-management committees."); *id.* at 381 (statement of National Association of Home Builders) (recognizing that "without meaningful employee input, an effective safety and health program is impossible to achieve," but opposing COSHRA's committee requirement); *id.* at 294 (statement of Gerard F. Scannell, Vice-President for Corporate Safety Affairs, Johnson & Johnson) (recognizing that an effective safety and health program "is not possible" without employee participation, but opposing COSHRA's committee requirement); *id.* at 188 (statement of General Electric Company) (recognizing that "[e]mployee participation can promote effective safety and health programs" but opposing COSHRA's committee requirement); *id.* at 346 (statement of American Bakers Association) (recognizing that "cooperative efforts between management and [workers] in the safety area can enhance adherence to newly devised safety rules or programs, and strongly influence a facility's attitude toward safety compliance efforts," but opposing COSHRA's committee requirement); *id.* at 354 (statement of the American Industrial Hygiene Association) ("strongly support[ing] the concept of employee participation," but opposing COSHRA's committee requirement); *1991 Senate Hearings*, *supra* note 34, at 154 (statement of Jerry L. Williams, Director, Corporate Safety, Industrial Hygiene and Workers' Compensation, McKee Foods, on behalf of the Independent Bakers Association) (supporting statutory requirement of employee involvement, but seeking "flexi-

Employer opposition to COSHRA's SHC requirement stems from three principal arguments: First, the proposed SHCs would be too costly; second, cooperation between workers and management on safety and health issues cannot be mandated; and third, employers need the flexibility to decide for themselves whether and how to set up SHCs at each of their worksites.

In their first argument, many employers assert that COSHRA's SHC requirement would impose a costly mandate on U.S. employers at a time when they are facing increasingly stiff economic competition from abroad. For example, the Employment Policy Foundation, a business-supported research group, estimated that it would cost employers \$11.01 billion annually to comply with COSHRA's SHC requirement.¹³² This estimate, however, suffers from a number of weaknesses: first, it is purely speculative; second, it makes no adjustment for employers that have already established SHCs; and third, it estimates costs but makes no effort to estimate savings which would result from lower injury, illness and fatality rates. A c t u a l experience provides a marked contrast to the Employment Policy Foundation's estimate. For example, when Oregon required employers to establish SHCs in 1991, the state's occupational safety and health agency found that "the fiscal impact to employers [was] negligible."¹³³

The Occupational Safety and Health Administration studied the proposed legislation based on its twenty-three years of enforcing the OSH Act, and reached conclusions very different from Employment Policy Foundation's conclusions. OSHA estimated that the legislation's SHC provision would impose \$1.2 billion in compliance costs on private sector employers, roughly one-tenth of the Employment Policy Foundation's estimate.¹³⁴ Moreover, OSHA estimated that the legislation as a whole would *save* employers between \$12 billion and \$18.3

bility" to determine exact method).

¹³² *Further Perspectives on OSHA Reform: Hearings on S. 575 Before the Senate Comm. on Labor and Human Resources, supra* note 129 (statement of Dr. James S. Holt, Senior Economist and Vice-President for Research, Employment Policy Foundation).

¹³³ 1 1991-92 *House Hearings, supra* note 30, 117, at 249 (testimony of John A. Pompei, Administrator, Oregon Occupational Safety and Health Division, Department of Insurance and Finance).

¹³⁴ OCCUPATIONAL SAFETY AND HEALTH ADMIN., *supra* note 43, at 7.

billion per year in lower injury rates and reduced medical and other associated costs. These savings, offset by total costs of \$10.7 billion, would ultimately result in an estimated net *benefit* of \$1.3 billion to \$7.6 billion annually.¹³⁵

The second employer argument asserts that mandated SHCs cannot function as effectively as voluntarily established SHCs. The Employment Policy Foundation, for example, testified that "mandating [SHCs] is a prescription for failure."¹³⁶ Similarly, many trade and industry associations have warned against attempts to impose mandatory SHCs.¹³⁷

Nevertheless, at least twelve states already have enacted laws requiring some or all employers to establish SHCs, and some of these laws have existed for years.¹³⁸ Despite this substantial body of experience, the opponents of COSHRA's SHC requirement have offered no evidence whatsoever that SHCs mandated by state laws have been any less effective than those established voluntarily.

Thus, the mere fact that a SHC is required by law, rather than established voluntarily or pursuant to a collective bargaining agreement, does not determine its effectiveness. In fact, SHCs established pursuant to a legislative mandate, with specific minimum requirements, may be more likely than voluntarily established programs to improve workplace safety and health. Many SHCs established on a voluntary basis are ineffective because their goals, structure, composition, and functions are poorly defined. As the U.S. Department of Labor

¹³⁵ *Id.* at 6-7.

¹³⁶ 1 1991-92 *House Hearings*, *supra* note 30, at 298 (statement of John M. Baitsell); *see also* 1993 *House Subcommittee Hearings*, *supra* note 52, at 469 (statement of the National Association of Home Builders) ("[M]eaningful employee participation . . . cannot be mandated.").

¹³⁷ 1992 *Senate Hearings*, *supra* note 33, at 344 (statement of American Ambulance Association) (maintaining that SHCs "can only be successful if they are voluntary"); 1993 *House Subcommittee Hearings*, *supra* note 52, at 279 (statement of Chocolate Manufacturers Association and National Confectioners Association) ("Forced cooperation simply does not work."); *Comprehensive Occupational Safety and Health Reform Act: Hearings on H.R. 1280 Before the House Comm. on Education and Labor*, 103d Cong., 1st Sess. 276 (White Paper statement of American Iron and Steel Institute) (claiming that COSHRA's SHC composition and operation requirements "will undermine the spirit of cooperation that is necessary for [SHCs] to work productively . . . to enhance employee safety and health.").

¹³⁸ *See supra* notes 67-81 and accompanying text.

recognized in a 1990 study, "many [safety and health] committees are paper tigers."¹³⁹

Virtually every COSHRA opponent cites the third argument, that employers need "flexibility" in setting up employee participation programs.¹⁴⁰ While businesses no doubt need operational flexibility in order to compete successfully, this argument ultimately fails because COSHRA does permit significant flexibility in the establishment of SHCs.

COSHRA's SHC requirement exempts employers with ten or fewer employees, leaving more than three-quarters of all U.S. firms free to establish voluntary SHCs tailored to their own needs.¹⁴¹ It also allows the Occupational Safety and Health Administration to modify SHC requirements for unusual work situations and worksites.¹⁴² Further, COSHRA provides only the minimum requirements for SHC structure, composition, and functions, leaving considerable discretion to SHCs in the exercise of those functions.¹⁴³ Finally, COSHRA already has been modified in the House of Representatives to allow an employer to apply for OSHA's permission to use an alternative employee participation program that is "at least as effective" as a SHC.¹⁴⁴

Some of this "employer flexibility" opposition is premised upon a mistaken belief that COSHRA would require employers to *discontinue* any existing employee participation programs in favor of the mandatory SHCs.¹⁴⁵ For example, representatives

¹³⁹ RUTTENBERG, *supra* note 85, at 9-11.

¹⁴⁰ See, e.g., 1993 House Subcommittee Hearings, *supra* note 52, at 130 (testimony of Dr. Frederick Toca, Director of Occupational Safety and Health, Hoechst Celanese Corporation, on behalf of the Chemical Manufacturers Association) (recognizing that "a workable employee participation program is critical to a successful health and safety program," but opposing COSHRA's SHC requirement because "[l]imiting management's flexibility will not enhance workplace health and safety"); *id.* at 146 (statement of Society for Human Resource Management) (opposing COSHRA's SHC requirement because "employers must have total flexibility in deciding how employee participation will be most effective within their companies").

¹⁴¹ See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 100, at 8.

¹⁴² See *infra* note 176 and accompanying text.

¹⁴³ See *infra* notes 177-180 and accompanying text.

¹⁴⁴ See *infra* notes 184-185 and accompanying text.

¹⁴⁵ See, e.g., 1992 Senate Hearings, *supra* note 33, at 346 (statement of American Bakers Association) (requiring committees "will unnecessarily derail

of the confectionery industry warned that COSHRA's SHC requirement "could destroy existing programs that are very successful."¹⁴⁶ Even some Republican members of the House Education and Labor Committee shared the misconception that "[COSHRA] limits employee involvement to safety committees."¹⁴⁷ In reality, nothing in the legislation would preclude an employer from continuing to use alternatives such as safety representatives, complaint procedures, or hazard-specific safety teams. In fact, such measures could complement SHCs to improve the effectiveness of the employer's overall safety and health program.¹⁴⁸ Furthermore, COSHRA's opponents have offered no evidence that employers have had difficulty complying with existing state-mandated SHC requirements in a broad range of work settings. In Washington state, for example, more than ninety-five percent of inspected businesses comply with a longstanding state law requiring SHCs at firms with eleven or more employees.¹⁴⁹

Finally, thousands of U.S. employers have declined to establish employee participation programs of any kind, although such programs would clearly help employers fulfill their statutory obligation to provide a safe workplace to their employees.¹⁵⁰ They have ignored significant evidence that SHCs help to reduce work-related injuries and illnesses as well as associated

existing, successful programs and otherwise damage productivity"); *id.* at 366-67 (statement of Amoco Corporation) ("[COSHRA's] requirement for safety and health committees with rigid rights and responsibilities will force us to abandon our heretofore successful adaptable approach."); *1993 House Subcommittee Hearings*, *supra* note 52, at 495 (statement of Eamonn McGeady, President, Martin G. Imbach, Inc.) (maintaining that COSHRA's SHC requirement "would require many well-functioning groups currently in place in many workplace sites to be disbanded or restructured on illogical grounds").

¹⁴⁶ *1993 House Subcommittee Hearings*, *supra* note 52, at 279 (statement of Chocolate Manufacturers Association and National Confectioners Association).

¹⁴⁷ H.R. REP. NO. 825, *supra* note 35, at 257 (statement of Minority Views).

¹⁴⁸ Where such an alternative already performs regular inspections or carries out other activities within the scope of the SHC's functions, the SHC would have the discretion not to exercise its right to perform such functions.

¹⁴⁹ *1991 Senate Hearings*, *supra* note 34, at 232-33 (testimony of Joseph A. Dear, Director, Washington State Department of Labor and Industries).

¹⁵⁰ See 29 U.S.C. § 654(a)(1) (1988) ("Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.").

costs. For some of these employers, perhaps "flexibility" simply means the right to make their workers' safety and health a low priority as a matter of corporate policy.¹⁵¹

F. DESIGNING A SUCCESSFUL SHC

Clearly, the structure and functions of SHCs are critical to their effectiveness in fostering labor-management cooperation and in reducing worksite accidents and occupational illnesses. In a 1990 study, the Department of Labor offered its insights into what makes a SHC successful. First, the Department observed that "if these committees are to function effectively, their mandates, the scope of their powers, and their limitations need to be clearly established."¹⁵² Second, according to the Department's study, most successful SHCs share a number of functions: they make recommendations, review safety and health records, prevent hazards, promote education and training, make plant inspections, investigate accidents and complaints, settle disputes, and shut down unsafe machinery. Third, the Department cautioned that

A joint committee with unequal representation by management and labor, or with infrequent meetings, or with members that have no line authority outside the committee, or that does not provide pay for members who do committee work during working hours is less likely to have the capability of making contributions

¹⁵¹ Some employers have raised an additional concern that written recommendations made by SHCs, if not carried out by the employer, could serve as the basis for tort suits against the employer by injured workers. See, e.g., *1992 Senate Hearings, supra* note 33, at 263 (testimony of Merle T. Alvis, Manager of Employee and Community Relations, Babcock and Wilcox, on behalf of the Society for Human Resource Management) ("The establishment of SHCs could . . . increase employer liability and adversely affect the exclusivity of worker's compensation as a remedy for job related injuries."). Nevertheless, § 4(b)(4) of the OSH Act expressly provides:

[n]othing in this [Act] shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, disease, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653 (1988).

¹⁵² RUTTENBERG, *supra* note 85, at 4.

which will have a major effect on correcting safety and health hazards in the workplace.¹⁵³

Thus, the Department of Labor recommended that SHCs be set up so that the SHC's rights would be well-defined, employees could participate as an equal partner and select their own representatives, and the SHC would be worksite-based to ensure a community of interests.¹⁵⁴

At a glance, these considerations may seem far removed from the daily grind of the factory floor. However, they do relate to the ultimate goal of saving lives. A pair of contrasting examples demonstrates that in practice, these considerations can mean the difference between life and death.

Prior to 1989, Keith Uddenberg, Inc., a grocery chain in Washington, showed relatively little commitment to worker safety.¹⁵⁵ Workers "never had much of a voice" in safety and health issues,¹⁵⁶ and the company's workers' compensation experience rating was 3.4% above the industry average.¹⁵⁷

In 1989, the company established new SHCs at each of its twenty-five stores and made a strong commitment to protecting its workers. As required by Washington State's occupational safety and health law¹⁵⁸, each SHC's employee representatives were elected by workers and comprised fifty percent of each SHC.¹⁵⁹ The company encouraged each SHC to meet once a month, conduct an inspection at least every other month, review the company's accident records, and make recommendations to the company regarding the correction of workplace hazards.¹⁶⁰

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 5, 37 ("Safety committees are most likely to prove effective where their work is related to a single establishment rather than a collection of geographically distinct places."); see also 1 1991-92 House Hearings, *supra* note 30, at 111 (testimony of Owen Bieber, President, United Automobile, Aerospace and Agricultural Implement Workers of America).

¹⁵⁵ Telephone interview with Cynde Harris, Risk Manager, Keith Uddenberg, Inc. (Nov. 1, 1994).

¹⁵⁶ *Id.*

¹⁵⁷ 1 1991-92 House Hearings, *supra* note 30, at 223 (statement of Joseph Dear).

¹⁵⁸ WASH. ADMIN. CODE § 296-24-045 (1992).

¹⁵⁹ Letter from Cynde Harris to Greg Watchman, *supra* note 90 (enclosing company's Risk Management Action Plan).

¹⁶⁰ *Id.*; Telephone Interview with Cynde Harris, *supra* note 155.

The company began to implement the SHCs' suggestions, confirming its commitment to safety and earning the trust of workers. According to the company's risk manager, employees became far more conscious of safety while performing their jobs.¹⁶¹ In addition, a "cooperative spirit" developed between workers and management.¹⁶²

The establishment of a strong SHC at each of the company's stores had a substantial impact on work-related injuries and illnesses. Between 1989 and 1992, the company dramatically reduced its workers' compensation claims by almost forty percent. By 1992, the company's experience rating, which had been above the industry average, was 33.9% *below* the industry average.¹⁶³ In contrast, the Monfort Company maintained a weak SHC at its meatpacking facility in Grand Island, Nebraska. The SHC met only on rare occasions, and kept no written records.¹⁶⁴ The company, not the workers, selected the employee members, marking the committee as a management or public relations device rather than a cooperative effort between workers and management.¹⁶⁵

In 1989, an employee was injured while working on a defleshing machine. The machine, about the size of a small van, removes flesh and hair from cattle hides by pressing the hides through a series of rollers. The employee's hand was amputated when it became caught in the rollers.¹⁶⁶

After the injury, neither the company nor the SHC took steps to provide the lockout devices and safety guards necessary to prevent another accident. Instead, the company continued to operate the machine with only one of five required lockout devices.¹⁶⁷ Not coincidentally, the absence of those devices

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 1 1991-92 *House Hearings*, *supra* note 30, 117, at 223 (statement of Joseph A. Dear).

¹⁶⁴ 1991 *Senate Hearings*, *supra* note 34, at 171 (testimony of Michael Wright, Director, Health, Safety and Environment Department, United Steelworkers of America).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 171-72.

¹⁶⁷ 1991 *Senate Hearings*, *supra* note 34, at 167 (testimony of Bonnie Skala).

and guards allowed the company to run the processing lines much faster.¹⁶⁸

In October of the following year, another employee was performing maintenance work on the same defleshing machine. As he leaned inside the machine to look for a pair of dropped pliers, a co-worker slipped, accidentally activating the machine. The employee's head was crushed between the rollers, killing him instantly.¹⁶⁹ After an inspection, OSHA levied a one million dollar fine against Monfort.¹⁷⁰ In 1993, Nebraska enacted a statutory SHC requirement for all employers subject to the state's workers' compensation law.¹⁷¹

In sum, Keith Uddenberg, Inc. improved worker safety and health by establishing strong, active SHCs, allowing employees to elect their own representatives, and empowering the SHCs to hold regular meetings, conduct inspections, and make recommendations.

Monfort's SHC, however, did not represent workers' interests, met infrequently, lacked significant responsibilities, never earned workers' trust, and ultimately failed to protect the company's employees.

G. COSHRA'S SHC PROPOSAL: ADVANCING WORKER SAFETY AND HEALTH

In 1991, Congress began to consider comprehensive reform of the twenty-year-old federal OSHA statute for the first time.¹⁷² On August 1, 1991, Senators Edward M. Kennedy and Howard M. Metzenbaum introduced the Comprehensive Occupational Safety and Health Reform Act (COSHRA) in the Senate.¹⁷³ Representative William D. Ford introduced com-

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ NEB. REV. STAT. § 48-443 (Supp. 1993). The Nebraska law provides for an equal number of management and worker representatives in non-union settings; in unionized shops, committees are to be established through collective bargaining. *Id.* The law requires employers to compensate SHC members for time spent on committee activities. *Id.*

¹⁷² Congress has amended the OSH Act only once since its 1970 enactment, increasing the maximum civil penalties in 1990. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Title III, § 3101, 104 Stat. 1388-29 (1990) (codified as amended at 29 U.S.C. § 666 (Supp. V 1993)).

¹⁷³ 137 CONG. REC. S11,833 (daily ed. Aug. 1, 1991) (introduction of S.

panion legislation in the House of Representatives on the same day.¹⁷⁴

COSHA represents a major overhaul of the original Occupational Safety and Health Act. The legislation promises to strengthen the Occupational Safety and Health Administration's traditional enforcement and standard-setting authority. It proposes new initiatives, including safety and health committees, to increase cooperation between management and workers.¹⁷⁵

Title II of COSHA requires each employer of eleven or more full-time employees to establish a joint health and safety committee (SHC).¹⁷⁶ Title II also provides minimum requirements for SHC composition and functions. COSHA's SHC proposal adopts many features of successful SHCs, promising workers a meaningful voice on safety and health issues.

Under COSHA's SHC proposal, SHCs would be worksite-based, to ensure a community of interests among represented workers. Each SHC would be comprised of both management and employee representatives, facilitating a cooperative approach to the identification and correction of hazards. After electing their own representatives, workers will likely view the SHC as a legitimate and trustworthy employee voice on safety and health issues.¹⁷⁷

1622).

¹⁷⁴ 137 CONG. REC. H6316 (daily ed. Aug. 1, 1991) (introduction of H.R. 3160).

¹⁷⁵ COSHA's major provisions include: (1) requiring employers to establish safety and health programs and joint safety and health committees; (2) expanding the Act's coverage to include federal, state, and local government workers; (3) streamlining the standard-setting process to roughly 18 months; (4) requiring specific standards on exposure monitoring, medical surveillance, and ergonomics; (5) authorizing OSHA to require immediate abatement of workplace hazards; (6) ensuring affected employees the right to participate in OSHA proceedings; (7) expanding the Act's criminal penalty provisions for employer violations causing death or serious bodily injury; (8) strengthening the Act's whistleblower protection provisions; and (9) improving occupational safety and health data collection efforts. See 137 CONG. REC. S11,839-44 (daily ed. Aug. 1, 1991).

¹⁷⁶ See *id.* at S11,834-35. The legislation would authorize OSHA to modify the SHC requirement for multi-employer worksites (such as construction projects), worksites with fewer than 11 employees, and situations in which employees do not primarily report to or work at a fixed location. *Id.*

¹⁷⁷ *Id.* COSHA provides that the number of management representatives may equal but not exceed the number of employee representatives. In

COSHRRA clearly defines each SHC's rights in order to guarantee that SHCs established under Title II would not be "paper tigers."¹⁷⁸ Under the COSHRRA proposal, each SHC would have the right to review the employer's safety program and injury and illness logs; investigate incidents resulting in illness, injury or death; conduct inspections of the workplace at least every three months and in response to complaints; interview employees; and observe monitoring of employee exposure to toxic substances.¹⁷⁹ Finally, each SHC would have the right to recommend improvements in worker protection.¹⁸⁰

After seven hearings, the House Committee on Education and Labor met on May 28, 1992 to consider COSHRRA.¹⁸¹ Chairman Ford offered a substitute amendment, which the Committee adopted by voice vote.¹⁸² The Committee then favorably reported COSHRRA, as amended, by voice vote.¹⁸³

The Chairman's substitute amendment modified Title II of COSHRRA in two significant respects. First, the amendment allowed employers to apply to OSHA for a variance from the SHC requirement. To obtain a variance, an employer would have to establish an alternative employee participation program that guaranteed meaningful employee participation "in a manner which is at least as effective" as a SHC; allowed employee participants to act in a representative capacity on behalf of other workers; and provided participants with the same rights granted to SHC members under COSHRRA.¹⁸⁴ The Committee report on COSHRRA lists several examples of acceptable alterna-

addition, it includes minimum requirements for the number of employee representatives. For worksites of between 11 and 50 employees, the committee would include at least one employee representative. For worksites of between 51 and 99 employees, the committee would include at least two employee representatives. Committees at larger worksites would include an additional representative for each additional 100 employees at such worksites (up to a maximum of six). *Id.*

¹⁷⁸ See *supra* note 139 and accompanying text.

¹⁷⁹ See 137 CONG. REC. S11,839-44 (daily ed. Aug. 1, 1991).

¹⁸⁰ See *id.*

¹⁸¹ H.R. REP. NO. 663, *supra* note 35, at 24 (listing hearings held on Sept. 12, 1991; Nov. 21, 1991; Feb. 26, 1992; Mar. 5, 1992; Apr. 2, 1992; Apr. 8, 1992; and Apr. 29, 1992).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 6, 56-57.

tives: periodic safety and health meetings with employee-selected representatives, systems of multiple committees for various hazards, full-time employee safety and health representatives, and work teams where all workers are given rights to inspect and make recommendations.¹⁸⁵ Second, the substitute amendment eliminated the requirement that employee representatives be elected by secret ballot in nonunion workplaces. Instead, the amendment simply requires that employee representatives be "selected" by employees.¹⁸⁶

The Senate Committee on Labor and Human Resources held five hearings on COSHRA in the 102nd Congress, and met to consider the bill on September 16, 1992.¹⁸⁷ Senators Kennedy and Metzenbaum proposed a substitute amendment, which the Committee adopted by voice vote.¹⁸⁸ The Kennedy-Metzenbaum amendment parallels the House Committee's amendment in its elimination of the secret ballot election requirement for nonunion workplaces.¹⁸⁹ The Committee approved the amended bill by a vote of ten to six, with one member voting "present."¹⁹⁰ The 102nd Congress adjourned without consideration of COSHRA by the full Senate or House.

Consideration of COSHRA resumed early in the 103rd Congress, with Representative Ford reintroducing the legislation on March 10, 1993,¹⁹¹ and Senators Kennedy and Metzenbaum reintroducing its companion measure the following day.¹⁹² The House Education and Labor Committee and its Subcommittee on Labor Standards, Occupational Safety and Health, held seven hearings on COSHRA during the 103rd

¹⁸⁵ *Id.* at 57.

¹⁸⁶ *Id.* at 56.

¹⁸⁷ S. REP. NO. 453, *supra* note 30, at 8, 10 (listing hearings held on Oct. 29, 1991; Nov. 5, 1991; Mar. 17, 1992; May 6, 1992; and June 10, 1992).

¹⁸⁸ *Id.* at 8.

¹⁸⁹ *Id.* at 26.

¹⁹⁰ *Id.* at 10 (Sens. Kennedy, Pell, Metzenbaum, Dodd, Simon, Harkin, Adams, Mikulski, Bingaman and Wellstone voting in favor; Sens. Hatch, Kassebaum, Jeffords, Coats, Thurmond, and Cochran voting against; and Sen. Durenberger voting "present").

¹⁹¹ 139 CONG. REC. H1163, E588-89 (daily ed. Mar. 10, 1993) (introduction of H.R. 1280).

¹⁹² 139 CONG. REC. S2805-20 (daily ed. Mar. 11, 1993) (introduction of S. 575).

Congress.¹⁹³ On March 10, 1994, the Committee adopted a substitute amendment and favorably reported the bill by a vote of twenty-six to seventeen,¹⁹⁴ without significant modification of Title II. The Senate Committee on Labor and Human Resources and its Subcommittee on Labor, held four hearings on COSHRA during the 103rd Congress.¹⁹⁵ Eventually, the 103rd Congress adjourned without further consideration of COSHRA in either house.¹⁹⁶

III. THE CASE FOR SHCs AS A MEANS OF IMPROVING LABOR-MANAGEMENT RELATIONS

COSHRA's SHC requirement seeks to foster effective labor-management cooperation through employee participation. Nevertheless, COSHRA's opponents claim that such participation would run afoul of Section 8(a)(2) of the National Labor Relations Act,¹⁹⁷ which prohibits employers from dominating or interfering with labor organizations. COSRHA's opponents base these assertions on two recent rulings, *Electromation*¹⁹⁸ and *DuPont*,¹⁹⁹ in which the NLRB held two employee participation programs violated Section 8(a)(2).

In fact, COSHRA contains an explicit safe harbor that immunizes the required SHCs from attack under Section

¹⁹³ H.R. REP. NO. 825, *supra* note 35, at 32. The full Committee held hearings on April 28, 1993, and July 29, 1993. *Id.* The Subcommittee held hearings on July 14, 1993; July 21, 1993; September 28, 1993; October 20, 1993; and February 10, 1994. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ The full Committee held hearings on July 14, 1993; February 9, 1994; and March 22, 1994. The Subcommittee held one hearing on October 19, 1993.

¹⁹⁶ Notably, Senator Kassebaum introduced an alternative OSHA reform bill on March 17, 1994. 140 CONG. REC. S3234-38 (daily ed. Mar. 17, 1994) (introduction of S. 1950). Senate Bill 1950 provided an exemption from general OSHA inspections for employers who engage in "regular consultation" with workers and allow workers to make recommendations regarding safety and health hazards. *Id.* No action was taken on Senator Kassebaum's legislation in the 103rd Congress.

¹⁹⁷ Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988)).

¹⁹⁸ *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

¹⁹⁹ *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).

8(a)(2).²⁰⁰ Moreover, even without that safe harbor, COSHRA's SHC proposal is fully consistent with both the letter and intent of the NLRA. The required SHCs would ensure meaningful employee involvement in workplace safety and health issues, free of employer domination. In addition, the SHCs would foster increased cooperation between management and workers by uniting them in pursuit of a common goal.

A. THE ORIGINS OF NLRA SECTION 8(A)(2)

The passage of the National Industrial Recovery Act²⁰¹ in 1933 granted American workers a federally protected right to organize and engage in collective bargaining. In response, thousands of employers set up "company unions" to thwart independent organizing efforts. Management typically dominated these company unions, ostensibly established in the name of employee representation.²⁰² As NLRB Member Devaney recently observed, such organizations "creat[ed] the illusion of a bargaining representative without the reality."²⁰³

During consideration of the National Labor Relations Act (then known as the "Wagner Act") in 1935, Congress heard ample testimony about the spread of company unions, labor-management committees, and other management-sponsored employee representation programs.²⁰⁴ As a result, Senator Wagner recognized the need to protect employees' right to independent self-organization and stated that "[t]he greatest obstacles to collective bargaining are employer dominated unions . . . [T]he very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment."²⁰⁵ Thus, Congress included in the

²⁰⁰ See *infra* note 293 and accompanying text.

²⁰¹ Ch. 90, 48 Stat. 195 (1933), *decl'd unconst.*, A.L.A. Schechter Poultry Corp. v. United States, 195 U.S. 495 (1935).

²⁰² See *generally* Electromation, Inc., 309 N.L.R.B. at 992-94 (1992) (discussing legislative history of § 8(a)(2) of the NLRA).

²⁰³ *Id.* at 999 (Devaney, Member, concurring).

²⁰⁴ See, e.g., *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. (1949), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1545-46 (1949) [hereinafter *Hearings on S. 1958*].

²⁰⁵ 78 CONG. REC. 3443 (1934), *reprinted in* 1 NLRB, *supra* note 204, at 15-

Wagner Act a provision designed to allow employees to deal with their employer regarding wages and working conditions, free of employer pressure or control.

Section 8(a)(2) of the Act makes employer domination or interference with the formation or administration of any labor organization an unfair labor practice.²⁰⁶ Under Section 2(5), the term "labor organization" includes, *inter alia*, an employee representation committee set up to allow employees to deal with the employer concerning conditions of work.²⁰⁷ As the NLRB recently recognized, Section 8(a)(2) was considered "a critical part of the Wagner Act's purpose of eliminating industrial strife through the encouragement of collective bargaining."²⁰⁸

B. THE EMERGING CONTROVERSY

In the late 1970s and 1980s, U.S. employers began to face increasing competition from abroad for both U.S. and foreign market shares. They searched for new methods of improving productivity and efficiency. Many opted for employee participation programs such as quality circles, self-managed work teams, grievance adjudication or other committees, joint training programs, information forums, task forces, and more informal communications between workers and management.²⁰⁹

16 (1949); see also *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, *supra* note 204, at 40-41, reprinted in 1 NLRB, at 1416-17 (statement of Sen. Wagner) ("Collective bargaining becomes a sham when the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing.").

²⁰⁶ 29 U.S.C. § 158(a)(2) (1988) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.").

²⁰⁷ 29 U.S.C. § 152(5) (1988) (defining "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work"). Notably, because the Supreme Court interpreted the term "dealing with" more broadly than the term "collective bargaining," it may apply even where neither workers nor management contemplate the negotiation of a collective bargaining agreement. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

²⁰⁸ *Electromation, Inc.*, 309 N.L.R.B. at 992.

²⁰⁹ See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 100, at 29-30 ("[S]ince the 1980s there has been a substantial expansion in the number and variety of employee participation ef-

Today, an estimated 30,000 employee participation programs exist, involving millions of employees.²¹⁰ The Commission on the Future of Worker-Management Relations reported that most large employers have established such programs.²¹¹ The Commission also concluded that "many small firms have more informal processes for employee participation," and that "between one-fifth and one-third of the workforce [as a whole] is covered by some form of employee participation."²¹²

With the proliferation of employee participation programs, the labor relations community has increasingly focused on the extent to which Section 8(a)(2) restricts an employer's ability to establish such programs. In recent years, this issue has emerged at the forefront of labor-management relations.

Much of this attention has been spurred by two recent NLRB decisions. In *Electromation, Inc.*,²¹³ the NLRB ruled that Electromation violated the NLRA by dominating "action committees" set up to deal with employee concerns about wages and working conditions. A few months later, in *E.I. du Pont de Nemours & Co.*,²¹⁴ the Board held that Dupont had unlawfully dominated its safety and health committees. Together, these two decisions triggered a spate of law review articles²¹⁵ and

forts."); THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1987); Randolph M. Hale, *The New Industrial Relations in a Global Economy*, 37 LAB. L.J. 539 (1986).

²¹⁰ See Janet Novack, *Make Them All Form Unions*, FORBES, May 11, 1992, at 174.

²¹¹ COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 100, at 34 (citing 1987 and 1990 U.S. General Accounting Office surveys and 1991 survey by Paul Osterman); see also Christopher J. Martin, *Electromation and its Aftermath*, 19 EMPLOYEE RELATIONS L.J. 133, 134 (1993).

²¹² *Id.* at 36. Similarly, a recent National Safety Council survey suggests that a majority of U.S. firms with 50 or more employees have established SHCs. PLANEK & KOLOSH, *supra* note 86, at 6 (of 249 respondent firms, 75% of those with 50 or more employees had established SHCs, and 31% of those with fewer than 50 employees had established SHCs). See generally Charles J. Morris, *From Crisis to Cooperation: A New Direction in Industrial Relations*, Address at the U.S.-Mexico-Canada Conference on Labor Law and Industrial Relations (Sept. 19, 1994), in [1994] Daily Lab. Rep. (BNA) No. 180, at D-1 (Sept. 20, 1994).

²¹³ 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

²¹⁴ 311 N.L.R.B. 893 (1993).

²¹⁵ See, e.g., Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the*

substantial media attention,²¹⁶ helped lead the Secretaries of Labor and Commerce to establish the Commission on the Future of Worker-Management Relations,²¹⁷ produced efforts in Congress to amend Section 8(a)(2),²¹⁸ and spawned a national debate on the efficacy and legality of employer-created employee participation programs.²¹⁹

NLRA, 69 N.Y.U. L. REV. 125 (1994); Note, *Labor-Management Cooperation After Electromation: Implications for Workforce Diversity*, 107 HARV. L. REV. 678 (1994); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127 (1993); Dennis M. Devaney, *Much Ado About Section 8(a)(2): The NLRB and Workplace Cooperation After Electromation and Du Pont*, 23 STETSON L. REV. 39 (1993); Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812 (1993); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993); Martin, *supra* note 211, at 133; Stephen S. Schlossberg & Steven M. Felter, *Electromation and the Future of Labor-Management Cooperation in the U.S.*, 43 LAB. L.J. 608 (1992).

²¹⁶ See, e.g., Bill Montague, *Labor Board: DuPont Must Kill Committees*, USA TODAY, June 8, 1994, at 6B; William Grady, *Court Weighs Labor-Management Groups*, CHI. TRIB., Sept. 28, 1993, (Business) at 1; Jube Shiver, Jr., *NLRB Orders DuPont to Deal Directly With Union*, L.A. TIMES, June 8, 1993, at D1; Frank Swoboda, *NLRB Ruling Tests How Much Companies Trust Their Workers*, WASH. POST, Dec. 27, 1992, at H2; Barbara P. Noble, *Setback for Labor-Management Teamwork Efforts*, N.Y. TIMES, Dec. 18, 1992, at A23; Dallas Gatewood, *Unions Say Employee Committees Are Trespassing on Their Turf*, NEWSDAY, Sept. 6, 1992, at 98; Novack, *supra* note 210, at 174.

²¹⁷ See Reich, *Brown Announce New Panel to Examine Workplace Cooperation, Employee Participation*, [1993] Daily Lab. Rep. (BNA) No. 56, at AA-1 (Mar. 25, 1993).

²¹⁸ See 139 CONG. REC. S4013 (daily ed. Mar. 30, 1993) (introduction of S. 669, the Teamwork for Employees and Management Act, by Sen. Kassebaum); 139 CONG. REC. H1738 (daily ed. Mar. 30, 1993) (introduction of H.R. 1529, the Teamwork for Employees and Management Act, by Rep. Gunderson); 140 CONG. REC. S14,113 (daily ed. Oct. 4, 1994) (introduction of S. 2499, the Worker-Management Relations for the 21st Century Act, by Sen. Pell).

²¹⁹ See, e.g., Randall Samborn, *Case Holds Key to U.S. Competitiveness*, NAT'L L.J., Apr. 6, 1992, at 1 (quoting management labor lawyer who described the *Electromation* case as "a struggle for the soul of the NLRB"). For their part, labor unions have generally embraced employee participation programs established jointly through the collective bargaining process, and have endorsed COSHRA's SHC requirement. See, e.g., *1991 Senate Hearings*, *supra* note 34, at 46 (statement of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO) (estimating that half of all collective bargaining agreements include SHC provisions and endorsing COSHRA's proposal). At the same time, labor unions have expressed deep skepticism about most employee participation

C. THE *ELECTROMATION* DECISION

*Electromation, Inc.*²²⁰ involved an Elkhart, Indiana employer's creation of five "action committees" to allow workers and management to "talk back and forth" about pay scales, smoking and attendance policies, and other issues.²²¹ Six employee representatives (selected by voluntary sign-ups) and two or three management representatives comprised each action committee.²²² *Electromation's* management unilaterally determined the committees' structure, policy goals, and functions, and retained the right to terminate the committees at any time.²²³

Within a few weeks after the committees were formed, Local 1049 of the International Brotherhood of Teamsters sought recognition from *Electromation* to serve as the exclusive bargaining representative of the company's rank-and-file employees.²²⁴ After Local 1049 lost a representation election, it filed an unfair labor practice charge against *Electromation*, charging that the company's establishment of action committees had violated Section 8(a)(2) of the NLRA.

The NLRB, in a decision by Chairman Stephens and Members Devaney, Oviatt, and Raudabaugh, found that the action committees constituted "labor organizations" because they allowed employees, in a representational capacity, to "deal with" management regarding the terms and conditions of their employment.²²⁵ The Board emphasized that management had set up the action committees "in order to achieve a *bilateral* solution to [employees'] problems."²²⁶

The Board further found "no doubt" that the company had dominated the action committees in violation of Section

programs unilaterally established by employers. See, e.g., Owen E. Hernstadt, *Why Some Unions Hesitate to Participate in Labor-Management Cooperation Programs*, 8 LAB. LAW. 71 (1992).

²²⁰ 309 N.L.R.B. 990 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

²²¹ 309 N.L.R.B. at 991.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 997.

²²⁶ *Id.*

8(a)(2).²²⁷ The Board noted that management had created the action committees with little support from employees and that management had determined their composition, functions, and duration.²²⁸ Electromation's management had been "sitting on both sides of the bargaining table with an 'employee committee' that it could dissolve as soon as its usefulness ended and to which it owed no duty to bargain in good faith."²²⁹

The Board held that Electromation had "imposed on [its] employees its own *unilateral* form of bargaining or dealing" in a manner designed "to create in employees the impression that their disagreements with management had been resolved *bilaterally*."²³⁰ The Board thus ordered Electromation to "immediately disestablish" the action committees.²³¹

The Board carefully limited the impact of its decision, noting that its findings were "not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed 'labor organizations' or that employer actions like some of those at issue here would necessarily be found, in isolation or in other contexts, to constitute unlawful support, interference, or domination."²³² Member Oviatt observed that "this case presents little more than garden variety 8(a)(2) conduct," adding that the Board's "narrow and unremarkable" ruling had little impact on existing case law.²³³

Electromation appealed the Board's decision to the United States Court of Appeals for the Seventh Circuit.²³⁴ Two years later, the Seventh Circuit rejected Electromation's petition to set aside the Board's order and granted the Board's cross-petition for enforcement.²³⁵ The court found that Electromation's

²²⁷ *Id.*

²²⁸ *Id.* at 997-98.

²²⁹ *Id.* at 998 n.30.

²³⁰ *Id.* at 998.

²³¹ *Id.*

²³² *Id.* at 990.

²³³ *Id.* at 1004 n.2 (Oviatt, Member, concurring).

²³⁴ *Electromation Files Appeal Challenging NLRB Holding on Employee Action Committees*, [1993] Daily Lab. Rep. (BNA) No. 3, at A-7 (Jan. 6, 1993). The Seventh Circuit heard oral argument on September 27, 1993. See *Electromation Asks Seventh Circuit to Overturn Labor Board's Decision*, [1993] Daily Lab. Rep. (BNA) No. 190, at A-1 (Oct. 4, 1993).

²³⁵ *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

management had exerted an unacceptable degree of control and influence over the action committees by unilaterally creating them, determining their agenda and functions, and retaining unilateral power to terminate them.²³⁶ The committees thus "lacked the independence of action and free choice" guaranteed by the National Labor Relations Act.²³⁷

D. THE *DUPONT* DECISION

In *E.I. du Pont de Nemours & Co.*,²³⁸ the NLRB considered the applicability of Section 8(a)(2) to employee participation programs established by an employer in a unionized workplace. DuPont's management unilaterally set up SHCs to award safety incentives (including cash bonuses) and to offer proposals on workplace safety and health.²³⁹ It also conducted safety and health conferences, in which employees offered ideas for improving workplace safety.²⁴⁰

The Board held that DuPont's SHCs constituted "labor organizations" within the meaning of Section 2(5) of the NLRA because they constituted a bilateral mechanism through which employees "dealt with" management about working conditions.²⁴¹ The Board further held that DuPont's management had unlawfully dominated the SHCs because it had retained unilateral power to decide SHC composition, structure, and functions, to select employee representatives, to veto proposed SHC action, and to terminate the SHCs at will.²⁴² The Board ordered DuPont to disband the SHCs.²⁴³

In a concurring opinion, NLRB Member Devaney asserted that DuPont had used the committees to get "on both sides of the bargaining table"²⁴⁴ and "to freeze the Union out of areas in which it had a vital and legally recognized interest: employ-

²³⁶ *Id.* at 1170.

²³⁷ *Id.*

²³⁸ 311 N.L.R.B. 893 (1993).

²³⁹ *Id.* at 894-95.

²⁴⁰ *Id.* at 896.

²⁴¹ *Id.* at 894-95.

²⁴² *Id.* at 895-96.

²⁴³ *Id.* at 897.

²⁴⁴ *Id.* at 903.

ee health and safety . . . , bonuses, and employee grievances over safety."²⁴⁵ He explained his reading of Section 8(a)(2):

I read Section 8(a)(2)'s legislative and precedential history as leaving employers significant freedom . . . to involve rank-and-file workers in matters formerly seen as management concerns. . . . Section 8(a)(2) should not create obstacles for employers wishing to implement [employee participation] plans--as long as such programs do not impair employees' free choice of a bargaining representative. . . . [Section 8(a)(2)] does, however, outlaw manipulating such committees so that they appear to be agents and representatives of the employees when in fact they are not.²⁴⁶

In contrast to its conclusions about DuPont's SHCs, the Board held that the company's safety conferences constituted a lawful means of involving workers in safety issues.²⁴⁷ The Board rejected the NLRB General Counsel's contention that the conferences had enabled DuPont to bypass the union and to deal directly with employees on a mandatory subject of bargaining, in violation of the company's duty to bargain with the union in good faith. The conferences served as communications devices rather than bilateral processes through which management could deal with workers on safety issues. The Board observed that allowing individual workers to make suggestions and offer ideas on their own behalf, without acting as representatives, did not usurp the union's role as the workers' exclusive bargaining representative.²⁴⁸ In fact, the Board cited the conferences as an example of how an employer could structure an employee participation program without running afoul of Section 8(a)(2).²⁴⁹

E. REACTION TO *ELECTROMATION* AND *DUPONT*

The labor relations community eagerly anticipated the *Electromation* and *DuPont* decisions, believing they would

²⁴⁵ *Id.* at 898.

²⁴⁶ *Id.* at 899.

²⁴⁷ *Id.* at 896-97.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 897.

impact broadly the viability of management-worker cooperative efforts. The Board, however, took pains to limit its holdings to the facts of each case and generally adhered to Section 8(a)(2) case law decided between 1935 and 1991. Member Devaney stressed that Section 8(a)(2) would continue to provide "significant latitude" to employers seeking to involve employees in the workplace.²⁵⁰ The decisions nevertheless produced a considerable outcry from segments of the employer community.²⁵¹ Management lawyers warned that the rulings placed employee participation programs "in danger of extinction."²⁵² The Wall Street Journal called the rulings "idiotic" and ominously predicted that for thousands of employers, "a litigation nightmare awaits."²⁵³ A representative of the National Association of Manufacturers warned that the Board was likely to find a violation of Section 8(a)(2) "*any time* a company works directly with its employees to discuss and address workplace issues without the involvement of a labor union."²⁵⁴

The Labor Policy Association (LPA), an employer group representing nearly 200 major American corporations, denounced the *Electromation* ruling as "totally unresponsive to modern workplace realities."²⁵⁵ A Marriott Corporation official later testified on behalf of the LPA, asserting that "[the two decisions] raise substantial doubt about the legality of virtually *any type* of cooperative effort — other than a traditional labor

²⁵⁰ See *Electromation, Inc.*, 309 N.L.R.B. 990, 999 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

²⁵¹ See, e.g., *Regional Public Hearing Before the Commission on the Future of Worker-Management Relations, U.S. Dep't of Labor* (Jan. 5, 1994) (testimony of Anthony Byergo, management labor lawyer) (concluding that the Board's present reading of § 8(a)(2) "does not meet the needs of a twenty-first century workplace"); CHARLES W. BAIRD, CATO INST., ARE QUALITY CIRCLES ILLEGAL? GLOBAL COMPETITION MEETS THE NEW DEAL at exec. summary page (1993) (observing that in the wake of the *Electromation* ruling, "labor-management cooperation on a wide range of issues is illegal" unless a union is involved).

²⁵² Gregory J. Kramer et al., *The New Legal Challenge to Employee Participation*, 45 LAB. L.J. 41 (1994).

²⁵³ *Quality Circle Busters*, WALL ST. J., June 9, 1993, at A12.

²⁵⁴ *Making the Future Work: Technology, Workers and the Workplace: Hearings on S. 1020 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. 86 (1993) [hereinafter *1993 Senate Hearings on S. 1020*] (statement of Mary Harrington, Director of Corporate Labor Relations, Eastman Kodak Company, on behalf of National Association of Manufacturers) (emphasis added).

²⁵⁵ Swoboda, *supra* note 216, at H2; Noble, *supra* note 216, at A23.

union — through which employees and managers address matters relating to the employees' jobs, working conditions, the workplace environment and the like."²⁵⁶

Several members of Congress also protested. Representative Steve Gunderson declared that the *Electromotion* ruling had invalidated all employee participation programs in which worker representatives speak on behalf of other workers.²⁵⁷ Senator Nancy Kassebaum warned that "the [NLRB] and the Federal courts have interpreted the [NLRA] to prohibit employers and employees from cooperating with each other."²⁵⁸ Specifically, Senator Kassebaum expressed her view that "any workplace-involvement committee where workers express their desire to management to modify their work environment violates Federal labor law."²⁵⁹ In 1993, Kassebaum and Gunderson introduced legislation to overturn the Board's *Electromotion* decision.²⁶⁰

Others within the labor relations community, including management representatives, labor law academics, and government officials, downplayed the significance of *Electromotion* and *DuPont*, emphasizing instead the continued viability of many forms of employee participation. Secretary of Labor Reich expressed his belief that the *Electromotion* ruling did not threaten labor-management collaboration, but he promised to monitor future Board decisions on the issue.²⁶¹ Professor Charles J. Morris called *Electromotion* "an obscure garden-variety company-union case" that did not deserve the attention it received from the employer community.²⁶² Shortly after leaving the NLRB, former member Raudabaugh declared that

²⁵⁶ 1993 Senate Hearings on S. 1020, *supra* note 254, at 92 (emphasis added).

²⁵⁷ See Steve Gunderson, *NLRB Muddies Regulatory Waters*, WALL ST. J., Feb. 1, 1993, at A10.

²⁵⁸ 139 CONG. REC. S4014 (daily ed. Mar. 30, 1993).

²⁵⁹ *Id.*

²⁶⁰ See 140 CONG. REC. S4013 (daily ed. Mar. 30, 1993) (introduction of S. 669, Teamwork for Employees and Management Act, by Sen. Kassebaum); 140 CONG. REC. H1738 (daily ed. Mar. 30, 1993) (introduction of H.R. 1529, Teamwork for Employees and Management Act, by Rep. Gunderson); see generally *infra* at 124-126 (describing congressional efforts to overturn the *Electromotion* decision).

²⁶¹ Frank Swoboda, *See Reich Vows to Preserve Workplace Cooperation; Secretary Would Seek Labor Law Changes*, WASH. POST, Mar. 9, 1993, at D3.

²⁶² See Morris, *supra* note 212, at D-3.

"much of the outcry over [*Electromation*] reflects Beltway interest group exaggeration and rhetoric."²⁶³ NLRB Member Devaney agreed, commenting that the "sky-is-falling" mentality of some in the business community warranted little merit.²⁶⁴

Many management representatives also downplayed the significance of the *Electromation* and *DuPont* decisions.²⁶⁵ Management attorney John S. Irving, a former NLRB Chair, stated that "these dire predictions about the loss of an important employer communications tool are exaggerated."²⁶⁶ Edward B. Miller, also a former NLRB Chair, declared that the "'so-called *Electromation* problem' is simply a 'myth.'"²⁶⁷ He candidly warned against repeal of Section 8(a)(2): "While I represent management, I do not kid myself. If Section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur."²⁶⁸

In sum, despite some claims to the contrary, the *Electromation* and *DuPont* decisions have left ample room for employers to establish bona fide employee participation programs. Professor James Rundle, in his study of Section 8(a)(2) case law, found that the Board typically struck down employee participation programs only where the employer had also engaged in other unlawful conduct.²⁶⁹ As he concluded, "in actual practice, [Section] 8(a)(2) has had virtually no impact on good-faith experimentation with employee involvement."²⁷⁰

²⁶³ *Seventh Circuit Endorses NLRB Holding on Joint Employee Involvement Committees*, [1994] Daily Lab. Rep. (BNA) No. 179, at AA-1, AA-2 (Sept. 19, 1994).

²⁶⁴ *Id.*

²⁶⁵ See, e.g., *Labor Law Precedents Will Fall, Management Attorney Warns SHRM*, [1993] Daily Lab. Rep. (BNA) No. 99, at C-1 (May 25, 1993) (reporting comments by management attorneys Harold P. Coxson and Betty Southard Murphy that *Electromation* affirmed existing case law).

²⁶⁶ JOHN S. IRVING, UNION PLANS TO AMEND THE LABOR LAWS 16 (5 National Legal Center for the Public Interest, White Paper No. 2, 1993).

²⁶⁷ *Former NLRB Chairman Calls Electromation Problem 'Myth'*, [1993] Daily Lab. Rep. (BNA) No. 201, at A-5 (Oct. 20, 1993) (summarizing Miller's testimony before the Commission on the Future of Worker-Management Relations).

²⁶⁸ *Id.*

²⁶⁹ See James R. Rundle, *The Debate Over the Ban on Employer Dominated Labor Organizations: What Is the Evidence?*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 161, 166 (Sheldon Friedman et al. eds., 1994).

²⁷⁰ *Id.* at 164.

Moreover, the Board has not prioritized enforcement of Section 8(a)(2). Between 1989 and 1993, the Board issued an average of fewer than ten complaints per year involving employee participation programs, out of the thousands of complaints issued during that period.²⁷¹ Finally, even if the NLRB ruled that an employee participation program had violated Section 8(a)(2), the remedy would be extremely limited. At worst, the Board would order the employer to disestablish its employee participation program,²⁷² allowing it to start over.

F. DESIGNING A LAWFUL SHC

The *Electromation* and *DuPont* decisions provided an opportunity for the NLRB to synthesize earlier decisions and federal case law to resolve Section 8(a)(2) issues. Taken together, the two decisions serve as a roadmap for employers and workers wishing to construct lawful employee participation programs in the future.

From the outset, Congress intended Section 8(a)(2) to proscribe employee participation programs only to the extent that they interfere with employee rights to organize independently for collective bargaining purposes.²⁷³ Subsequent acts of Congress have confirmed this view.²⁷⁴ The Senate Report on the original Wagner Act stated that Section 8(a)(2)'s purpose was "to remove from the industrial scene unfair pressure, not fair discussion."²⁷⁵ Accordingly, the NLRB and the federal

²⁷¹ See *Challenges to Legality of Joint Committees Form Small Part of NLRB Workload*, ABA *Told*, [1993] Daily Lab. Rep. (BNA) No. 153, at C-1 (Aug. 11, 1993).

²⁷² See Martin, *supra* note 211, at 139.

²⁷³ See, e.g., S. REP. NO. 1184, 73d Cong., 2d Sess., *reprinted in* 1 NLRB, *supra* note 204, at 1104.

²⁷⁴ See, e.g., 29 U.S.C. § 175a (1988) (provision of Taft-Hartley Act of 1947 directing Federal Mediation and Conciliation Service "to provide assistance in the establishment and operation of plant, area and industrywide labor management committees"); 29 U.S.C. § 186(c)(9) (1988) (provision of Taft-Hartley Act of 1947 banning employer financial support of labor organizations, but, as amended by the Labor Management Cooperation Act of 1978, exempting contributions made "to a plant, area or industrywide labor management committee").

²⁷⁵ S. REP. NO. 1184, *supra* note 273, *reprinted in* 1 NLRB, *supra* note 204, at 1104. Congress included a provision in § 8(a)(2) specifically providing that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." 29 U.S.C. § 158(a)(2)

courts have validated many employee participation programs that provide meaningful employee involvement without employer domination or interference.²⁷⁶

The Board's rulings in *Electromation* and *DuPont* reaffirm this basic framework. Member Devaney stressed that the NLRA "should not create obstacles for employers wishing to implement [employee involvement programs] — as long as those programs do not impair the right of employees to free choice of a bargaining representative."²⁷⁷

How, then, can employers continue to make use of employee participation programs without running afoul of Section 8(a)(2)? An analysis of Section 8(a)(2) involves two principal issues: first, whether the employee participation program constitutes a "labor organization" as defined by Section 2(5) of the National Labor Relations Act,²⁷⁸ and second, whether the employer unlawfully dominated or interfered with it.

The first principal inquiry requires a three-part analysis. An employee participation program is likely to be deemed a labor organization if employees act in a representative capacity, the program establishes a bilateral process by which employees deal with their employer, and the subject of such dealings involves wages, benefits, or working conditions.²⁷⁹ Programs such as work teams (where all employees participate) or brainstorming sessions (where individual employees make suggestions on their own behalf) are not labor organizations because employees participate only in an individual capacity.²⁸⁰ Conversely, an employee participation program may be a labor organization where management, or the workers themselves, select a subset of workers to represent employee interests.²⁸¹

(1988).

²⁷⁶ See *infra* notes 280, 282, 285-286 and accompanying text.

²⁷⁷ E.I. du Pont de Nemours & Co. v. NLRB, 311 NLRB 893, 899 (1993) (Devaney, Member, concurring).

²⁷⁸ 29 U.S.C. § 152(5) (1988).

²⁷⁹ See *supra* note 207 and accompanying text.

²⁸⁰ See, e.g., General Foods Corp., 232 N.L.R.B. 1232 (1977) (finding no violation where all employees participated in work teams as part of a job enrichment plan).

²⁸¹ See, e.g., NCR Corp., No. 9-CA-30467, 1994 NLRB LEXIS 353 (NLRB Div. of Judges, Dayton, Ohio May 26, 1994) (finding of administrative law judge that satisfaction councils collectively constituted a labor organization where employer established them to represent workers' interests in dealing

An employee participation program does not constitute a labor organization simply because management has granted it decision-making authority (as in a grievance adjudication committee),²⁸² or because it allows employees to communicate with their employer. A program that establishes an ongoing bilateral process, facilitating a dialogue between workers and management, however, may be deemed a labor organization.²⁸³

Even where the first two conditions are satisfied, a program will be deemed a labor organization only if the issues within the scope of its consideration include wages, benefits, working conditions and other issues within the province of collective bargaining.²⁸⁴ An employee participation program designed to address issues such as efficiency, productivity, or quality is not likely to be considered to be a labor organization.²⁸⁵ Indeed,

with management).

²⁸² See, e.g., *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108 (1977) (no violation where labor-management committee performed adjudicative function resolving employee complaints); *Spark's Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977) (no violation where labor-management council performed adjudicative function resolving employee grievances). Section 9(a) of the NLRA provides that although an elected union is the exclusive bargaining representative, "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted" without the union's intervention. 29 U.S.C. § 159(a) (1988).

²⁸³ See, e.g., *NLRB v. Peninsula Gen. Hosp. Medical Ctr.*, 36 F.3d 1262, 1272-73 (4th Cir. 1994) (in absence of ongoing bilateral process, hospital's nursing services organization constituted a communications device rather than a labor union; isolated instances of management responding to employee proposals did not constitute "dealing"); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (upholding NLRB's finding of violation where employer-created labor-management committees regularly made proposals to management regarding working conditions); *Ona Corp.*, 285 N.L.R.B. 400, 405 (1987) (finding violation where employee committee made proposals regarding vacations and holiday schedules).

²⁸⁴ See generally *St. Vincent's Hosp.*, 244 N.L.R.B. 84 (1979) (finding violation where employee committee made proposals regarding wages, hours, and vacations); see also *NCR Corp.*, No. 9-CA-30467, slip op. at 15, 1994 NLRB LEXIS 353, *40 (May 26, 1994) (finding violation where employer created satisfaction councils "to serve as a vehicle for rank-and-file employees to deal with [NCR's] management" on issues such as wages, benefits, and working conditions).

²⁸⁵ See, e.g., *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 244 (1985) (finding no violation where labor-management communications committee performed managerial, non-representative function, in seeking to improve efficiency). Similarly, in his concurring opinion in *Electromation*, NLRB Member Oviatt

the Board has never ordered an employer to disestablish an employee participation program set up to promote efficiency, quality, or productivity.²⁸⁶

Most employee participation programs do constitute labor organizations within the meaning of NLRA Section 2(5), as NLRB Member Raudabaugh recognized in *Electromation*.²⁸⁷ However, a program deemed to be a labor organization may still be lawful under Section 8(a)(2) if the employer does not dominate or interfere with it.²⁸⁸

The second principal inquiry is largely procedural. An employer dominates and interferes with an employee participation program when it unilaterally creates the program, unilaterally determines its purpose, structure, composition, functions and processes, and unilaterally holds the right to terminate the program at will.²⁸⁹ Similarly, where the employer exercises control or veto power over the program's agenda, the employer will be seen as "sitting on both sides of the bargaining table."²⁹⁰ In contrast, an employer does not dominate or interfere with an employee participation program where employer and employees jointly establish the program, jointly determine its purpose, structure, composition, functions and processes, exercise equal control over the program's agenda, and retain an equal voice in deciding whether and when to terminate the program.

Thus, the *Electromation* and *DuPont* decisions provide some well-marked signposts to guide employers and workers who seek to establish employee participation programs. The analysis

suggested that quality circles, quality of work-life programs, joint problem-solving structures, communication mechanisms, and other employee participation schemes aimed at improving quality, efficiency or productivity do not violate § 8(a)(2). *Electromation, Inc.*, 309 N.L.R.B. 990, 1004-05 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

²⁸⁶ Rundle, *supra* note 269, at 173.

²⁸⁷ 309 N.L.R.B. at 1008 (Raudabaugh, Member, concurring).

²⁸⁸ See *supra* note 206 and accompanying text.

²⁸⁹ See, e.g., *NLRB v. Newport News Shipbuilding & Drydock Co.*, 308 U.S. 241 (1939) (finding violation where employer controlled form and structure of employee committee and retained unilateral veto power over proposed committee actions); see also *NCR Corp.*, No. 9-CA-30467, 1994 NLRB LEXIS 353 (NLRB Div. of Judges, Dayton, Ohio May 26, 1994) (finding § 8(a)(2) violation where employer created satisfaction councils and determined their charter, composition, and functions without employee input).

²⁹⁰ See *supra* notes 229, 245 and accompanying text.

boils down to one fundamental issue: Does the program foster genuine employee involvement and therefore improve labor-management relations, or does it simply create "the illusion of a bargaining representative without the reality?"²⁹¹

G. COSHRA'S SHC PROPOSAL: ENSURING MEANINGFUL
EMPLOYEE INVOLVEMENT WITHOUT EMPLOYER DOMINATION

Opponents of COSHRA's SHC requirement fear that the proposed SHCs would run afoul of Section 8(a)(2) as interpreted by the NLRB in *Electromation*.²⁹² In response, COSHRA's House and Senate sponsors added language providing that "[a] safety and health committee established under and operating in conformity with [COSHRA] shall not constitute a labor organization within the meaning of [the NLRA]."²⁹³ The Senate Committee on Labor and Human Resources further clarified its belief that "committees established under [COSHRA] would not pose a problem under [S]ection 8(a)(2) of the National Labor Relations Act," even without the added language.²⁹⁴ Indeed, the safe harbor provision is unnecessary. Application of the Section 8(a)(2) two-part analysis set forth above demonstrates the legality of SHCs as a means of fostering meaningful employee participation without employer domination or interference.

Admittedly, a SHC established pursuant to COSHRA would likely constitute a "labor organization" under Section 2(5) of the NLRA. Employee members of the SHC would clearly act in a representative capacity, having been selected by the workforce

²⁹¹ *Electromation, Inc.*, 309 N.L.R.B. 990, 999 (1992) (Devaney, Member, concurring), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

²⁹² See, e.g., H.R. REP. NO. 663, *supra* note 35, at 142 (1992) (statement of Minority Views) (expressing concern that "employers would be caught in a 'Catch-22' of being mandated to implement a committee by [COSHRA] but in doing so, being faced with potential violation of Section 8(a)(2) of the NLRA"); 1 1991-92 *House Hearings*, *supra* note 30, at 342 (testimony of Chemical Manufacturers Association) ("[M]andatory committees may constitute an unfair labor practice under the National Labor Relations Act.")

²⁹³ See S. REP. NO. 453, *supra* note 30, at 8, 10, 170 (reflecting language included in sponsors' substitute amendment, adopted by the Senate Comm. on Labor and Human Resources and favorably reported on Sept. 16, 1992, by a vote of ten to six, with one member voting "present"); H.R. REP. NO. 663, *supra* note 35, at 6, 24 (reflecting language included in sponsors' substitute amendment, adopted by the House Comm. on Education and Labor and favorably reported on May 28, 1992, by voice vote).

²⁹⁴ S. REP. NO. 453, *supra* note 30, at 27.

as a whole for that very purpose. The SHC would establish an ongoing, bilateral process for employees to deal with their employer. Finally, the subject matter of that dialogue, worker safety and health, clearly would involve issues of working conditions within the scope of the collective bargaining process.

Nevertheless, the structure contemplated by COSHRA would protect the SHC from employer domination or interference, thus preventing a violation of Section 8(a)(2). Consider the definition of "domination" offered by the NLRB in *Electromation*: "a labor organization that is the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2)."²⁹⁵

Under COSHRA's requirements, employers would set up joint safety and health committees, but they would do so pursuant to a mandate from Congress, not as a freely determined unilateral act.²⁹⁶ The structure, purpose, composition and functions of the SHCs would be determined by Congress, rather than by the employer. Moreover, employers would not be free to terminate SHCs at will.

Under COSHRA, employees would select their own representatives, who would comprise at least fifty percent of the committee membership. Management would select its representatives, but would have no voice in the selection of employee representatives. Employee and management representatives would determine jointly the SHC's agenda and management would not hold a veto power. In addition, each SHC member could make recommendations to the employer, ensuring employee representatives a meaningful role in addressing safety and health issues, even in the event of a committee deadlock.

COSHRA's structure would thus ensure meaningful employee involvement in workplace safety and health issues, free of

²⁹⁵ *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

²⁹⁶ See *supra* notes 184-185 and accompanying text (discussing the House version of COSHRA, which permits an employer with an equally effective alternative employee participation program to apply to OSHA for a variance from the SHC requirement). The House bill requires such alternatives to include employee representation and certain minimum employee rights. Conceivably, an employer could establish an alternative employee participation program consistent with COSHRA's requirements, but so dominate it as to raise the spectre of unlawful domination in violation of § 8(a)(2).

unlawful employer domination or interference. Such genuine involvement "is in no way inimical to the free exercise of the right of employees to choose a bargaining representative."²⁹⁷ Thus, the SHC requirement is fully consistent with both the letter and spirit of Section 8(a)(2), even without the safe harbor included in COSHRA.

The SHC requirement would help to foster improved labor-management relations as a whole, as many employers have attested in congressional hearings. According to Ford Motor Company, "[t]he establishment of joint committees within Ford facilities has promoted a spirit of teamwork . . . that improves working conditions for all employees. . . . In a work atmosphere where there has traditionally been an adversarial working relationships [sic], joint health and safety committees have helped reduce conflict by demonstrating that our objectives are the same--an accident-free work environment."²⁹⁸

IV. CONCLUSION: TOWARD A NEW CONCEPT OF SOCIAL RESPONSIBILITY

The 1991 fire at Imperial Food's poultry processing plant²⁹⁹ bore a striking resemblance to another workplace tragedy of eight decades earlier. In 1911, some 500 immigrant women and girls toiled long hours making low-cost shirts in the top floors of the cramped, ten-story building of the Triangle Shirtwaist Company in New York City.³⁰⁰ Although the

²⁹⁷ 309 N.L.R.B. 990, 1003 (Devaney, Member, concurring).

²⁹⁸ 1991 *Senate Hearings*, *supra* note 34, at 201 (statement of Anthony Ruggiero, Union Relations Coordinator, North American Automotive Operations, Ford Motor Company). Surprisingly, some employer representatives and some Republicans have asserted that COSHRA's SHC requirement would damage labor-management relations. *See, e.g.*, H.R. REP. NO. 825, *supra* note 35, at 257 (stating Minority Views of Republican members of House Comm. on Education and Labor that COSHRA's SHC requirement "is designed for confrontation rather than cooperation"); 1992 *Senate Hearings*, *supra* note 33, at 346 (statement of American Bakers Association) (fearing that committees required by COSHRA "likely will heighten adversarial tensions"); *id.* at 344 (statement of American Ambulance Association) ("[T]he practical impact of mandating joint safety committees is to create an adversarial labor/management relationship."). Critics of COSHRA's SHC requirement offered no anecdotal or systemic evidence that the SHCs required by law in thirteen states negatively affected labor-management relations.

²⁹⁹ *See supra* notes 1-16 and accompanying text.

³⁰⁰ *See* Laurie Goodstein, 1911 *N.Y. Factory Fire Brought Wave of Reform*,

plant's floors were littered with flammable shirt fabric, the company locked the doors from the outside during employees' shifts.³⁰¹ The building had no sprinklers and only one fire escape.³⁰² The plant's few fire hoses were rotted through³⁰³ and, despite four previous fires, the company did not conduct regular fire drills.³⁰⁴ The factory workers, struggling to make a new life in America, feared losing their jobs if they complained about the dangerous conditions.³⁰⁵

On the afternoon of March 25, 1911, shirt fabric caught fire on the eighth floor.³⁰⁶ The fire spread quickly, and panicked workers tried to flee the building.³⁰⁷ Many workers were trapped behind the plant's locked front doors, while others leapt from windows and down elevator shafts to escape the smoke and flames, their hair and clothes on fire.³⁰⁸ The sole fire escape collapsed under the weight of too many workers.³⁰⁹ One hundred and forty-six women and girls died in the blaze.³¹⁰

Several commissions investigated the Triangle Shirtwaist fire, inspiring a national campaign for worker safety.³¹¹ Thirty-six states passed protective occupational safety and health laws in the ensuing years.³¹² Some years later, a plaque was placed at the factory site, inscribed with the words, "On this site, 146 workers lost their lives in the Triangle Shirtwaist Co. fire on March 25, 1911. Out of their martyrdom came new con-

WASH. POST, Sept. 5, 1991, at A12.

³⁰¹ *Id.*

³⁰² *Id.*; see 1991 Senate Hearings, *supra* note 34, at 69 (testimony of Eula Bingham, former Assistant Secretary of Occupational Safety and Health, U.S. Department of Labor).

³⁰³ Goodstein, *supra* note 300 at A12.

³⁰⁴ 1991 Senate Hearings, *supra* note 34, at 69 (testimony of Eula Bingham).

³⁰⁵ *Id.*

³⁰⁶ Goodstein, *supra* note 300, at A12.

³⁰⁷ See *id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ 1991 Senate Hearings, *supra* note 34, at 70 (testimony of Eula Bingham).

³¹² *Id.*

cepts of social responsibility and labor legislation that have helped make American working conditions the finest in the world."³¹³

In the eight decades since the Triangle Shirtwaist fire, the United States has achieved some improvements in workplace safety and health. The state laws passed just after the 1911 fire and subsequent state and federal efforts have established the importance of worker safety as a public policy objective. In turn, many U.S. employers have made their workplaces much safer.

As the 1991 Imperial Food fire demonstrated, however, the job is far from finished. Frightening parallels can be seen between that tragedy and the Triangle Shirtwaist fire eighty years earlier: at both plants, exit doors were locked from the outside despite substantial fire hazards; both companies failed to install adequate fire suppression systems or to conduct fire drills, even after several earlier plant fires; and many workers died trying to escape each blaze. The similarities between these two tragedies, nearly a century apart, cast doubt on the reality of this nation's progress in protecting its workers.

The Imperial Food fire represents just one incident, but that plant's sweatshop conditions reflect those of far too many American workplaces. While twenty-five workers died in that 1991 blaze, more than ten times as many American workers die from safety accidents or occupational disease every single working day.³¹⁴ Far from an anomaly, the Imperial Food fire symbolizes a national crisis in occupational safety and health, and underscores the need for a new public policy approach to protect American workers. Federal policy makers can no longer ignore the number of work-related fatalities, nor the fact that most of these fatalities easily could be prevented. Instead, they must recognize the reality that federal law has fallen considerably short of its original promise of ensuring a safe and healthful workplace for all Americans.

COSHRA's proposed SHC requirement represents a new public policy approach designed to succeed where existing measures have failed. Its approach is both "safe" from the standpoint of protecting workers, and "sound" from the standpoint of labor-management relations. The experiences of thousands of U.S. firms already using SHCs demonstrate their effec-

³¹³ *Id.* at 72.

³¹⁴ See S. REP. NO. 453, *supra* note 30, at 2.

tiveness in reducing work-related injuries, illnesses, and fatalities. SHCs further provide an effective means of fostering meaningful employee involvement free of employer domination.

For these reasons, a broad range of interest groups has banded together as the Coalition for Safe Jobs to seek enactment of COSHRA. The Coalition includes public health organizations, civil rights groups, labor unions, environmental organizations, religious groups, consumer advocates, and other socially active interest groups.³¹⁵ The National Safety Council has also endorsed the concept and purpose of COSHRA's proposed SHC requirement.³¹⁶

If Congress enacts COSHRA or other legislation requiring the establishment of SHCs, perhaps the workers at Imperial Food will not have died in vain. Perhaps, like the workers who died in the Triangle Shirtwaist fire, their deaths will produce a new public policy approach to worker safety, one that embodies "a new concept of social responsibility."

³¹⁵ As of March, 1994, the membership of the Coalition for Safe Jobs included: the American Public Health Association, the Leadership Conference on Civil Rights, the National Urban League, the AFL-CIO and its affiliated unions, Public Citizen, the Environmental Defense Fund, Citizen Action, the United Methodist Church Board of Church and Society, the Women's Legal Defense Fund, OMB Watch, the American Lung Association, the Sierra Club, the Mexican American Legal Defense and Education Fund, the NOW Legal Defense and Education Fund, the American Nurses Association, the National Council of La Raza, the Natural Resources Defense Council, the National Rainbow Coalition, the Occupational Health Foundation, the NAACP, the United Church Board for Homeland Ministries, the National Consumers League, Interfaith Impact for Justice and Peace, the National Wildlife Federation, the Consumer Federation of America, the National Education Association, the Farmworker Justice Fund, Americans for Democratic Action, the Washington Association of Churches, 26 local Committees on Occupational Safety and Health (COSH) around the nation, and a host of other organizations. Coalition for Safe Jobs, Members of the Coalition for Safe Jobs: National Organizations List 1-2 (March 1, 1994) (on file with author).

³¹⁶ 1992 Senate Hearings, *supra* note 33, at 384.

APPENDIX

CONGRESSIONAL EFFORTS TO AMEND SECTION 8(A)(2)

Members of Congress introduced legislation to amend Section 8(a)(2) of the National Labor Relations Act even before the NLRB issued its 1992 decision in *Electromation, Inc.* Representative Tom Campbell introduced the American Competitiveness Act in 1991.¹ The legislation would have added a proviso to Section 8(a)(2) stating that "nothing in this paragraph shall prohibit the formation or operation of quality circles or joint production teams composed of labor and management, with or without the participation of representatives of labor organizations."²

In 1993, Senator Nancy Kassebaum and Representative Steve Gunderson introduced legislation to overturn the Board's *Electromation* decision.³ The bill proposed to amend Section 8(a)(2) of the NLRA to allow employers "to establish, assist, maintain or participate in any organization or entity of any kind, in which employees participate to discuss matters of mutual interest . . . and which does not have, claim or seek authority to negotiate or enter into collective bargaining agreements . . . with the employer." The bill would establish a very broad exception to Section 8(a)(2)'s prohibitive rule, one that might swallow the rule itself. Any employer domination or interference with a labor organization would be permissible in the absence of a collective bargaining agreement or negotiations toward such an agreement. Thus, an employer's unilateral determination of purpose, structure, membership, and functions would become irrelevant to the legality of an employee participation program. Management could even override employee opposition to its creation of the program.

At a 1994 meeting of the Senate Labor and Human Resources Committee, Senator Kassebaum proposed Senate Bill 669 as an amendment to Senate Bill 1020, the Workers Technol-

¹ See 137 CONG. REC. E2048-49 (daily ed. June 5, 1991).

² See H.R. 2523, 102d Cong., 1st Sess. § 301(a) (1991).

³ See 140 CONG. REC. S4013 (daily ed. Mar. 30, 1993) (introduction of S. 669, the Teamwork for Employees and Management Act of 1993, by Sen. Kassebaum); 140 CONG. REC. H1738 (daily ed. Mar. 30, 1993) (introduction of H.R. 1529, the Teamwork for Employees and Management Act of 1993, by Rep. Gunderson).

ogy Skill Development Act.⁴ The Committee rejected the amendment by a ten to seven vote.⁵ Senator Kassebaum also included language comparable to Senate Bill 669 in OSHA reform legislation she introduced in 1994.⁶ The 103rd Congress took no action on that legislation, on Senate Bill 669, or on House Bill 1529.⁷ Representative Steve Gunderson also attempted another means to achieve Section 8(a)(2) reform — broadening COSHRA's safe harbor for SHCs. The House Committee on Education and Labor met to consider COSHRA in March of 1994.⁸ Representative Gunderson offered an amendment to allow any OSHA-approved alternative employee participation program to consider issues other than safety and health.⁹ More importantly, the Gunderson amendment would have exempted any "employee participation committee" from the reach of Section 8(a)(2), regardless of whether its purpose was the improvement of worker safety and health, and regardless of whether it was established in compliance with COSHRA's requirements. On March 9, the Committee voted twenty-six to fifteen to reject the amendment.¹⁰

⁴ See *Senate Labor Committee Approves Workplace, Education Technology Bills*, [1994] Daily Lab. Rep. (BNA) No. 36, at A-18 (Feb. 24, 1994). S. 1020, introduced by Senator Wofford of Pennsylvania, proposed to create a grants program to ensure worker involvement in the development of high-performance workplaces. See 139 CONG. REC. S6455 (daily ed. May 25, 1993).

⁵ 139 CONG. REC. S6455 (daily ed. May 25, 1993) (all 10 Committee Democrats voting against the amendment and all seven Committee Republicans voting in favor of it). *Id.*

⁶ 140 CONG. REC. S3234-38 (daily ed. Mar. 17, 1994) (introduction of S. 1950). Representative Harris Fawell introduced similar legislation in the House. 139 CONG. REC. H6378 (daily ed. Aug. 6, 1993).

⁷ At the conclusion of the 103d Congress, S. 669 had nine sponsors (Senators Kassebaum, Gorton, Hatch, Jeffords, Thurmond, Gregg, Danforth, Grassley, and Craig), while H.R. 1529 had 26 (Representatives Gunderson, Goodling, Porter, Livingston, Barrett of Nebraska, Hoekstra, Boehner, Fawell, Crane, Zeliff, Bateman, Bereuter, Petri, Coble, Upton, Ballenger, Emerson, Hoke, Hutchinson, Linder, Hayes, Hall of Texas, Quillen of Tennessee, McMillan, Sundquist, and Portman).

⁸ H.R. REP. NO. 825, *supra* note 35, at 32.

⁹ See *Ford Amendment Reflects DOL's Views; House Labor Committee Rejects GOP Proposal*, [1994] Daily Lab. Rep. (BNA) No. 41, at A-6 to A-7 (Mar. 3, 1994).

¹⁰ *GOP Amendment Over Employee Committees Rebuffed by House Labor Panel Democrats*, [1994] Daily Lab. Rep. (BNA) No. 46, at A-4 (Mar. 10, 1994). Committee Chairman William D. Ford had tentatively accepted the amend-

Committee Chairman William D. Ford explained that the Gunderson amendment would "open up the National Labor Relations Act to the very kind of abuse that the original language was intended to prevent."¹¹ In response, Representative Gunderson labelled the Committee's action "crass politics" and accused the committee of mandating safety and health committees while simultaneously denying employers the ability to work voluntarily with employees toward improving quality, productivity, and efficiency.¹² Representative Gunderson protested that the Committee was taking "a huge step backwards in assisting America to become competitive in a global, high-tech market."¹³

At the conclusion of the 103rd Congress, Senator Pell also introduced legislation to amend Section 8(a)(2) of the National Labor Relations Act.¹⁴ Senator Pell explained that current federal labor law makes labor-management cooperation "difficult at the least and impossible at best."¹⁵ Thus, Senator Pell proposed to amend Section 8(a)(2) to allow employers and employees (by majority assent) to establish committees jointly "to discuss matters of interest and concern."¹⁶ The bill would require an equal number of employee-elected and management representatives to comprise each committee.¹⁷

ment on March 2, 1994, indicating a desire to consult with the NLRB before reaching a final decision. After consultation with the Board, Ford rejected the amendment because it would "do mischief to the National Labor Relations Act." *Id.* at A-5. The Committee favorably reported the Comprehensive Occupational Safety and Health Reform Act on March 10, 1994, by a vote of 26 to 17. *House Panel Clears Democratic OSHA Bill, Rejecting GOP Proposals to Soften Mandates*, [1994] Daily Lab. Rep. (BNA) No. 47, at A-1 (Mar. 11, 1994). Congress took no further action on the bill in 1994.

¹¹ *GOP Amendment Over Employee Committees Rebuffed by House Labor Panel Democrats*, *supra* note 10, at A-5.

¹² *Id.*

¹³ *Id.*

¹⁴ 140 CONG. REC. S14,113 (daily ed. Oct. 4, 1994) (introduction of S. 2499, the Worker-Management Relations for the 21st Century Act of 1994, by Sen. Pell).

¹⁵ *Id.*

¹⁶ *Id.* at S14,114.

¹⁷ *Id.*