

6-1-2002

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### Recommended Citation

Kelli L. Dutrow, *Working at Home at Your Own Risk: Employer Liability for Teleworkers Under the Occupational Safety and Health Act of 1970*, 18 GA. ST. U. L. REV. (2002).

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# WORKING AT HOME AT YOUR OWN RISK: EMPLOYER LIABILITY FOR TELEWORKERS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

“O, how full of briers is this working-day world!”

WILLIAM SHAKESPEARE, AS YOU LIKE IT, act 1, sc. 3

## INTRODUCTION

Teleworking is a recent phenomenon that portends fundamental change in the landscape of American business.<sup>1</sup> Teleworkers function within an entirely new occupational paradigm; instead of going to work, the work comes to them.<sup>2</sup> The number of teleworking Americans increased by seventeen percent in 2001.<sup>3</sup> Currently, one in five American employees regularly teleworks.<sup>4</sup> An entirely new vocabulary has simultaneously developed alongside this alternative approach to work. Telework, telecommute, and telecenter—all are examples of the new terms that have now become part of the American workplace vernacular.<sup>5</sup> The telework alternative is being hailed by many as a veritable panacea to a host of modern workplace problems.<sup>6</sup> The most cited advantages are that teleworking will solve

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1. See discussion *infra* Part II.

2. See JALA International, Inc., available at <http://www.jala.com> (visited Apr. 14, 2002).

3. International Telework Association & Council, *Telework America 2001*, available at <http://www.telecommute.org/twa/twa2001/newsrelease.htm> (visited Jan. 4, 2002) [hereinafter *Telework America 2001*].

4. *Id.*

5. See JALA International, *supra* note 2. Telecommuting is a subset of teleworking and is defined as “[p]eriodic work out of the principal office, one or more days per week, either at home, a client’s site, or in a telework center . . . [t]he emphasis [being] on reduction or elimination of the daily commute to and from the workplace.” *Id.* Throughout this Note, both terms will be used to describe employees who work at home for an employer. A telecenter is a “remote work center” or central hub, where telecommuting employees travel shorter distances to gather and work for various employers. Metro Atlanta Telecommuting Advisory Council, Inc., *Telework Glossary*, at [http://www.matac.org/How\\_To/Learn\\_The\\_Basics/Glossary/glossary.html](http://www.matac.org/How_To/Learn_The_Basics/Glossary/glossary.html) (last visited Nov. 20, 2000).

6. See discussion *infra* Part II.

environmental problems,<sup>7</sup> provide an effective compromise for working parents (particularly mothers),<sup>8</sup> increase employee productivity and retention,<sup>9</sup> and provide new opportunities for disabled Americans to enter the workforce.<sup>10</sup> Following the tragic events of September 11, 2001 (“9-11”), teleworking became a necessity for many workers displaced by terrorism.<sup>11</sup> Not surprisingly, interest in teleworking has increased exponentially

7. See Oregon Office of Energy, *Telecommuting in Oregon: Findings and Future Direction*, at <http://www.energy.state.or.us/telework/telecom.htm> (last visited Sept. 16, 2000) (reporting a 35.2 mile average reduction in miles traveled by workers in Oregon from a non-telecommuting day to a telecommuting day) [hereinafter Oregon Office of Energy Report]; Joseph Rose, *Clackamas County Beckons Workers to Fill Telecommunity Center Officials Hope a Canby Site, and Others in the Works, Will Ease Traffic Congestion and Pollution*, PORTLAND OREGONIAN, May 8, 2000, at A1 (reporting that Susan Christenson of the Oregon Department of Environmental Quality estimates that “[ten] telecommuters who use a [telecenter] twice a week would drive 50,000 fewer miles a year, keeping 8,150 pounds of pollutants out of the atmosphere”).

8. See Oregon Office of Energy Report, *supra* note 7; Interview by Korva Coleman, Host of National Public Radio’s *Talk of the Nation*, with Peg Seminario, AFL-CIO Director of Safety and Health (Jan. 6, 2000) [hereinafter NPR Interview]; OSHA Home Office Regulations: *Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Education and the Workplace*, 106th Cong. (2000) (statement of Rep. Ron Paul) (“The option of ‘telecommuting’ is particularly valuable for women with young children or those caring for elderly parents.”) [hereinafter Paul Testimony].

9. See Paul C. Boyd, *Six Organizational Benefits of Telecommuting*, available at <http://www.home.netcom.com/~pboyd/orgbens.html> (last visited Oct. 11, 2000); Alice Bredin, *Internet Boom Pave’s [sic] Way for Telecommuting Surge*, 22 L.A. BUS. J. 27 (Jan. 17, 2000) (discussing the results of the International Telework Association & Council’s 1999 research study); *Telework America 2001*, *supra* note 3 (quoting Dr. Brad Allenby, AT&T Vice President of Environment, Health & Safety as saying: “[AT&T’s] internal research validates the findings of increased productivity and job satisfaction among teleworkers . . . [due to] access to high-speed connections, an improved ability to concentrate and a better balance between work and family responsibilities.”).

10. Remarks Announcing the New Freedom Initiative, 37 PUB. PAPERS 5 (Feb. 5, 2001). President Bush called the ability to work out of the home a “revolution” for “workers with disabilities.” *Id.*; see also Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 7 AM. BUS. L.J. 857, 891-98 (2001); JOHN R. PADDOCK, JR., EMPLOYMENT LAW AND PRACTICE § 6.29(e)(i) (2002) (suggesting that telecommuting may establish a “reasonable accommodation” under the Americans with Disabilities Act).

11. At 8:45 A.M. on Tuesday, September 11, 2001, hijackers piloted two commercial airliners into the World Trade Center in the heart of New York City, killing approximately 3000 individuals. Simultaneously, another plane slammed into the Pentagon, resulting in the deaths of nearly 200 passengers and federal employees. A fourth plane crashed in rural Pennsylvania, killing all on board. The United States and its allies responded to the attack, allegedly masterminded by Osama bin Laden and his Al Qaeda terrorist network, by waging an international war against terrorism. See President’s Address to a Joint Session of Congress on the United States’ Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

following 9-11 as traumatized workers retreat to the safe haven of home.<sup>12</sup>

At first blush, teleworking appears to be a winning combination for employees, employers and society as a whole—promising comfort for workers in times of crisis, a cleaner environment, reduced business costs, decreased absenteeism, improved productivity, retention, and job satisfaction.<sup>13</sup> Recently however, that rosy picture began to fade when the Occupational Safety and Health Administration (OSHA) suggested that employers could be liable for unsafe conditions within the home worksite.<sup>14</sup>

OSHA rendered that suggestion through an advisory letter sent via the Internet to a Texas corporation seeking guidance regarding its work-at-home programs.<sup>15</sup> The suggestion triggered a storm of controversy culminating in OSHA's decision to rescind the letter.<sup>16</sup> The debate continues, however, apparently fueled by a growing frustration with OSHA's rulemaking procedures which was gathering force long before the November 1999 letter surfaced.<sup>17</sup>

The focus of this Note is to explore whether employers are, or should be, liable to teleworkers under the Occupational Safety and Health Act of 1970<sup>18</sup> (OSH Act). Part I reviews the history and purpose of the OSH Act to ascertain how it is to be interpreted and who gets to decide whether its drafters intended for the Act's protections to extend into the home environment. Part II outlines the

12. See discussion *infra* Part III.E.2; Monty Phan, *Comfort Zone/Since the Attacks, More Companies Have Turned to Telecommuting as They Try to Accommodate Uneasy Workers*, *NEWSDAY*, Nov. 26, 2001, at C14 (quoting Chuck Wilsker, Executive Director of the International Teleworking Ass'n & Council, as saying: "The whole world has changed. . . . [P]eople just feel more comfortable if they can be close to home.").

13. See discussion *infra* Part II.

14. See OSHA Standard Interpretation and Compliance Letters (Nov. 15, 1999), *withdrawn* Jan. 5, 2000, available at [http://www.osha-slc.gov/html/hot\\_4.html](http://www.osha-slc.gov/html/hot_4.html) [hereinafter OSHA Home Advisory Letter]; H.R. REP. NO. 106-1040 (2001), available at 2001 WL 29435; L. Kim Tan, *OSHA's Advisory Slammed*, *BOSTON HERALD*, Jan. 5, 2000, at 26; discussion *infra* Part I.C.

15. See OSHA Home Advisory Letter, *supra* note 14; H.R. REP. NO. 106-1040.

16. See discussion *infra* Part I.C.

17. See discussion *infra* Part V.

18. 29 U.S.C. §§ 651-78 (1994).

social impact of teleworking. Part III addresses the various arguments as to whether the OSH Act should be interpreted as applicable to home offices. Additionally, Part III reviews several recent developments, including Congress' first exercise of its power under the Congressional Review Act<sup>19</sup> to overturn OSHA's sweeping ergonomics regulations, which suggest OSHA will not soon succeed in any effort to extend the OSH Act to home offices. Part IV explores OSHA's rulemaking efforts and the growing sentiment that, through advisory letters like the one at issue, OSHA improperly and perhaps unconstitutionally engages in "rulemaking through the back door."<sup>20</sup> Finally, Part V suggests a workable solution to the problem of OSHA in the home based upon a theory of bargaining, which, as illustrated by several model teleworking programs, may offer the type of quid pro quo arrangement necessary to satisfy advocates on both sides of the debate.

### I. HISTORY AND PURPOSE OF THE OSH ACT

The Occupational Safety and Health Act of 1970 (OSH Act)<sup>21</sup> is "the primary federal law regulating workplace safety and health."<sup>22</sup> The Occupational Safety and Health Administration (OSHA) administers the OSH Act, which mandates that an employer must "keep its place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to its employees."<sup>23</sup> To establish a violation of the OSH Act, OSHA must demonstrate: 1) the existence of a hazardous condition at the workplace, 2) the employer either knew or should have known about

19. Congressional Review Act, 5 U.S.C. §§ 801-08 (1996).

20. *Rulemaking Through the Back Door: How OSHA Imposes New Requirements Through Interpretations: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Education and the Workforce*, 106th Cong. (2000) (statement by Arthur G. Sapper, OSHA Practice Group, McDermott, Will & Emery, Wash., D.C.) [hereinafter April 2000 Sapper Testimony]; discussion *infra* Part IV.

21. 29 U.S.C. §§ 651-78 (1994).

22. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 436 (2d ed. 1999).

23. *Id.*

it, and 3) the employer failed to correct the hazardous condition according to the appropriate OSHA standards.<sup>24</sup> To facilitate these regulations, OSHA compliance officers are “empowered . . . to inspect any workplace covered by the Act.”<sup>25</sup>

Throughout its thirty-year history, the OSH Act has been both praised and criticized.<sup>26</sup> At the eye of the storm of criticism swirling around the teleworking debate is the assertion that extending the OSH Act to home offices vitiates its original purpose, thereby tarnishing OSHA’s credibility and weakening the overall integrity of the OSH Act.<sup>27</sup>

### *A. Purpose of the OSH Act*

The OSH Act was designed to reduce work-related injuries by establishing and responding to national safety and health standards.<sup>28</sup> A review of the OSH Act’s legislative history reflects that the statute was primarily designed to prevent industrial accidents.<sup>29</sup> The types of hazards originally at issue were those which arose during the industrial revolution,<sup>30</sup> and continued to plague “workers in the dusty trades.”<sup>31</sup> Manufacturing and construction workers were specifically

24. *See id.* at 459.

25. *Id.* at 436.

26. *See* Lloyd Meeds, *A Legislative History of OSHA*, 9 GONZ. L. REV. 327, 327 (1974) (calling OSHA one of the “most highly praised” but also “most vilified legislative endeavors of [the twentieth century]” and stating that “[f]ew other laws have been so necessary and yet so difficult to resolve”); *OSHA Oversight: Hearing Before the Senate Labor Comm.*, FDCH Cong. (1995) (statement by Sen. Kay Bailey Hutchison) (stating that “more than in any other area of federal government regulation, [OSHA] has come to symbolize what is wrong”) [hereinafter Hutchison Testimony].

27. *OSHA and Home Workers: Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Education and the Workforce*, 106th Cong., available at 2000 WL 11067554 (statement by Rep. E. Clay Shaw) [hereinafter Shaw Testimony].

28. *See* THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, S. REP. NO. 91-1282, 91st Cong. (1970), available at 1970 WL 5923; Michael C. McClintock, *Foreword*, 9 GONZ. L. REV. 317 (1974) (Foreword to special issue on OSHA) (quoting the OSH Act § 2(b)).

29. S. REP. NO. 91-1282; *see also* *OSHA and Home Workers*, 106th Cong., available at 2000 WL 11067553 (testimony of Arthur G. Sapper, OSHA Practice Group, McDermott, Will & Emery, Wash. D.C.) [hereinafter January 2000 Sapper Testimony].

30. *See* S. REP. NO. 91-1282.

31. *Id.*

listed for consideration.<sup>32</sup> “Industrial plants” are mentioned throughout the language of the OSH Act.<sup>33</sup> Proponents of the Act relied upon compelling statistics which, at the time, illustrated a national industrial crisis in need of immediate resolution.<sup>34</sup> Agency authority under the OSH Act has been broadly interpreted as “coterminous with congressional power to regulate commerce.”<sup>35</sup> Congress deemed the Commerce Clause<sup>36</sup> was implicated in this context because of the impact work related injuries have on interstate commerce via lost wages, reduced productivity, and medical and disability expenses.<sup>37</sup> Whether a nexus exists between occupational safety, health, and commerce is beyond the scope of this Note. However, the fact that the OSH Act was founded on such an expansive premise, and functioned accordingly for almost thirty years, may help explain the reform movement which began in the mid-1990s.<sup>38</sup>

### B. 1995 Amendments: The “New OSHA”

OSHA received a great deal of criticism during the 104th Congress.<sup>39</sup> Legislators proposed extensive changes to the OSH Act that were designed to limit its regulatory power and reduce its impact

32. *Id.*

33. *Id.*

34. See H.R. REP. NO. 91-1291, at 14 (1970). The proffered evidence was striking: [t]he on-the-job health and safety crisis is the worst problem confronting American workers, because each year as a result of their jobs over 14,500 workers die. In only four years time, as many people have died because of their employment as have been killed in almost a decade of American involvement in Vietnam. Over two million workers are disabled annually through job-related accidents.

*Id.*

35. McClintock, *supra* note 28, at 321; see also U.S. CONST. art. I, § 8 (stating that “[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes”).

36. U.S. CONST. art. I, § 8.

37. See Richard S. Thwaites, Jr., *The Occupational Safety and Health Act of 1970: An Overview*, 9 GONZ. L. REV. 477, 479 (1974).

38. See Hutchison Testimony, *supra* note 26 (stating that “[w]hat has emerged over the past 25 years in OSHA is a culture of regulatory excess that eats away at the vitality of our economy”).

39. See JOHN HARTNETT, *OSHA IN THE REAL WORLD: HOW TO MAINTAIN WORKPLACE SAFETY WHILE KEEPING YOUR COMPETITIVE EDGE* 5 (1996).

on the private sector.<sup>40</sup> In May 1995, President Clinton announced “the new OSHA”<sup>41</sup> along with a general Regulatory Reinvention Initiative<sup>42</sup> which included a fresh perspective on the OSH Act, and was designed to meet four primary goals: to “cut obsolete regulations,” within government agencies; to “reward results, not red tape”; to “create grassroots partnerships” between regulating agencies and the people being regulated; and to “negotiate” rather than “dictate.”<sup>43</sup> The President also directed government agencies to increase communication with the private sector, with an ultimate goal of changing their traditional adversarial relationship to one based upon compromise and negotiated rulemaking.<sup>44</sup>

In particular, President Clinton directed agencies to consider how to achieve their goals less intrusively and to consider when “private sector alternatives . . . [might] better achieve the public good envisioned by the regulation.”<sup>45</sup> The President’s suggestions were well-received<sup>46</sup> and OSHA did make some attempts at reform.<sup>47</sup> However, not long after this directive to reduce bureaucracy and enhance negotiation with the private sector, OSHA took a decidedly controversial turn.<sup>48</sup>

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40. *See id.*

41. HARTNETT, *supra* note 39, at 30; *The Occupational Safety and Health Amendments of 1995: Hearings Before the Senate Labor and Human Resources Comm.*, 104th Cong. (1995) (testimony of Senator Judd Gregg) [hereinafter Gregg Testimony].

42. President’s Memorandum on Regulatory Reform, 31 WEEKLY COMP. PRES. DOC. 363 (Mar. 4, 1995).

43. *Id.*

44. *See id.*

45. *Id.*

46. *See* Gregg Testimony, *supra* note 41.

47. *See* HARTNETT, *supra* note 39, at 30-41.

48. *See* H.R. REP. NO. 106-1040 (2001), available at 2001 WL 29435.



*C. From Common Sense to Chaos: Taking the Lid Off Pandora's Box*<sup>49</sup>

In an advisory letter to a Texas credit services company on November 15, 1999, OSHA declared that employers are responsible for the health and safety of home workers.<sup>50</sup> Considering the potential liability for an estimated twenty million Americans who were working out of their homes at that time,<sup>51</sup> the business community responded with an overwhelming attack on the OSHA position.<sup>52</sup> Shortly after OSHA published the letter on its Web site, then Labor Secretary Alexis Herman rescinded the letter, but maintained his position that "employers still must work to ensure 'safe and healthful' work conditions for [home-based] employees."<sup>53</sup>

In an attempt to quell the raging debate, OSHA Administrator Charles Jeffress announced that OSHA will not inspect home offices, nor are employers expected to do so, out of respect for the privacy of the home.<sup>54</sup> However, Jeffress also stated that the agency "will . . . follow-up on complaints involving potentially hazardous factory work being performed in the home."<sup>55</sup> On the same day, OSHA issued a directive instructing compliance personnel on the scope of OSHA involvement in home-based worksites, and reiterating Jeffress' position statement, but leaving many questions

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49. According to Greek mythology, Pandora was "[t]he first woman, who was bestowed upon humankind as punishment for Prometheus's theft of fire and who out of curiosity opened a box containing all human ills and released them." THE AMERICAN HERITAGE COLLEGE DICTIONARY 986 (3d ed. 1997).

50. See OSHA Home Advisory Letter, *supra* note 14; Tan, *supra* note 14, at 26.

51. See J.C. Howard, *At-Home Work Spurs Risk Mgt. Concerns*, 104 NAT'L UNDERWRITER PROP. & CASUALTY RISK & BENEFITS MGMT. 6 (May 1, 2000).

52. See Kelly Dunn, *Is OSHA Leaving Home?*, 79 PERSONNEL J. 26 (Feb. 1, 2000).

53. *Id.*

54. See OSHA Formalizes Policy on Home-Based Work (Feb. 25, 2000), available at <http://www.osha.gov/media/oshnews/feb00/national-20000225.html>.

55. *Id.* "Examples include assembling electronics, using unguarded crimping machines, or handling potentially hazardous materials without adequate protection." *Id.*

unanswered.<sup>56</sup> In particular, issues that went unaddressed included how to distinguish between a home office and work performed in the home; which whistle-blowers deserve a response by OSHA; and whether this compromise position would alleviate concerns prompted by the threat of liability.<sup>57</sup>

## II. SOCIAL IMPACT OF TELEWORKING

Improving air quality and reducing traffic congestion are two of the most frequently cited reasons to telecommute.<sup>58</sup> The National Environmental Policy Institute (NEPI) estimates that allowing just ten percent of the nation's workforce to telecommute a mere one day a week would eliminate 12,963 tons of air pollution and save more than 1.2 million gallons of fuel each week.<sup>59</sup> Other employer incentives include reducing overhead costs and retaining employees in a tight labor market.<sup>60</sup> There is also growing governmental support to increase the number of teleworkers;<sup>61</sup> simultaneously, the commercial popularity of teleworking is on the rise.<sup>62</sup> Environmental and other quality of life issues are of particular concern in the metropolitan

56. See Home Based Worksites, OSHA Dir. No. CPL 2-0.125 (Feb. 25, 2000) [hereinafter OSHA Directive]; January 2000 Sapper Testimony, *supra* note 29.

57. See Paul Testimony, *supra* note 8. The Congressman specifically outlined:

Although OSHA has announced that it will only hold employers liable for conditions at home-based worksites if the employee is performing "hazardous manufacturing work," this proposal still raises serious concerns. . . . because any expansion of OSHA's regulatory authority in the homes represents a major expansion of federal authority far beyond anything intended by Congress when it created OSHA in the 1970s. . . . OSHA regulation of any type of work in the private residence opens the door to the eventual regulation of all home worksites.

*Id.*

58. See Karen Lee, *Governments Back Telework to Support Public Agenda*, EMPLOYEE BENEFIT NEWS, June 1, 2000; Rose, *supra* note 7, at A1.

59. Carole Keeton Rylander, *Take This Job and . . . Go Home*, FISCAL NOTES, Nov. 1, 2001, at 12, available at 2001 WL 13551779 (citing statistics from the NEPI, a Washington, D.C.-based nonpartisan research and advocacy organization).

60. See *id.*

61. See Alan Sipress, *Initiative to Encourage Telecommuting: Regional Goal Is to Double Number of People Working from Home or in Centers*, WASH. POST, Apr. 12, 2000, at A12.

62. See *Telework America 2001*, *supra* note 3.

Atlanta area,<sup>63</sup> where an estimated fifty-two percent of telecommuters live in the suburbs but travel into the city to go to work.<sup>64</sup> A survey in the Atlanta area showed that sixty-one percent of respondents believe their commute is going to get worse over the next four years, traffic is considered to be the “most urgently need[ed] improvement for metro Atlanta to have healthy, prosperous, growth,”<sup>65</sup> and seventy-five percent of respondents would be interested in working at home.<sup>66</sup>

Statistics also reveal strategic business reasons for leaders to consider providing teleworking programs. In particular, offering telecommuting programs reduces the amount of expensive commercial real estate needed to support an employer’s workforce.<sup>67</sup> Additionally, lowered absenteeism and continued productivity during inclement weather reduce business costs.<sup>68</sup> Some business leaders, however, have been reluctant to embrace the growing trend of teleworking<sup>69</sup> for fear they will lose control of remote workers or that the costs of telecommuting would be prohibitive.<sup>70</sup>

Not surprisingly, the idea of being liable for violating OSHA regulations in the home-office heightens employer concerns. In a poll of human resource professionals conducted shortly after OSHA announced the potential for liability, thirty-seven percent of

63. See Dan Chapman, *Telecommuting Lags Citing Productivity and Air Quality Concerns, Many Workers Like It. Bosses Aren't So Sure*, ATLANTA J. CONST., June 12, 2000, at D1.

64. See *id.*; United States Environmental Protection Agency, USA Air Quality Nonattainment Areas, available at <http://www.epa.gov/airs/nonattn.html> (last visited Sept. 20, 2000) (illustrating Atlanta air pollution regularly exceeds National Ambient Air Quality Standards).

65. Mark Bixler, *Gridlock, Pollution Top Concerns Poll Results: Armed with Survey, Groups Launch Drive to Keep Cars at Home in Metro Atlanta*, ATLANTA J. CONST., Apr. 29, 2000, at E3.

66. See *id.*

67. Rylander, *supra* note 59, at 12.

68. See *id.*; Tammy Joyner, *Business Still Gets Done as Snow Falls Teleworkers Don't Have Commutes*, ATLANTA J. CONST., Jan. 4, 2002, at F1 (discussing the benefits of telecommuting during a rare snowstorm in Atlanta; quoting Michael Dziak, President of Inteleworks, a Peachtree City consulting firm specializing in telecommuting as saying: “Any business executive who hasn’t set up contingency plans to assure critical workers are able to remain productive on [inclement weather] days . . . [is] losing out”).

69. See Bixler, *supra* note 65 (noting that “[s]ixty-one percent of leaders polled said they had no plans to allow more workers to telecommute during the next year”).

70. See PADDOCK, *supra* note 10, § 6.29(a).

respondents rejected the idea.<sup>71</sup> According to one executive, “[i]f an employee wants . . . to work at home, the employer should be absolved of any workplace liability if that workplace now becomes the employee’s home.”<sup>72</sup>

### III. SHOULD THE OSH ACT APPLY TO HOME OFFICES?

Opponents of employer liability for home workers suggest employers will be overburdened with questions such as whether floors are cluttered with children’s toys, whether a home is free of lead paint, and whether two-story homes have separate and approved fire escapes.<sup>73</sup> Senator “Kit” Bond, a Missouri Republican, called the OSHA proposal ridiculous, giving as an example the potential that “mothers working at home, who need to step over a child safety gate, will now be considered in a hazardous work environment.”<sup>74</sup> Another concern is the potential for privacy invasions associated with government-sponsored OSHA inspections of private residences.<sup>75</sup>

#### *A. Privacy Concerns: At What Cost Safety?*

Whether OSHA has become “compulsively intrusive,”<sup>76</sup> or with the February 25th directive, has properly delineated the parameters of its authority over the home work environment, remains to be seen. In that directive, OSHA indicated that, “*home offices*,”<sup>77</sup> will not be inspected, but inspections of “*other home-based worksites*” will be

71. See Dunn, *supra* note 52, at 26.

72. Tan, *supra* note 14, at 26 (quoting Christopher Anderson, Vice-President of the Massachusetts High Technology Council).

73. See Charles Crumpley, *OSHA Gets More Intrusive*, DAILY OKLAHOMAN, Jan. 9, 2000, at 1C.

74. *Sen. Bond Demands Withdrawal of OSHA’s Home Workplace Policy*, U.S. NEWSWIRE, Jan. 5, 2000.

75. See Paul Testimony, *supra* note 8 (calling the proposal “a massive invasion of employees’ privacy”).

76. Crumpley, *supra* note 73, at 1C (commenting that because “few homes could withstand the scrutiny of OSHA’s picky standards . . . the impact of the new interpretation [embodied in the OSHA advisory letter] was to chill so-called telecommuting or any other initiatives to do more work from home - the very thing that workers say they want”).

77. OSHA Directive, *supra* note 56 (emphasis added).

made if the agency receives notification of a potential violation.<sup>78</sup> OSHA defines “home office” as “[o]ffice work activities in a home-based worksite . . . [which]. . . may include the use of office equipment.”<sup>79</sup>

Although OSHA mentions home manufacturing as the type of in-home activity that is subject to agency inspection, OSHA broadly defines home-based worksites as “[t]he areas of an employee’s personal residence where the employee performs work of the employer.”<sup>80</sup> Such an expansive definition seems to leave the door open to inspections of a much wider range of in-home activities.<sup>81</sup> Further, OSHA has not indicated who has authority to make a complaint or whether some complaints will be taken more seriously than others.<sup>82</sup> Although OSHA has asserted that the scope of any inspections would be “limited to the employee’s work activities . . . [and would] not apply to an employee’s house or furnishings,”<sup>83</sup> the distinctions between those areas and activities subject to OSHA inspection and those not subject to inspection are not readily apparent and may be difficult to ascertain in the field.<sup>84</sup> By blurring these lines, OSHA may have failed in its attempt to quell the fears of those who believe that implementing these standards would violate private citizens’ Fourth Amendment rights.<sup>85</sup>

78. *Id.* (emphasis added).

79. *See id.* (listing “filing, keyboarding, computer research, reading [and] writing” as examples of home office activities, and “telephone, facsimile machine, computer, scanner, copy machine, desk [and] file cabinet” as examples of office equipment).

80. *Id.*

81. *See* Interview by Korva Coleman, Host of National Public Radio’s *Talk of the Nation*, with Jennifer Krese, Director of Employment Policy of the National Association of Manufacturers (Jan. 6, 2000) (stating that despite the fact that OSHA withdrew its original interpretation letter, “the interpretation [that employers are responsible for OSHA compliance in the home] is still very real and exists”), and with Anne Crossman, owner of Completed Systems, Inc. (Jan. 6, 2000) (stating she was “glad to hear that [the letter was rescinded] but [doesn’t] feel that [the issue has] gone away”).

82. *See id.*

83. OSHA Directive, *supra* note 56.

84. *See* January 2000 Sapper Testimony, *supra* note 29.

85. *See id.*

### *B. Administrative Searches Under the Fourth Amendment*

Administrative inspections or “searches”<sup>86</sup> have often implicated Fourth Amendment concerns.<sup>87</sup> The Fourth Amendment to the United States Constitution<sup>88</sup> prohibits unreasonable searches and seizures.<sup>89</sup> Courts have interpreted the Fourth Amendment’s main purpose as “safeguard[ing] the privacy and security of individuals against arbitrary invasions by governmental officials.”<sup>90</sup> It is generally recognized that a warrant and probable cause are prerequisites to finding a search reasonable.<sup>91</sup>

A warrantless search is considered *per se* unreasonable unless it falls within one of “a few . . . well-delineated exceptions.”<sup>92</sup> Whether or not a warrant issues depends upon the degree to which an individual had a reasonable expectation of privacy in the area

86. “The term *administrative search* typically describes inspections carried out according to a preexisting scheme established by statute or regulation.” Scott Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 407 (1988) (citing C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE* 267-68 (1986)).

87. See *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523 (1967); *Frank v. Maryland*, 359 U.S. 360, 374 (1959) (Douglas, J., dissenting); *District of Columbia v. Little*, 178 F.2d 13, 15 (D.C. Cir. 1949); *Banovetz v. King*, 66 F. Supp. 2d 1076 (D. Minn. 1999); David A. Christensen, *Warrantless Administrative Searches Under Environmental Laws: The Limits to EPA Inspectors’ Statutory Invitation*, 26 ENVTL. L. 1019 (1996); Susan M. McDonough, *The Fourth Power? Administrative Searches v. The Fourth Amendment*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 195 (1993); Zionne N. Pressley, Note, *Privacy or Safety: A Constitutional Analysis of Public Housing Sweep Searches*, 6 B.U. PUB. INT. L.J. 777, 779 (1997); Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority ‘Sweeping’ Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103 (1992).

88. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

89. U.S. CONST. amend IV.

90. *Camara*, 387 U.S. at 528; see also *Frank*, 359 U.S. at 364-66.

91. See *Carroll v. United States*, 267 U.S. 132, 161 (1925) (declaring that probable cause sufficient to authorize the issuance of a search warrant exists when “the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed”) (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878)).

92. *Katz v. United States*, 389 U.S. 347, 357 (1967).

searched.<sup>93</sup> It is well settled that an individual has a high expectation of privacy in his own home.<sup>94</sup> Some have suggested that an exception to the warrant requirement exists for administrative inspections.<sup>95</sup> However, the issue of OSHA inspections in private residences is relatively uncharted legal territory, as is the question of whether a warrant would be required to search a home worksite. “[A]s society increasingly values the right of individuals to be free from intrusive searches of their person and property,”<sup>96</sup> an in-home OSHA inspection may be deemed unconstitutional.<sup>97</sup> Reviewing how other in-home administrative inspections have fared when challenged as unconstitutional may provide insight into how the courts might respond to the privacy issues implicated in such inspections.

In *Camara v. Municipal Court of the City and County of San Francisco*,<sup>98</sup> the Supreme Court held that administrative searches are not immune to the Fourth Amendment warrant requirement.<sup>99</sup> There, the Court reversed *Frank v. Maryland*,<sup>100</sup> a prior case which seemed to carve out a warrant exception for administrative searches.<sup>101</sup> In *Frank*, the appellant was convicted under Baltimore law for resisting a city health inspector’s warrantless inspection of his home.<sup>102</sup> The appellant challenged the conviction as a violation of the Fourteenth

93. See *id.* at 357-59.

94. See *Camara*, 387 U.S. at 528-29. The explicit language of the Fourth Amendment states that, “[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV (emphasis added).

95. See Swink, *supra* note 10, at 858, 871. “Because telecommuting challenges traditional notions of how work is structured, it poses unique questions in the area of employment law. . . . One of the major hurdles . . . will be balancing the privacy of the home (and the employee) with the employer’s duties . . .” *Id.*

96. ROTHSTEIN ET AL., *supra* note 22, at 399.

97. See Paul Testimony, *supra* note 8.

98. 387 U.S. 523 (1967).

99. See *id.* at 534. “[A]dministrative searches [such as those conducted by a municipal housing agency inspector] are significant intrusions upon the interests protected by the Fourth Amendment . . . such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.” *Id.*

100. 359 U.S. 360 (1959).

101. See *Camara*, 387 U.S. at 534.

102. See *Frank*, 359 U.S. at 361-62.

Amendment, arguing that a warrant was required to protect his constitutional rights.<sup>103</sup>

The Court held that the warrantless search was not unconstitutional, because

[t]he attempted inspection of appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. . . . No evidence for criminal prosecution is sought to be seized . . . [therefore], [a]ppellant . . . cannot properly resist . . . [an] act . . . consistent with the maintenance of minimum community standards of health and well-being, including his own.<sup>104</sup>

The *Camara* Court rejected the assertion in *Frank* that the constitutional privacy interests “at stake in . . . inspection cases are merely ‘peripheral’. . . [because] the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>105</sup> In *Camara*, the appellant was charged with violating the San Francisco Housing Code by refusing to allow a warrantless inspection of his leased apartment.<sup>106</sup> The Court held that this type of administrative search falls within the purview of the Fourth Amendment, and thus is unconstitutional if conducted without a warrant.<sup>107</sup> However, the Court suggested that the threshold for cause might be lower in these cases<sup>108</sup> and proposed a balancing test to determine whether there is probable cause sufficient to justify issuing a warrant in such cases.<sup>109</sup>

In outlining this balancing test, the Court reasoned that “the need for the inspection must be weighed in terms of these reasonable goals

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103. *See id.* at 362.

104. *Id.* at 366.

105. *Camara*, 387 U.S. at 530.

106. *See id.* at 525.

107. *See id.* at 534.

108. *See Camara*, 387 U.S. at 538.

109. *See id.* at 535.



of code enforcement.”<sup>110</sup> Some have suggested that this test is “‘ill-defined’ . . . [and] pushe[s] traditional probable cause off center stage and . . . [into] an uncertain supporting role.”<sup>111</sup> Others believe that the test “created injustice and unconstitutional results”<sup>112</sup> by placing too much discretion in government hands, and tipping the scales in favor of administrative agencies.<sup>113</sup> Despite that criticism, *Camara* continues to represent the prevailing view on administrative inspections.<sup>114</sup>

The situation in *Camara* is not altogether different from the type of scenario that may arise should OSHA pursue home worksite inspections. In fact, it was increased government regulation and inspections that led the Court in *Camara* to reexamine its holding in *Frank*.<sup>115</sup> If city health inspectors can be likened to OSHA compliance officers, the *Camara* rationale suggests that an OSHA inspection of a home-office made contrary to a homeowner’s consent—but based on a sufficient public interest—would be constitutionally valid.<sup>116</sup> Consequently, whether the OSH Act should apply to home worksites may depend upon whether the public interest in limiting certain safety and health risks outweighs an individual’s expectation of privacy in his own home.

### C. Prevalence of Teleworker Injuries

Unlike the compelling need apparent in the “dusty trades” where the OSH Act was born,<sup>117</sup> “there are [currently] no known claims of fatalities or serious injuries occurring at telecommuters’ homes

110. *Id.* “If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” *Id.* at 539 (referencing *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186 (1946)).

111. Sundby, *supra* note 86, at 400.

112. McDonough, *supra* note 87, at 230.

113. *See id.*

114. *See id.* at 231.

115. *See id.* at 202-04.

116. *See generally Camara*, 387 U.S. 523.

117. *See discussion supra* Part I.

arising from the activities of their employment.”<sup>118</sup> Further, “the types of jobs most telecommuters perform in their homes do not lend themselves to substantial risks for fatalities or serious injuries.”<sup>119</sup> Without evidence of a quantifiable health and safety risk it is unclear why the public is (or should be) interested in agency regulation of the home worksite.

Many teleworkers use computers, telephones, fax machines and other typical office equipment when working at home. Theoretically then, in the absence of specific telecommuter injury data, the prevalence of injuries associated with working with office equipment might shed some light on whether reducing those risks should be part of our social agenda. OSHA and others suggest that a plethora of repetitive motion-related musculoskeletal disorders is associated with these tasks; yet the methods used to establish evidence of such injuries has been criticized as unreliable and inconclusive junk science.<sup>120</sup> In fact, Congress was recently compelled to exercise its authority under the Congressional Review Act of 1996<sup>121</sup> (CRA) in overturning OSHA’s epic ergonomics standard<sup>122</sup> due to a lack of proof that any real safety problem existed.<sup>123</sup> On March 22, 2001, President Bush signed a congressional resolution disapproving the

118. Swink, *supra* note 10, at 872.

119. *Id.* (citing Gil Gordon, *The OSHA Episode: How Molehills Become Mountains*, TELECOMMUTING TOOLS, Jan. 29, 2000, at [http://www.gilgordon.com/telecommuting/osha\\_interp.html](http://www.gilgordon.com/telecommuting/osha_interp.html)).

120. See Eugene Scalia, *OSHA’s Ergonomics Litigation Record: Three Strikes and It’s Out*, CATO INSTITUTE POLICY ANALYSIS, available at <http://www.cato.org> (last visited Jan. 2, 2002).

121. Congressional Review Act, 5 U.S.C. §§ 801-08 (2000).

122. See Ergonomics Program, 66 Fed. Reg. 20,403 (2000). OSHA rolled out its 600-page ergonomics rule on Nov. 14, 2000, during the final days of the Clinton Administration. *Id.*

123. See *The Need to Reduce Musculoskeletal Disorders in America’s Workforce: Hearings Before the Subcomm. on Labor, Health and Human Services, and Education of the Senate Appropriations Comm.*, 107th Cong. (2001) (statement by Secretary of Labor Elaine Chao) [hereinafter Chao Testimony]. Secretary Chao explained that OSHA’s ergonomics plans failed in part because

[i]n the [Clinton] Administration’s rush to issue an ergonomics standard, [the Department of Labor through OSHA] acted before the completion of a National Academy of Science study that would have provided all stakeholders with more information . . . . In the future, the Department should make sure that it makes determinations based on the best available science.

*Id.*

rule, calling it “unduly burdensome” due to a combination of excessive employer costs and “uncertain” public benefits.<sup>124</sup> Randel Johnson, Vice President for Labor Policy at the United States Chamber of Commerce, seconded the sentiment calling the ergonomics rule “overbroad and unreasonable” and saying the rule “exemplif[ied] irresponsible government at [its] worst.”<sup>125</sup> Eugene Scalia, a known critic of OSHA’s policies and President Bush’s nominee for Labor Solicitor, said of the rule: “[N]o agency should be permitted to impose on the entire American economy a costly rule premised on a ‘science’ so mysterious that the agency itself cannot fathom it.”<sup>126</sup> The President’s signature, executing Congress’ decision to overturn the rule, actually “marks the first time a federal agency rule has been overturned under the [CRA], which provides a mechanism for Congress to consider and then vote up or down on controversial federal rules.”<sup>127</sup>

#### *D. Congressional Response to “The Letter”*

With similar passion, Congress quickly responded to the question of whether employers should be liable for the health and safety of their home workers. The existence of compelling interests on both sides of the debate was evident in the legislation proposed during the 106th Congress.

The Home Workplace Preservation Act of 2000<sup>128</sup> would amend the OSH Act, expressly relieving employers of liability for “federal health and safety violations that occur in their employee’s home

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124. President’s Statement on Signing Legislation to Repeal Federal Ergonomics Regulation, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 26, 2001); Ergonomics Program, 66 Fed. Reg. 20,403 (2001); *Bush Signs Resolution of Disapproval*, 31 O.S.H. Rep. (BNA) 253 (BNA) (2001) [hereinafter *Resolution of Disapproval*] (calling Congress’ move a “good and proper use” of the CRA because federal agencies ‘need to be held accountable’”).

125. *Resolution of Disapproval*, *supra* note 124.

126. Scalia, *supra* note 120.

127. *Resolution of Disapproval*, *supra* note 124.

128. H.R. 3530, 106th Cong. (2000).

offices.”<sup>129</sup> According to Representative E. Clay Shaw, Jr., who introduced the bill on January 24, 2000, “[t]elework is a necessary component of the structure of modern work patterns essential for helping employees better balance work and home life. . . . [It is] a means to improve public health, productivity, economic growth and quality of life and is a solution to air quality and decreasing traffic congestion.”<sup>130</sup> Representative Shaw also stated that “[t]elework . . . has special benefits for the poor, who spend a disproportionate percentage of their income on transportation.”<sup>131</sup> His primary concern is that employers will terminate their telecommuting programs if they are required to comply with traditional OSHA regulations.<sup>132</sup>

The Home Office Protection Enhancement Act (HOPE)<sup>133</sup> introduced by Representative John D. Hayworth on January 27, 2000, would also amend the OSH Act to render it inapplicable “to employment performed in a workplace located in the employee’s residence.”<sup>134</sup> Speaking in support of the bill, Congressman Ron Paul stated that extending OSHA regulations into the home would cause employers to eliminate the option of teleworking, thus having a negative impact on the environment as well as people in need of alternative worksites.<sup>135</sup>

Representative Gregory Walden introduced the American Telecommuter Protection Act<sup>136</sup> on February 10, 2000, to amend the

129. Shaw Testimony, *supra* note 27.

130. *Id.*

131. *Id.* “A survey by a New York based consulting and research firm . . . shows that . . . one quarter of telecommuters are in blue collar jobs.” *Id.*

132. *See id.*

133. H.R. 3539, 106th Cong. (2000).

134. *Id.*

135. *See* Paul Testimony, *supra* note 8. According to Representative Paul:  
[a]ny federal requirements holding employers liable for the conditions of a home office may well cause . . . employers to forbid their employees from telecommuting, thus shutting millions of mothers, persons caring for elderly parents, and disabled citizens out of the workforce!

Federal policies discouraging telecommuting will harm the environment by forcing American workers out of their home[s] and onto America's already overcrowded roads.

*Id.*

136. H.R. 3643, 106th Cong. (2000).

OSH Act to expressly provide that it does not apply to the home worksite.<sup>137</sup> Findings in this bill included:

- (1) [Telecommuting] is the best option for many as they raise families or deal with illness to perform their work at home.
- (2) OSHA and other Government entities should not interfere with the home lives of law-abiding Americans.
- (3) The Federal Government should not put employers in a situation where they are required to interfere with the home life of an employee.
- (4) The home work environment is sufficiently different from the work environment envisioned in the Occupational Safety and Health Act of 1970.<sup>138</sup>

Representative Thomas J. Campbell introduced House Bill 3588 on February 8, 2000.<sup>139</sup> Like the proposed HOPE Act,<sup>140</sup> and the Home Workplace Preservation Act,<sup>141</sup> this proposed legislation would amend the OSH Act to expressly state that the Act does not apply to employment performed in the home.<sup>142</sup> However, this bill also added the caveat that OSHA regulations *would* apply in the home if such “employment involves hazardous materials or the workplace was created so that that Act would not apply to the workplace.”<sup>143</sup>

Michigan Representative Peter Hoekstra continued the flurry of legislation by introducing the Home Office Worker Protection Act of 2000 in the House on March 23, 2000.<sup>144</sup> In it, he suggested that

137. *See id.*

138. *Id.*; *see also* Shaw Testimony, *supra* note 27 (stating his belief that “when OSHA was created, this was not what its framers had in mind”); Paul Testimony, *supra* note 8.

139. H.R. 3588, 106th Cong. (2000).

140. H.R. 3539, 106th Cong. (2000).

141. H.R. 3530, 106th Cong. (2000).

142. *See* H.R. 3588, 106th Cong. (2000).

143. *Id.*

144. H.R. 4080, 106th Cong. (2000).

OSHA regulations should apply to “home office employment” in certain situations.<sup>145</sup> First, Representative Hoekstra recommended that employers be required to “report work-related injuries and illnesses sustained by an employee engaged in home office employment,”<sup>146</sup> subject to sanctions for failing to do so.<sup>147</sup> Second, home office inspections would be prohibited.<sup>148</sup> Finally, Representative Hoekstra encouraged “maxim[um] public participation”<sup>149</sup> in the form of enhanced notice of rule-making and increased opportunities for public comment on the regulations.<sup>150</sup>

Senator Rick Santorum introduced the Telework Tax Incentive Act<sup>151</sup> on April 13, 2000 in an effort to offset the potential business costs associated with teleworking.<sup>152</sup> Senator Santorum’s plan was to create an income tax credit for teleworking expenses.<sup>153</sup> The maximum annual credit given to an employee or employer engaged in a “teleworking arrangement” would be \$500.<sup>154</sup> In support of this legislation, Senator Santorum offered compelling statistics highlighting both the prevalence of teleworking, and potential cost savings associated with the practice.<sup>155</sup>

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145. *Id.*

146. *Id.*

147. *See id.*

148. *See id.*

149. *Id.*

150. *See* H.R. 4080, 106th Cong. (2000). Specifically, such notice publication would be electronic in order to target home workers, and a minimum of sixty days would be allowed for public comment on any proposed rules. *See id.*

151. S. 2431, 106th Cong. (2000).

152. *Id.*

153. *See id.* (proposing to amend the 1986 Internal Revenue Code).

154. *Id.* “The term ‘teleworking arrangement’ means an arrangement under which an employee teleworks for an employer not less than 75 days per year.” *Id.*

155. *See id.* Proposed congressional “findings” included the following:

Congestion on the Nation’s roads costs over \$74,000,000,000 annually in lost work time, fuel consumption and costs of infrastructure and equipment repair; . . . On average on-road-vehicles contribute 30 percent of nitrogen oxides emissions; . . . staying at home to work requires 3 times less energy consumption than commuting to work; . . . if . . . 10 to 20 percent of commuters switched to teleworking, 1,800,000 tons of regulated pollutants would be eliminated, 3,500,000,000 gallons of gas would be saved, 3,100,000,000 hours of personal time would be freed up, and maintenance and infrastructure costs would decrease by \$500,000,000 annually [due to] reduced congestion and reduced vehicle

The Rural Telework Act of 2000<sup>156</sup> would amend the Consolidated Farm and Rural Development Act to “authorize the Secretary of Agriculture to make competitive grants to establish National Centers for Distance Working to provide assistance to individuals in rural communities to support the use of teleworking in information technology fields.”<sup>157</sup> According to Senator Paul Wellstone, who introduced the bill on April 13, 2000, “teleworking allows rural employees to perform skill intensive information technology jobs from their communities for firms located outside rural communities.”<sup>158</sup> His goals in proposing the bill included reducing unemployment rates and increasing higher quality, modern work opportunities for rural workers, including those individuals located on Indian reservations.<sup>159</sup>

### *E. 2001: Three Strikes—OSHA’s Out?*

While such immediate congressional and public opposition to the idea of OSHA in the home may have alone been sufficient to sound the idea’s death knell, three particular events in 2001 seem certain to do so.

#### *1. The New Freedom Initiative*

In February 2001, President Bush announced his New Freedom Initiative (“the Initiative”).<sup>160</sup> The Initiative represents a series of

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miles traveled; . . . The increase in work from 1969 to 1996, the increase in hours mothers spend in paid work, [along] with a shift toward single-parent families resulted in families . . . experiencing a decrease of 22 hours a week (14 percent) in parental time available outside of paid work they could spend with their children; . . . Companies with teleworking programs have found that teleworking can boost employee productivity [5 to 20] percent; . . . 60 percent of the [current] workforce is involved in information work; . . . [which allows and encourages] decentralization of paid work . . . 19,000,000 Americans [will be] teleworking by the year 2002, 5 times the amount in 1990.

*Id.*

156. S. 2447, 106th Cong. (2000).

157. *Id.*

158. *Id.*

159. *See id.*

160. Remarks Announcing the New Freedom Initiative, 37 PUB. PAPERS 5 (Feb. 5, 2001).

proposals to Congress designed to, inter alia, facilitate disabled Americans entering the the workforce.<sup>161</sup> In the Initiative, President Bush specifically referred to OSHA's November 1999 advisory letter and proposed amending the OSH Act to prohibit its application in worksites where employees use telephones, computers or other electronic devices to work from home.<sup>162</sup> The President asserted that applying the OSH Act to home offices would "have had a chilling effect on teleworking, as employers would seek to avoid potential liabilities."<sup>163</sup> President Bush felt the need to take such action despite OSHA's subsequent withdrawal of the advisory letter because "OSHA . . . has not yet foreclosed future action."<sup>164</sup> Due to the events of 9-11, whether Congress will adopt the Initiative will likely remain unclear for some time as many labor and employment related issues will rightly take a back seat to international affairs.<sup>165</sup> However, the events of 9-11 have already begun to indirectly impact the issue as the business world seems to be seeking safe haven from future terrorist actions in the form of teleworking.<sup>166</sup>

## 2. 9-11

The tragedy of 9-11 has further fueled support for telecommuting.<sup>167</sup> Workers are now more afraid to enter skyscrapers, travel, and be present in large crowds.<sup>168</sup> Business leaders have also

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161. President George W. Bush, *New Freedom Initiative*, Feb. 2001, at Foreword [hereinafter *New Freedom Initiative*].

162. *Id.* at 13.

163. *Id.*

164. *Id.*

165. *Congress Likely to Stall Labor Legislation as Focus Turns to Economy, Terrorist Fight*, 31 O.S.H. Rep. (BNA) 879 (Sept. 27, 2001).

166. Amy Joyce, *Getting in Gear to Telecommute; Interest in Work-at-Home Options Is Up Since Terrorist Attacks, Advocates Say*, WASH. POST, Dec. 31, 2001, at E1.

167. *Id.*

168. Human Resource Department Management Report, Nov. 1, 2001, available at 2001 WL 18381280 (reporting that according to a post-crisis Gallup Poll, 43% of Americans are less willing to fly, 35% are less willing to enter skyscrapers, and 30% are less willing to attend events with large crowds); Diane E. Lewis, *Emotional Scars Still Raw in U.S. Workplace Fear, Tension Linger Months After Attacks*, BOSTON GLOBE, Nov. 18, 2001, at H1.



been brutally reminded of the need to “decentralize intellectual property.”<sup>169</sup> Psychologically, workers are placing a higher value on being close to friends and family.<sup>170</sup> As a result, employees and employers are turning to telecommuting for both emotional comfort and business preservation.<sup>171</sup> One commentator has even expressed America’s need for telecommuting by drawing an eerie comparison with terrorist “worksites,” stating:

I do not understand why business cannot be done successfully from a virtual workplace in virtual New York with full videoconferencing facilities, when Osama bin Laden and Al Qaida [sic] can carry on their worldwide activities so successfully from the caves of a primitive country like Afghanistan. It is time to learn from the terrorists.<sup>172</sup>

The potential downside to a full scale worker retreat into the “caves” of their own homes is that association through a team type concept can also provide comfort in times of stress.<sup>173</sup> “[I]f everyone is home, ‘you lose the benefit of having other people around you.’”<sup>174</sup> Further, “[s]ome telecommuters report feelings of isolation,

169. Joyce, *supra* note 166, at E1 (quoting Chuck Wilsker of International Telework Association & Council; reporting that a Society for Human Resource Management study done following 9-11 indicated that 14% of human resource executives surveyed believe telecommuting would “be preferred or will grow at a faster rate pace than previously expected.”). Gil Miller, Vice President of the Center for Telecommunications and Advanced Technology at Mitretek Systems Inc., stated that 9-11 highlighted the fact that telecommuting “makes good business sense. You’re able to conduct business in the face of whatever tragedy.” *Id.*

170. Torri Minton, *Telecommuting From Terror/More Working From Home After Sept. 11 Attacks*, S.F. CHRON., Oct. 28, 2001, at W1.

171. *Id.*; see also Stephen Barr, *Terrorism, Anthrax Crises Heighten Lawmakers’ Desire to Expand Telecommuting*, WASH. POST, Oct. 22, 2001, at B2 (“The virtual reality of telecommuting seems closer to reality after the Sept. 11 terrorist attacks and the anxiety caused by the discovery of anthrax in congressional and postal offices.”); Joyce, *supra* note 166, at E1; Lewis, *supra* note 168.

172. N.D. Batra, *New York, Virtual New York*, STATESMAN (India), Nov. 19, 2001. Professor Batra is a Professor of Communications at Norwich University, Vermont. *Id.*

173. Joyce, *supra* note 166, at E1.

174. *Id.* (quoting Jean Shaughnessy-Hodges of Freeman Business Solutions, a Potomac, Maryland-based business management firm).

alienation and lack of support.”<sup>175</sup> Teleworking is clearly not a panacea for the multitude of challenges workers will face following 9-11. However, offering it as an option may elevate workers’ job satisfaction and emotional well-being. In light of these new psychological and strategic demands for an alternative workplace paradigm, the future of any obstacle impeding the success of teleworking appears dim. The events of 9-11 brought life into razor-sharp perspective for many Americans. Consequently, the public’s interest in home office injuries may be diminished in the face of such unspeakable horrors lurking elsewhere.<sup>176</sup> Americans may in fact be more willing to work at home, at their own risk, in exchange for peace of mind.

### 3. *The Ergonomics Fiasco*

The ergonomics debacle further fueled the 2001 teleworking fire by drawing attention to OSHA’s rulemaking processes.<sup>177</sup> In particular, OSHA justified its authority to promulgate the ergonomics rule under the general duty clause in the OSH Act.<sup>178</sup> The general duty clause establishes that “[e]ach 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

175. Swink, *supra* note 10, at 863 (citing *More on Telecommuting*, OR. EMP. L. LETTER, May 2000, available in LEXIS, News Library, Emplaw database).

176. See Phan, *supra* note 12, at C14 (quoting Bob Timm, an editor at About.com in Manhattan, as saying: “A lot of people’s personal priorities have changed. . . . [After 9-11] I was . . . apprehensive about spending as much time in the city as I was before. [Working from home outside of Manhattan] you don’t worry about entering Penn Station 10 times a week and thinking about what might be waiting for you there.”).

177. *Making Sense of OSHA Rulemaking: A Thirty Year Perspective: Hearings Before the Subcomm. on Workforce Protections of the House Comm. on Education and the Workforce*, 107th Cong. (2001) (statement by Subcommittee Chairman Charlie Norwood) (stating his belief that Congress’ response to the ergonomics rule represented a “point of critical mass when it comes to OSHA rulemaking” and referencing those events as a primary impetus for the hearings) [hereinafter Norwood Testimony].

178. See Eugene Scalia, *Ergonomics: OSHA’s Strange Campaign to Run American Business*, 6 NAT’L LEGAL CTR. WHITE PAPER 22-31 (1994) (discussing the problems with OSHA’s proposal for national ergonomics standards, and reliance upon the general duty clause when little scientific data was available to support the asserted need for regulations).

death or serious physical harm to his employees.”<sup>179</sup> That method of justification, however, raises substantial constitutional issues—such as whether the authority and discretion inherent in such nonspecific statutory language represents an improper delegation of power to OSHA.<sup>180</sup>

#### IV. AGENCY RULEMAKING AND JUDICIAL REVIEW

The OSHA advisory letter and subsequent directive regarding the application of the OSH Act to the home worksite is an example of what some call “[r]ulemaking through the back door.”<sup>181</sup> The fact that there is strong congressional opposition to the idea of OSHA in the home,<sup>182</sup> and that the OSH Act by all accounts was intended to regulate *industrial* worksites<sup>183</sup> raise the issue of whether OSHA overreached its rulemaking authority in issuing the decision.<sup>184</sup>

Administrative agencies typically perform legislative, judicial and enforcement functions.<sup>185</sup> When disputes pertaining to the enforcement of the OSH Act arise, the Occupational Safety and Health Review Commission (OSHRC) is empowered to adjudicate the dispute.<sup>186</sup> In essence, Congress created the OSHRC as a check on OSHA’s power to enforce its own rules.<sup>187</sup> However, the efficacy of that precaution has been questioned, given the Supreme Court’s traditionally deferential treatment of administrative rulemaking.<sup>188</sup> In

179. 29 U.S.C. § 654(a)(1) (1994).

180. See Scalia, *supra* note 178, at 25; see also Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

181. April 2000 Sapper Testimony, *supra* note 20.

182. See discussion *supra* Part III.D (reviewing the numerous bills proposed in the 106th Congress that expressly prevent the application of the OSH Act to private home worksites).

183. See discussion *supra* Part I.A; January 2000 Sapper Testimony, *supra* note 29.

184. See January 2000 Sapper Testimony, *supra* note 29.

185. NICHOLAS A. ASHFORD & CHARLES C. CALDART, TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT 59 (Revised ed. 1996).

186. See *id.* at 60.

187. See April 2000 Sapper Testimony, *supra* note 20.

188. See *id.*; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); see, e.g., *Martin v. OSHRC*, 499 U.S.

fact, some commentators suggest that OSHA abuses the judicial deference it is afforded by circumventing the notice and comment requirements administrative agencies typically must follow pursuant to the Administrative Procedure Act.<sup>189</sup>

The deferential standard afforded to administrative rulemaking is evidenced in the holdings of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>190</sup> *Bowles v. Seminole Rock & Sand Co.*,<sup>191</sup> and *Martin v. OSHRC*.<sup>192</sup> In *Chevron*, the Supreme Court evaluated the Environmental Protection Agency's interpretation of "stationary source" in the Clean Air Act Amendments of 1977.<sup>193</sup> In upholding the validity of the interpretation, the Court outlined a two-part inquiry to be used during judicial review of an administrative agency's interpretation of the statute it administers.<sup>194</sup> The first question is "whether Congress has directly spoken to the precise question at issue. . . [and] if the statute is silent or ambiguous [on] the specific issue . . . [the second question is] whether the agency's answer is based on a permissible construction of the statute."<sup>195</sup>

In *Bowles*, the Administrator of the Office of Price Administration brought suit against a manufacturer of crushed stone for violating the Emergency Price Control Act.<sup>196</sup> There, the Court asserted that although the Constitution and Congress' intent "may be relevant . . . [but] the ultimate criterion [in interpreting an ambiguous administrative regulation] is the administrative [agency's]

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144 (1991) ("CF&I"); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

189. See Administrative Procedure Act, 5 U.S.C. §§ 551-58 (1994); April 2000 Sapper Testimony, *supra* note 20; James N. Christman et al., *Courts Should Not Defer to Agencies' Interpretation of Their Own Rules*, LEGAL BACKGROUNDER, May 12, 2000.

190. 467 U.S. 837 (1984).

191. 325 U.S. 410 (1945).

192. 499 U.S. 144 (1991).

193. See 467 U.S. at 839-40.

194. See *id.* at 842-43.

195. See *id.*

196. 325 U.S. at 412.

interpretation . . . unless it is plainly erroneous or inconsistent with the regulation.”<sup>197</sup>

Finally, in *Martin* (“*CF&I*”),<sup>198</sup> the Court specifically addressed OSHA’s rulemaking parameters.<sup>199</sup> There, the Court stated that the OSHA Secretary’s interpretations would be upheld against the OSHRC’s interpretations if found to be “reasonable.”<sup>200</sup> In other words, OSHA gets the benefit of the doubt when it engages in statutory interpretation.<sup>201</sup> Critics have suggested that with this decision, the Court “emasculate[d]”<sup>202</sup> the OSHRC, tilting the balance of power in favor of the executive branch.<sup>203</sup> Commentators have suggested that because administrative agencies “[know] that they can act almost with impunity,” they “create law without following statutorily prescribed procedures.”<sup>204</sup> In particular, some analysts suggest the *CF&I* decision provides a legal foundation that “encourages OSHA to resolve major policy issues in secretly-written interpretation letters and compliance directives”<sup>205</sup> like the very ones at issue in this Note.

OSHA’s response to the teleworking controversy belies an awareness that the agency may have overstepped its bounds.<sup>206</sup> An

197. *Id.* at 414.

198. 499 U.S. 144 (1991).

199. *See id.*

200. *Id.* at 155-59.

201. *See* April 2000 Sapper Testimony, *supra* note 20; *see also* Christman et al., *supra* note 189; Manning, *supra* note 188.

202. April 2000 Sapper Testimony, *supra* note 20.

203. *See* Christman et al., *supra* note 189 (arguing that this deference may not be justified in the “real world” and that the deference is most egregious when agencies are “empowered, first, to create regulations and then, in case they have second thoughts, to interpret them as they see fit”); April 2000 Sapper Testimony, *supra* note 20 (stating that “[t]he *CF&I* Steel decision upset the balance of power that Congress carefully wrote into the statute . . . [and] undermines the rulemaking process”).

204. Christman et al., *supra* note 189 (citing Judge Williams’ portion of the opinion in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *cert. denied*, *Appalachian Power Co. v. EPA*, 532 U.S. 903 (2001)).

205. *See* April 2000 Sapper Testimony, *supra* note 20.

206. *See* *Senators Call on Herman to Reform Standard Interpretation Letter Procedures*, 30 O.S.H. Rep. (BNA) 485 (May 18, 2000) (reporting that the teleworking controversy slowed OSHA’s issuance of interpretation letters from fifty-eight during January through April 1999 to a mere ten during the same period in 2000) [hereinafter *Senators Call*].

internal audit of the Department of Labor's Office of the Inspector General (OIG) recently revealed that OSHA is now "revising its internal policies and procedures to strengthen requirements for letters 'which provide interpretations of the OSH Act or significantly expand on existing policies.'"<sup>207</sup> The OIG effectively slapped OSHA's hand in the report by making five specific recommendations to guide OSHA in that internal inquiry.<sup>208</sup> Most relevant to this discussion are the first two recommendations: 1) "OSHA should develop written procedures that specifically govern the preparation and processing of interpretation letters," and 2) "Language in OSHA directives that clouds the policy role of interpretation letters should be clarified."<sup>209</sup>

Coincidentally, in the same year that OSHA faced the ergonomics failure and the teleworking controversy, the OSH Act celebrated its thirtieth birthday. Although it was the landmark year that prompted the House Subcommittee on Workforce Protections to hold hearings on the topic of OSHA rulemaking,<sup>210</sup> the ergonomics and teleworking issues also encouraged the discussion.<sup>211</sup> While this age-old debate over OSHA's authority continues, the need and desire for teleworking increases.<sup>212</sup> Until the issue is resolved, the business world must find a workable arrangement that adequately protects employee rights but limits employer liability. A reevaluation of basic employment and contract doctrines may provide some guidance toward that end.

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207. *Id.* (quoting the OIG audit).

208. *Id.*

209. *Id.*

210. Norwood Testimony, *supra* note 177. Chairman Norwood opened the hearings by saying "We are here today to discuss a topic of endless fascination, frustration and complexity – OSHA's standards rulemaking process. I say fascination because it has been a constant source of wonder to me how it is that everything Congress manages to legislate seems to get turned on its head in the regulatory process. I say frustration because it seems to me there isn't much of anyone these days, I dare say on both sides of the aisle, who is completely satisfied with OSHA's rulemaking efforts."

*Id.*

211. *Id.*

212. *See supra* Parts II, III.E.2.

## V. QUID PRO QUO: TOWARD A WORKABLE PRIVATE SOLUTION

One of the primary goals of our legal system is to provide relief for injured people.<sup>213</sup> When new legal issues arise, such as the question of employer liability in the home, it is often unclear which path will lead most directly to that end. Reviewing some basic employment law doctrines may help clarify whether alternative legal remedies adequately address teleworkers' occupational safety and health needs or whether OSH Act compliance is the best way to protect those interests.<sup>214</sup>

### A. *The Employment Relationship*

#### 1. *General Tenets*

The doctrine of master-servant liability is classic American jurisprudence.<sup>215</sup> Traditionally, the common law duties of an employer for the protection of his employees included, among others, “[t]he duty to provide a safe place to work,”<sup>216</sup> and “[t]he duty to promulgate and enforce rules for the conduct of employees which would make the work safe.”<sup>217</sup> Contrary to the time when employees expected broad “Big Brother”<sup>218</sup>-type protections from their employers, modern employees seem more concerned about protecting their own privacy rights.<sup>219</sup>

Understanding the nature of the employment relationship will help clarify whether and how employers may be held responsible for their

213. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

214. See Swink, *supra* note 10, at 858-59 (arguing that “existing employment law doctrines could, and should, be applied to telecommuters”).

215. See KEETON ET AL., *supra* note 213, at 568-69, 571.

216. *Id.* at 569.

217. *Id.*

218. The concept of “Big Brother” came from the novel *1984* by George Orwell. The term has become identified with “[a] ruthlessly oppressive or authoritarian state, organization, or leader.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 136 (3d ed. 1997).

219. See KEETON ET AL., *supra* note 213, at 849-54.

employees. Ultimately, the employment relationship is a contractual one.<sup>220</sup> Contract language alone, however, is not always determinative of the relationship between the parties.<sup>221</sup> In most cases, a variety of factors must be weighed to determine a worker's precise status and thus the hiring party's concomitant liability.<sup>222</sup>

If a worker is classified as an independent contractor rather than an employee, the employer may be relieved of a certain amount of liability.<sup>223</sup> For example, employees, but not contractors, are generally protected from discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act,<sup>224</sup> and the Americans with Disabilities Act.<sup>225</sup> In addition, certain wage, hour, unemployment, and workers' compensation laws apply to employees but not independent contractors.<sup>226</sup>

## 2. Defining "Employee"

Several traditional tests are used to determine whether an individual is classified as an employee under state or federal laws.<sup>227</sup>

### a. Right to Control Test

The Restatement (Second) of Agency defines a "servant" as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."<sup>228</sup> One of the factors often considered in determining the degree of control over

220. See ROTHSTEIN ET AL., *supra* note 22, at 75.

221. See *id.* at 83.

222. See *id.* at 545-50.

223. See Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457 (1999).

224. See *id.* at 457; see also Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2000).

225. See Barron, *supra* note 223, at 457; Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994).

226. See Barron, *supra* note 223, at 457-58.

227. See *id.*

228. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958).



the worker is the extent to which the employer supplies the work tools or the actual work place.<sup>229</sup> The right to control test, originally developed to define the parameters of an employer's tort liability, is currently the test used by the Internal Revenue Service (IRS) to determine whether employers have obligations for certain workers.<sup>230</sup>

### *b. Economic Reality Test*

The economic reality test is a broader test that "looks to *all* the circumstances involved to determine the *economic reality* of the workplace situation. . . . The rationale of this test is that it is important to compensate or provide protection to those who look to their employer for financial security and well-being."<sup>231</sup>

The economic reality test is used to determine whether a worker is an employee for purposes of evaluating liability under the Fair Labor Standards Act (FLSA) due, in part, to the broader definitions of employer and employee in that legislation.<sup>232</sup> This is also the test most often used to evaluate liability under the OSH Act.<sup>233</sup>

### *c. Hybrid Test*

The hybrid test combines elements of both the right to control and the economic reality tests and is often utilized to evaluate liability

229. See Barron, *supra* note 223, at 459.

230. See *id.* at 459; see also Employment Taxes and Collection of Income Tax at Source, 26 C.F.R. § 31.3401(c)-1(b) (2001), which states that

the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services . . . . it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so . . . . Other factors characteristic of an employer . . . are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. . . . if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

*Id.*

231. See Barron, *supra* note 223, at 460.

232. See *id.* at 466; Fair Labor Standards, 29 U.S.C. § 203(e)(i) (1994) (defining employee as "any individual employed by an employer").

233. See, e.g., *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm'n*, 20 F.3d 938 (9th Cir. 1994).

under anti-discrimination statutes.<sup>234</sup> Despite the more intriguing aspects of the teleworking issue, determining whether an individual is an “employee” is the first step in ascertaining what rights, responsibilities, and legal remedies exist for both master and servant.<sup>235</sup>

## *B. Alternative Legal Remedies to Ensure Worker Safety*

### *1. Workers' Compensation*

Depending upon their status as defined under one of the preceding definitions, teleworkers may be protected under workers' compensation laws.<sup>236</sup> Workers' compensation statutes were enacted nationwide in an effort to provide “adequate, predictable, and efficient remedies” for employees who had suffered work-related injuries or disease.<sup>237</sup> Such statutes differ from the OSH Act in several ways. First, these are state laws.<sup>238</sup> Second, the OSH Act is designed to prevent injuries and illness while workers' compensation is designed to compensate an injury or illness that has already occurred; in other words, the distinction is between prevention and rehabilitation.<sup>239</sup> Third, workers' compensation provides a no-fault, or strict liability, remedy<sup>240</sup> while OSHA imposes a duty upon employers to provide a safe worksite.<sup>241</sup> Finally, while workers' compensation is delivered directly to the worker,<sup>242</sup> relief for an

234. See Barron, *supra* note 223, at 460.

235. See generally KEETON ET AL., *supra* note 213.

236. See ROTHSTEIN ET AL., *supra* note 22, at 542-45. Workers' compensation usually only covers individuals who meet a statutory definition of “employee.” Independent contractors are usually excluded from coverage. Also, certain employers may be exempt from workers' compensation laws if they employ very few people. *Id.* See generally Swink, *supra* note 10, at 858-59.

237. See ROTHSTEIN ET AL., *supra* note 22, at 536.

238. See *id.*

239. See *id.*

240. See *id.* at 539.

241. See 29 U.S.C.A. § 654(a)(1) (1994).

242. Successful workers' compensation claims usually result in the worker receiving a percentage of his pre-injury wage for a period of time determined by the severity of his injury. See, e.g., O.C.G.A. § 34-9-260. See generally ROTHSTEIN ET AL., *supra* note 22, at 628.

OSHA violation less tangibly benefits the employee in the form of employer fines or enhanced company compliance.<sup>243</sup> Employers also benefit from workers' compensation laws by virtue of limited liability and tort immunity.<sup>244</sup>

Workers' compensation statutes seem to focus more on the nature of the work rather than the work place,<sup>245</sup> and employees may even be compensated if they are injured while traveling for business or attending employer-sponsored social events.<sup>246</sup> Analysts speculate that "[o]ne of the next major battles in the workers' compensation arena will be 'whether an injury (or illness) that occurs during home-based employment [will be considered to be] an injury arising out of and in the course of employment.'"<sup>247</sup> No state currently has workers' compensation legislation regarding the application of workers' compensation laws to telecommuters.<sup>248</sup> However, considering the amount of attention the issue has received in Congress in the context of the OSH Act, workers' compensation legislators might be wise to begin drafting their own legal framework.

## 2. Traditional Tort Claims and Defenses

Traditional tort claims for negligence based on an employers' general duty of care may augment any workers' compensation

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243. See generally 29 U.S.C. § 666 (1994).

244. See ROTHSTEIN ET AL., *supra* note 22, at 541.

245. See *id.* at 573 ("The . . . majority of state workers' compensation laws require claimants seeking benefits to demonstrate . . . that they sustained injuries *during the course of* their employment, . . . [and] that their conditions *arose out of* their employment.").

246. See *id.* at 561-64 (citing *Schneider v. United Whelan Drug Stores*, 135 N.Y.S.2d 875, 876 (App. Div. 1954) for holding that

when an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of injury was engaged in a reasonable activity).

247. Swink, *supra* note 10, at 873 (second alteration in original) (quoting *OSHA Issues Guidance on Home-based Work Sites*, N.H. EMP. L. LETTER (July 2000)).

248. *Id.*

provisions for teleworkers injured at home.<sup>249</sup> Products liability claims are also available if equipment used by teleworkers malfunctions.<sup>250</sup> Additionally, the privacy issues previously discussed might be remedied by the tort of intrusion upon another's seclusion.<sup>251</sup> If the regulation of the home worksite is left to traditional common law remedies, employers may be able to raise traditional defenses such as contributory negligence or that the worker assumed certain risks by choosing to work at home.<sup>252</sup>

### *C. Benefit of the Bargain*

“Regardless of the selection criteria or method used to create it, the employer-employee relationship is a contractual relationship”<sup>253</sup> and contractual relationships are based upon a theory of bargaining.<sup>254</sup> In companies where teleworking thrives today, employers and employees have reached a mutually beneficial agreement that seems to equally satisfy the interests of both parties.<sup>255</sup> Perhaps foregoing OSHA protection in the home could be viewed as a type of consideration extended in exchange for an employer's loss of physical control over the employee.<sup>256</sup> Most of these companies

249. See ASHFORD & CALDART, *supra* note 185, at 459-60 (discussing the use of tort remedies to compensate for occupational injuries and disease and outlining the basic cause of action that the injured worker would have to prove as follows:

(1) that the defendant is *liable* for the injury in question (generally, either because the defendant has committed negligence, or because strict liability applies), (2) that the actions of the defendant *proximately caused* the injury, and (3) that the plaintiff suffered *actual damages* (economic, physical, or psychological) as a result of the injury).

250. See *id.* at 469.

251. See KEETON ET AL., *supra* note 213, at 854.

252. See *id.*

253. ROTHSTEIN ET AL., *supra* note 22, at 75.

254. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 168-80 (4th ed. 1998) (describing the theory of bargaining underlying consideration in contracting).

255. See Boyd, *supra* note 9; Paul Testimony, *supra* note 8.

256. See CALAMARI & PERILLO, *supra* note 254, at 168-169. This classic summary outlined the three requirements necessary to establish a binding “bargained-for exchange,” as follows:

(a) The promisee must suffer legal detriment; that is, do or promise to do what the promisee was not legally obligated to do; or refrain from doing or promise to refrain from doing what the promisee is legally privileged to do.

...

handle the potential problem of at-home injuries via workers' compensation<sup>257</sup> and waivers of liability.<sup>258</sup> Effective screening of candidates, training, and education of the individuals on both sides of the equation, seem to be the basic building blocks of successful private programs.<sup>259</sup> As Secretary of Labor Elaine Chao stated

OSHA [had] a finite budget of \$425.4 million in FY 2001. It is impossible to inspect every workplace with this limited budget. This money is more effectively spent, and protects more workers, if it is focused on prevention efforts. Prevention, education and training are the most effective methods for providing the maximum amount of protection to the greatest number of workers.<sup>260</sup>

The following pioneering methods may prove effective in establishing a satisfying quid pro quo for employers and employees by improving the environment, reducing employer costs and keeping OSHA out of the home. In addition, these model arrangements support the type of grassroots effort Congress encouraged in the mid-1990s,<sup>261</sup> and the type of limited government sought by the Bush administration.<sup>262</sup> President Bush has described his vision in this way: "Government has a role, and an important role. Yet, too much

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(b) The detriment must induce the promise. The promisor must have made the promise because the promisor wishes to exchange it, at least in part, for the detriment to be incurred by the promisee.

...

(c) The promisee must induce the detriment. This means . . . the promisee must know of the offer and intend to accept.

*Id.* (footnotes omitted).

257. See *supra* Part V.B.1.

258. See *OSHA's Teleblunder*, 16 BUS. J. - SACRAMENTO 30 (Jan. 14, 2000).

259. See International Telework Association & Council Web site, at <http://www.telecommute.org> (last visited Sept. 10, 2000); Swink, *supra* note 10, at 899-900 ("A well-written telecommuting agreement may resolve some legal issues before they arise.").

260. Chao Testimony, *supra* note 123.

261. See *supra* Part I.B.

262. President's Address Before a Joint Session of the Congress on Administration Goals, 37 WEEKLY COMP. PRES. DOC. 351357 (Feb. 27, 2001).

government crowds out initiative and hard work, private charity and the private economy. Our new governing vision says government should be active, but limited; engaged, but not overbearing.”<sup>263</sup>

#### *D. Work Smart Process*<sup>264</sup>

The goal of the Work Smart model is to empower teleworkers “with the means and responsibility for ensuring the work can be performed safely . . . [because then] they are in the best position to create their own safe work environment and to identify changes in that environment that require a change in work habits.”<sup>265</sup> This plan, which has been implemented for teleworkers at the U.S. Department of Energy in Washington State,<sup>266</sup> includes five basic steps to be implemented by the worker and approved by the employer:

1. Identify and document the work activities to be performed;
2. Identify and document the hazards associated with those activities;
3. Identify (or create) standards for safe performance of work to ensure that the hazards identified in step 2 are mitigated;
4. Perform the work; and
5. Periodically evaluate the work, hazards, and standards to ensure a safe environment.<sup>267</sup>

One of Work Smart’s added benefits is that it protects teleworkers’ privacy interests by eliminating the need for in-home inspections

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263. *Id.*

264. Rick Johnson, *Working Smart Is No Accident*, available at <http://www.gilgordon.com/telecommutesafe/whatsold/safesound/WorkSmart1.html> (last visited Jan. 6, 2002).

265. *Id.*

266. *See id.*

267. *See id.*

conducted by either employers or regulatory agencies like OSHA.<sup>268</sup> The architect of the Work Smart process would prefer that “teleworkers be completely responsible for their own in-home safety.”<sup>269</sup> As he put it, “employers [are] already giving us a big safety and health benefit, just by providing the telecommuting work option.”<sup>270</sup>

### *E. The Oregon Model*

Funded by a 1993 grant from the Oregon Department of Transportation, the Oregon Department of Energy recently completed a four year initiative to “set up telecommuting programs and resolve telecommuting issues.”<sup>271</sup> The program included the development and distribution of educational materials introducing the telecommuting work option.<sup>272</sup> Pilot programs were established with a variety of employers across the state, and then the program was evaluated to measure its success.<sup>273</sup> As part of the pilot program, a “telework office checklist” was designed to help employees set up their own work space at home, and a teleworker self-assessment form was used for potential candidates to determine whether or not teleworking would be right for them.<sup>274</sup>

The study’s findings revealed that Oregon telecommuters have reduced their weekday auto travel; that formal telecommuting programs will most likely succeed; that potential telecommuters make up almost half of Oregon’s work force; and that telecommuting is fast becoming a popular employment alternative mutually benefitting employers and employees.<sup>275</sup> Both the Work Smart and the Oregon programs illustrate the types of successful grassroots models of

268. *Id.*

269. Johnson, *supra* note 264.

270. *Id.*

271. Oregon Office of Energy Report, *supra* note 7.

272. *Id.*

273. *See id.*

274. *See id.*

275. *Id.*

telework arrangements that are cropping up all over the country and benefit the employer, the employee and the environment.<sup>276</sup> But, telecommuting is not for everyone.<sup>277</sup> Prior to establishing this type of program, employers should carefully screen candidates to ensure that the situation is a well negotiated and mutually agreeable bargain.<sup>278</sup>

### CONCLUSION

“The final word is trust.”<sup>279</sup> If employees want to enjoy the flexibility of working at home, along with better air and less traffic congestion, they may have to sacrifice the “Big Brother” protections of OSHA and be more accountable for their own health and safety.<sup>280</sup> Employers who hope to lower absenteeism and increase employee retention in a tight labor market may have to provide some protection in the form of more training or education relating to safety in the home.<sup>281</sup> Ultimately, OSHA in the home is unmanageable and does not provide enough advantages to the employee to make it worth the intrusion into their privacy.<sup>282</sup> Other legal remedies are available to

276. See Paul Testimony, *supra* note 8 (stating “many companies are experiencing great success at promoting worker safety by forming partnerships with their employees to determine how best to create a safe workplace”).

277. Metro Atlanta Telecommuting Advisory Council, Inc., *Learn the Basics*, at [http://www.matac.org/How\\_To/Learn\\_The\\_Basics/learn\\_the\\_basics.html](http://www.matac.org/How_To/Learn_The_Basics/learn_the_basics.html) (last visited Apr. 14, 2002).

278. See *id.* (suggesting the following telecommuter selection criterion: 1) “a position with portable tasks” 2) “home conditions conducive to remote work” 3) “an acceptable performance and absenteeism record” 4) “employ[ment] with the organization or in the position for an adequate period of time” 5) “trust and support of [the candidate’s] immediate manager” 6) “having [a] signed . . . telecommuting agreement [c]jiting the terms and conditions of remote work activity.” *Id.*

279. Gail Martin, former Executive Director of the Int’l Telework Assoc. & Council, *quoted in* Chapman, *supra* note 63, at D1.

280. See Paul Testimony, *supra* note 8 (stating that the “old ‘command-and-control’ model” of workplace safety regulations should be replaced with “one that respects the constitution and does not treat Americans like children in need of the protection of ‘big brother’ government”).

281. See *discussion supra* Part V.D, E (discussing the successful Work Smart and Oregon models which relied heavily on training and education of employees who entered their teleworking programs).

282. See Paul Testimony, *supra* note 8. Representative Paul stated:

there is no evidence that OSHA’s invasiveness promotes workplace safety [because although] workplace accidents have declined since OSHA’s creation, OSHA itself has had little effect on the decline. Workplace deaths and accidents were declining before



both prevent and rehabilitate employee injuries and illnesses.<sup>283</sup> No consensus has yet emerged as to whether working at home poses a health and safety risk for teleworkers, but statistical data clearly demonstrates traffic congestion causes environmental problems.<sup>284</sup> Compelling evidence also proves that working at home enhances employee productivity and quality of life.<sup>285</sup> The OSH Act's drafters did not anticipate this alternative work arrangement.<sup>286</sup> Encouraging creative, empowering contract solutions arrived at through private, equal bargaining between employers and employees is a more palatable alternative than applying a thirty-year-old statute to the modern day workplace.<sup>287</sup>

Finally, an awareness of and empathy for the American worker was unavoidably thrust into our social consciousness by the events of September 11, 2001 ("9-11").<sup>288</sup> The tragedy of 9-11 may necessitate teleworking as a way to embrace traumatized workers, ensure continuity of business in times of crisis, and reduce the effectiveness of any future terrorist acts by decentralizing human resources.<sup>289</sup> As Americans search for meaning in the wake of such crisis, forging more satisfying and empowering employment relationships may well contribute to our nation's healing.<sup>290</sup> Overly intrusive government regulations should not be allowed to chill a growing trend that could revolutionize American business.<sup>291</sup> Teleworking arrangements

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OSHA's creation, thanks to improvements in safety technology and changes in the occupational distribution of labor.

*Id.*

283. See discussion *supra* Part V.

284. See Oregon Office of Energy Report, *supra* note 7; Shaw Testimony, *supra* note 27; Swink, *supra* note 10, at 862.

285. See discussion *supra* Part II.

286. See January 2000 Sapper Testimony, *supra* note 29 (stating that OSHA standards "were not designed for homes where the owner is already deeply concerned about his well-being and that of his family"); Paul Testimony, *supra* note 8; Shaw Testimony, *supra* note 27.

287. See *supra* Part V.

288. See discussion *supra* Part III.E.2.

289. See *id.*

290. See *id.*

291. See discussion *supra* Parts II, III.

objectively reward employers for their enhanced compassion and sensitivity to quality of life issues, arguably bringing out the best in business by bringing out the best in people.<sup>292</sup> As George Orwell predicted: “The high sentiments always win in the end, the leaders who offer blood, toil, tears and sweat always get more out of their followers than those who offer safety and a good time. When it comes to the pinch, human beings are heroic.”<sup>293</sup>

*Kelli L. Dutrow*<sup>294</sup>

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292. *See id.*

293. GEORGE ORWELL, *The Art of Donald McGill* (1941), reprinted in *THE COLLECTED ESSAYS* (1961).

294. The author would like to dedicate this work to her husband, Doug Jackson, with profound thanks for his infinite patience and encouragement throughout law school and particularly during her tenure on the *Law Review*.