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Rethinking America's Approach to Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry

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RETHINKING AMERICA'S APPROACH TO WORKPLACE
SAFETY: A MODEL FOR ADVANCING SAFETY ISSUES IN THE
CHEMICAL INDUSTRY

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I. INTRODUCTION

Dan Ross died in 1990 at the age of 46 after a long and painful fight with brain cancer.¹ For decades, Dan worked at the Conoco Chemical and Condea Vista plant in Louisiana in a job that repeatedly exposed him to the dangerous chemical vinyl chloride.² Convinced that this exposure caused Dan's terminal brain cancer, Dan's wife, Elaine, filed a wrongful death action against his employer.³ Documents produced during discovery prior to settlement of the case revealed that the chemical industry had known for decades that its products could be harmful to its employees.⁴

¹Chemical Industry Archives, *In Memory of Dan Ross (1944 to 1990)*, <http://www.chemicalindustryarchives.com/about/dedication.asp> (last visited Sept. 24, 2005) [hereinafter *Dan Ross*]. This website provides a dedication to the memory of Dan Ross by publishing an archive of chemical industry documents that were revealed during the discovery phase of the wrongful death suit his wife brought against Conoco (now Vista). The website also provides general information about the chemical industry in America and dangerous chemicals that workers may be exposed to in the workplace.

²*Id.* Vinyl chloride is a dangerous reality for chemical workers who are exposed to it on a daily basis; exposure causes disintegration of finger bones, fatal liver cancers, and other types of cancers. Chemical Industry Archives, *The Inside Story: Vinyl Chloride*, <http://www.chemicalindustryarchives.com/dirtysecrets/vinyl/1.asp> (last visited Sept. 24, 2005) [hereinafter *Vinyl Chloride*]. As early as 1959, a Dow scientist concluded "we feel quite confident . . . that 500 ppm [of vinyl chloride] is going to produce rather appreciable injury when inhaled 7 hours a day, five days a week for an extended period." *Id.* The Conoco plant where Dan Ross worked is located in Louisiana, which, as of 1998, was the third ranked state in highest vinyl chloride emissions. *Id.* Louisiana has ten facilities, which emitted over 125,000 pounds of vinyl chloride emissions in 1998. *Id.*

³*Dan Ross*, *supra* note 1.

⁴*Id.* Although Elaine Ross settled her suit against Conoco, she allowed her lawyer, William Baggett, Jr., to bring a separate suit against companies and trade associations in the American Chemistry Council. *Id.* This latter suit alleged that companies "conspired to

For many years, the chemical industry has tried to conceal knowledge of product dangers from its employees, consumers, and the general public, all to the detriment of workers' safety.⁵ The actions of the chemical industry exemplify why employees need to have increased access to information concerning workplace safety risks and an effective channel for addressing workplace safety issues and injuries. Currently, when chemical workers like Dan Ross suffer workplace injuries, they look to legislation and litigation for relief, neither of which provides a complete solution to the problem of workplace safety. I propose an alternative vehicle—employee board representation in the chemical industry—that will provide workers at risk for chemical exposure injuries⁶ access to vital safety information and a forum for advocating improved workplace safety.

In Part II of this note, I analyze the impact of tort litigation, workers' compensation, collective bargaining, and the Occupational Safety and Health Act on workplace safety. I begin by describing how each of these vehicles operated historically and then I provide a contemporary perspective. In this section, I also consider the advantages and disadvantages of using these approaches to prevent and compensate for injuries. In Part III, I propose an alternative approach to workplace

withhold crucial information about dangers of vinyl chloride from workers, government regulators, and the public." *Id.* Baggett later filed three other such conspiracy suits; all four suits are still in the process of adjudication. *Id.*

⁵ *Vinyl Chloride*, *supra* note 2 (explaining that although the chemical industry began discovering the many dangers of vinyl chloride over thirty years ago, it continued to withhold that information from unknowing workers, who are still dying from overexposure).

⁶Workers in the chemical industry are exposed to harmful chemicals daily, putting them at continuous risk of developing occupational injuries and illnesses from chemical exposure. The harm that these workers may experience depends on the intensity and length of exposure, as well as the worker's "own individual susceptibility." Francis H. Miller, *Biological Monitoring: The Employer's Dilemma*, 9 AM. J.L. & MED. 387, 389 (1984). Although the Occupational Safety and Health Administration issues standards for the levels of exposure permitted for chemicals in the workplace, it is unable to keep pace with the thousands of chemicals handled by chemical workers each year. Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 2 (1989). New information is constantly being discovered relating to safe exposure levels and unknown potential affects. In fact, recent studies have revealed that although U.S. occupational guidelines limit exposure for the chemical benzene, one of the most commonly used chemicals in the industry, to one part per million, even lower amounts may be harmful to those exposed. *Benzene Causes Lowered Blood Cell Counts in Workers Exposed at Low Levels*, STATE NEWS SERV., Dec. 2, 2004. As explained by Dr. David A. Estmond, professor of environmental toxicology at the University of California, "These results clearly indicate that the current OSHA permissible exposure limit is not sufficiently protective of worker health." Andrew C. Revkin, *Broad Study Suggests a Lower Tolerance for Exposure to Benzene*, N.Y. TIMES, Dec. 4, 2004, at A20.

The case of hexavalent chromium provides another example of an OSHA standard lagging behind actual present day exposure risks of a certain chemical. *U.S. Centers for Disease Control & Prevention; Lung Cancer Risk from Hexavalent Chromium Exposure Assessed*, LAB BUS. WEEK, February 20, 2005, available at LEXIS, News, Most Recent Two Years. Hexavalent chromium is used in the chromate industry and poses risks to workers when they are exposed to hexavalent-chromium-containing dusts and mists. *Id.* A recent scientific study reveals, "current occupational standards for hexavalent chromium permit a lifetime excess risk of dying of lung cancer that exceeds 1 in 10." *Id.*

safety: employee board representation. In this section, I analyze and critique various methods of employee board representation and ultimately recommend a form of representation in which an outside professional hired to represent worker safety issues serves on the board of directors. I advocate this model as an effective means for providing workers in the chemical industry with critical safety information and a channel for improving workplace safety.

II. ADDRESSING WORKPLACE SAFETY ISSUES IN AMERICA

A. Tort Litigation

1. Historically

Before legislatures enacted workers' compensation statutes around 1910, workers such as Dan Ross relied solely on tort suits to recover for workplace injuries.⁷ Tort suits were based on a system of common law negligence liability.⁸ Under the negligence system, an employer was held liable for a worker's injury when the employer was found to be at fault for the injury.⁹ The potential success of tort claims rose with the expansion of the doctrine of respondeat superior. Under the expanded doctrine of respondeat superior, employers became liable in tort for injuries occurring in the course of employment and caused by the negligence of any one of their employees.¹⁰

However, the doctrines of contributory negligence and assumption of the risk limited workers' ability to recover against their employers in tort suits for workplace injuries.¹¹ If the injured worker was determined to have been negligent in any way, the doctrine of contributory negligence completely barred recovery.¹² Recovery was also barred under the doctrine of assumption of the risk if the suit involved a risk of employment of which the worker either reasonably knew or could have been expected to know.¹³

Not surprisingly, most workers who brought tort suits against their employers for workplace injuries were unable to recover damages.¹⁴ One employment law scholar has estimated that a maximum of only thirteen percent of workers ever recovered for

⁷STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW CASES AND MATERIALS* 892 (3d ed. 2002).

⁸PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* 28-29 (2000).

⁹*Id.*

¹⁰MATTHEW BENDER, 20-96 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 2.02 (2004), *LEXIS, Matthew Bender(R), By Area of Law*.

¹¹WILLBORN ET AL., *supra* note 7, at 892.

¹²*Id.* The doctrine of contributory negligence barred recovery even if the worker was determined to be one percent at fault for his injuries and the employer was determined to be ninety-nine percent at fault for the worker's injuries. *Id.*

¹³*Id.*

¹⁴*Id.*

their workplace injuries in tort suits, although more than seventy percent of their injuries were likely attributable to working conditions or employer negligence.¹⁵

2. Contemporary Tort Litigation

Although the doctrines of contributory negligence and assumption of the risk have almost disappeared, workers' compensation laws have restricted the settings in which employees can bring tort suits. One of the key features of workers' compensation is exclusivity, meaning that when an injury falls under the applicable workers' compensation statute, workers' compensation is the exclusive remedy available against an employer.¹⁶ Because injuries and illnesses resulting from workplace accidents fall under workers' compensation, the exclusion provision prevents almost all workers from filing tort suits against their employers.¹⁷

There are a few noted exceptions to the exclusivity doctrine, the most relevant to this note being an exception for intentional torts.¹⁸ Although states word their intentional tort exceptions differently, this exception typically applies when an employer intentionally caused the employee's workplace injury or took action with knowledge that the injury was certain or substantially certain to result.¹⁹ Proving an intentional tort is a higher burden than proving traditional negligence (pre-workers' compensation) because employees must prove their employers acted with intent, not simply that they acted without due care.²⁰ This burden makes recovery for workplace injuries under present-day tort suits even more difficult than under pre-workers' compensation tort suits.

3. Advantages of the Contemporary Tort System

One advantage of the current tort system is that tort suits function as a vehicle for employees to obtain safety information through discovery. In tort suits, parties participate in a lengthy discovery process²¹ that involves the exchange of significant

¹⁵*Id.*

¹⁶CHARLES A. SULLIVAN ET AL., *CASES AND MATERIALS ON EMPLOYMENT* 1267 (1993).

¹⁷WILLBORN ET AL., *supra* note 7, at 903.

¹⁸Other exceptions to the exclusivity doctrine include dual injury and bad faith. Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L.J. 403, 409-10 (1998). Dual injury occurs when an employee who has already suffered a workplace injury is deceived by her employer and this deception causes the employee to experience additional or aggravated injury. WILLBORN ET AL., *supra* note 7, at 974. Bad faith refers to employer fraud in defending a workers' compensation claim. *Id.* at 975.

It is also important to note that tort suits against third parties are not barred by the exclusivity provision of workers' compensation. *Id.* at 985. Injured workers may sue manufacturers of the machinery or products that caused their injuries under product liability theories. *Id.* In a few states, workers may also sue their employers' insurance carriers for "negligent inspection of the workplace or negligent medical care." *Id.* at 986.

¹⁹ 27 AM. JUR. 2d § 203 (2005). *See also* Gabel et al., *supra* note 18. In some instances, an employer's conduct may be so egregious that intent may be inferred. *Id.*

²⁰Gabel et al., *supra* note 18, at 409-10.

²¹Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1701 (1992).

amounts of company information, thus reducing the information gap between workers and their employers. During discovery, plaintiff workers obtain access to critical information concerning workplace dangers, safety measures, and employer actions. As exemplified in Dan Ross's story, this information can help to reveal workplace hazards to which workers are unknowingly exposed.²² In turn, this information can be used to lobby employers to reduce these workplace hazards.

Another advantage of the current tort system is that when a worker plaintiff is successful, she can obtain full recovery for her injuries as long as her losses do not exceed any caps on awards imposed by the particular jurisdiction. Unlike workers' compensation, the tort system allows recovery for all economic and noneconomic losses,²³ thus providing the most complete compensation available for workplace injuries.

4. Disadvantages of the Contemporary Tort System

Tort suits are not effective at compensating for workplace injuries, however, because plaintiff workers are rarely able to overcome the exclusion provisions and, even when they do, there is no guarantee they will win or fully recover their losses. As I explained previously, achieving a successful outcome for workplace injuries under the present-day tort system is difficult because most injuries are governed by workers' compensation²⁴ or require the plaintiff to prove that the employer acted with intent,²⁵ which is a high burden of proof. Even if the plaintiff satisfies the required elements for employer liability, recovery is not automatic when the claims fall outside workers' compensation.²⁶ The plaintiff must go through a lengthy legal process²⁷ and convince a jury that the employer is liable and that the plaintiff is entitled to the full amount of her damages.²⁸

The jury may grant a damage award lower than the plaintiff's actual losses. Likewise, under the doctrine of comparative negligence, recovery can be reduced if the employee is partially at fault for the injury.²⁹ Where states place caps on awards,

²²Dan Ross, *supra* note 1.

²³SULLIVAN ET AL., *supra* note 16, at 1266.

²⁴WILLBORN ET AL., *supra* note 7, at 903.

²⁵Gabel et al., *supra* note 18, at 409-10.

²⁶See generally WILLBORN ET AL., *supra* note 7.

²⁷SULLIVAN ET AL., *supra* note 16, at 1272. The time between filing a tort action and trial can range from fifteen to twenty months. *Id.* (citing Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 847 (1987)). The delay caused by tort suits often causes worker plaintiffs "to accept low settlements rather than face the uncertainty of lengthy litigation." Frances L. Edwards, *Worker Right-to-Known Laws: Ineffectiveness of Current Policy-Making and a Proposed Legislative Solution*, 15 B.C. ENVTL. AFF. L. REV. 1, 18-19 (1987).

²⁸MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES, CASES AND MATERIALS 114 (7th ed. 2001).

²⁹SULLIVAN ET AL., *supra* note 16, at 1266. See also FRANKLIN & RABIN, *supra* note 28, at 440. Under comparative negligence, the plaintiff's recovery is reduced depending on the degree of the plaintiff's negligence compared to the defendant's negligence. *Id.*

the caps can prevent a plaintiff from obtaining full recovery if her losses exceed the ceiling.³⁰

A further limitation persists in tort systems because tort suits alone do not provide sufficient incentives for employers to improve workplace safety. Absent other incentives, employers may choose simply to ignore tort litigation and workplace safety where the threat of successful tort litigation is minimal. As long as the employers pay out less in tort damages to injured employees than the cost of improved safety measures that would prevent such injuries, the employer has a cost incentive not to improve workplace safety.³¹

B. Workers' Compensation

The failure of tort suits to supply employees with an adequate remedy for workplace injuries generated a national push for another form of compensation for employee injuries: statutory workers' compensation.³² In 1908, Theodore Roosevelt successfully pressed for passage of the first workers' compensation statute in the United States, which covered specific federal employees.³³ In 1910, New York enacted the first state workers' compensation act.³⁴ By 1948, workers' compensation statutes existed in every state in the United States.³⁵

1. Historically

The purpose of the early state workers' compensation statutes was to provide employers with limited liability and employees with more certain recovery for workplace injuries³⁶ by altering liability for workplace injuries from negligence to strict liability.³⁷ The workers' compensation system operated as a no-fault system in which employers were required to insure against workplace injuries and employees were automatically provided with compensation for workplace injuries, regardless of the employer's fault.³⁸ Workers' compensation worked much like a contract between workers and their employers in which workers gave up their rights to sue in return

³⁰FRANKLIN & RABIN, *supra* note 28, at 695.

³¹Of course, there are many other factors, such as business reputation and employee morale, which exist outside the threat of tort suits that may provide incentives for employers to improve workplace safety.

³²WILLBORN ET AL., *supra* note 7, at 894.

³³*Id.*

³⁴*Id.* at 895. The New York act was held unconstitutional in *Ives v. S. Buffalo Railway Company*, 94 N.E. 431 (N.Y. 1911) on due process grounds. WILLBORN ET AL., *supra* note 7, at 895. After the act was struck down, "fear of unconstitutionality impelled the legislatures to pass over the ideal type of coverage, which would be both comprehensive and compulsory, in favor of more awkward and fragmentary plans'. . . . By the time the U.S. Supreme Court held in 1917 that compulsory compensation laws were constitutional, the pattern of elective statutes had been set." *Id.*

³⁵*Id.*

³⁶*Id.* at 900.

³⁷FISHBACK & KANTOR, *supra* note 8, at 29-30.

³⁸*See generally* SULLIVAN ET AL., *supra* note 16.

for access to certain benefits when they suffered a workplace injury.³⁹ Workers favored workers' compensation because they no longer had to bear the burden of workplace injuries.⁴⁰ Instead, they automatically received some compensation for their injuries. Employers favored workers' compensation because it eliminated the uncertainty employers faced concerning unbounded tortious liability for workplace injuries, especially those outside their control.⁴¹

The early workers' compensation system was not without weaknesses. Originally, compensation was limited to industrial "accidents."⁴² This limitation engendered confusion concerning exactly what injuries or accidents were covered.⁴³ In addition, early state statutes provided narrow coverage, usually only applying to specific hazardous industries, which employed less than half of the workforce.⁴⁴ Occupational diseases were not expressly included in state workers' compensation acts, which sometimes precluded employees from recovering for such diseases.⁴⁵ Overall, the workers' compensation system was criticized for being inadequate and unfair.⁴⁶

2. The Contemporary Workers' Compensation System

The weaknesses of the workers' compensation system spurred the National Commission on State Workmen's Compensation Laws (National Commission) to push for an improved workers' compensation system.⁴⁷ The National Commission pressed for a program that would provide "(1) broad coverage of employees and work-related injuries and diseases; (2) substantial protection against interruption of

³⁹*Id.* at 309.

⁴⁰*Id.* at 310. Before workers' compensation statutes were enacted, workers bore a much higher burden for workplace injuries. First, workers were unable to obtain full insurance coverage, relying on savings and other household means of insurance against workplace injury risk. *Id.* Workers' compensation alleviated this burden on workers by requiring employers to purchase insurance providing their entire labor force with injury benefits exceeding those available under the tort system. Price V. Fishback & Shawn E. Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J. L. & ECON. 305, 311 (1998). Second, through the adoption of worker's compensation, payments employees received after suffering a workplace injury increased. *Id.*

⁴¹SULLIVAN ET AL., *supra* note 16, at 310.

⁴²*Id.* at 1277.

⁴³*See generally id.*

⁴⁴WILLBORN ET AL., *supra* note 7, at 901. In 1915, 41.2 percent of all non self-employed workers were covered by workers' compensation statutes. ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 2.08 (1997). The percentage of covered employees increased to 67.4 in 1920, and 75.2 in 1930. *Id.*

⁴⁵WILLBORN ET AL., *supra* note 7, at 902. Statutes providing for "injury" compensation were often determined to include disability from disease, however, statutes limiting compensation to "injur[ies] by accident" did not include disability from disease. *Id.*

⁴⁶*Id.*

⁴⁷*Id.* The National Commission on State Workmen's Compensation Laws was created by the Occupational Safety and Health Act of 1970.

income; (3) sufficient medical care and rehabilitation services; (4) promotion of safety; and (5) an effective delivery system."⁴⁸ Over time, many states improved their workers' compensation statutes at the urging of the National Commission.⁴⁹

Contemporary state workers' compensation statutes provide for more expansive coverage than their predecessors. Currently, about ninety-seven percent of workers are covered under workers' compensation statutes.⁵⁰ In order to be eligible for workers' compensation under most state laws, a worker must satisfy the following elements: suffer a personal injury, resulting from an accident, arising out of and in the course of employment.⁵¹ Although traditionally most diseases were not compensable because they could not pass the accident test, most states have amended their workers' compensation statutes to cover occupational diseases.⁵²

State workers' compensation statutes provide an array of benefits including cash⁵³ and wages, medical and rehabilitation expenses, and death benefits for surviving dependants.⁵⁴ The compensation provided in each state varies in terms of the types, levels, and duration of the benefits.⁵⁵ Employers finance workers' compensation benefits by purchasing private or state workers' compensation fund insurance or by self-insuring.⁵⁶ The administration of workers' compensation, including the payouts of benefits, is usually carried out by a state workers' compensation agency.⁵⁷

3. Advantages of the Contemporary Workers' Compensation System

The primary advantage of the current workers' compensation system is that it provides certain recovery for injured workers with a minimal burden of proof. Compensation is automatic for any personal injury caused on the job as long as it "ar[ises] out of and in the course of employment."⁵⁸ Automatic compensation

⁴⁸WILLBORN ET AL., *supra* note 7, at 902.

⁴⁹*Id.* at 903.

⁵⁰*Id.* States vary concerning the percentage of employees that are covered, from only eighty percent in some states, such as Texas, to 100 percent in other states. Less than 100 percent of coverage occurs because of various exemptions, including employers with a small number of employees, particular industries, and particular occupations. *Id.*

⁵¹WILLBORN ET AL., *supra* note 7, at 903.

⁵²*Id.* State statutes normally include both an enumerated list of certain occupational diseases that are compensable and a general category allowing compensation for other diseases. *Id.*

⁵³WILLBORN ET AL., *supra* note 7, at 906. Cash benefits include temporary and permanent partial and total disability and death benefits to surviving spouses and dependants. *Id.*

⁵⁴LARSON & LARSON, *supra* note 44, at § 1.01.

⁵⁵WILLBORN ET AL., *supra* note 7, at 904. Typically, cash-wage benefits comprise one-half to two-thirds of the employee's average weekly salary. Many states impose fee schedules limiting charges for medical expenses. *Id.*

⁵⁶*Id.* at 906.

⁵⁷*Id.* at 907.

⁵⁸SULLIVAN ET AL., *supra* note 16, at 1266.

provides an assured recovery to workers that is unavailable in tort suits because workers do not have to prove fault on the part of their employers in order to receive workers' compensation benefits.⁵⁹

The workers' compensation system incentivizes employers to prevent injuries from occurring. When employers purchase insurance mandated by workers' compensation, the insurance premiums are rated.⁶⁰ Each employer is assigned to a specific insurance classification and then the employer's experience is compared to other companies in the same insurance classification.⁶¹ The better the employer's rating, i.e., the lower the amount of workers' compensation it pays out relative to other companies in its classification, the lower the employer's insurance premiums, and consequently, its costs.⁶² In this way, workers' compensation encourages employers to prevent workplace injuries from occurring because the fewer injuries that occur, the less money the employer will have to pay in insurance premiums.⁶³

4. Disadvantages of the Contemporary Workers' Compensation System

While the contemporary system encourages employers to improve workplace safety, thereby reducing payouts and insurance premiums, it fails to fully incentivize employers to improve safety. Employers will continue paying out-of-pocket compensation to injured workers and accepting high premiums until such costs become higher than the cost of preventing injuries through improved safety measures. Because the main goal of any company is usually profit maximization,⁶⁴ employers are likely to choose cost savings over worker safety.

Another primary disadvantage of the current workers' compensation system is that it does not fully compensate employees for workplace injuries.⁶⁵ In successful workers' compensation actions, workers are not entitled to compensation for all economic and noneconomic losses suffered.⁶⁶ Instead, injured workers receive

⁵⁹*See generally id.*

⁶⁰WILLBORN ET AL., *supra* note 7, at 907.

⁶¹*Id.*

⁶²*Id.*

⁶³*Id.* Evidence is not definitive concerning the effectiveness of workers' compensation at improving workplace safety. *Id.* at 1022. However, according to Willborn, there is a reasonable basis for agreeing with Butler that experience rating "has had at least some role in improving workplace safety for large firms." WILLBORN ET AL., *supra* note 7, at 1022 (quoting RICHARD J. BUTLER, SAFETY INCENTIVES IN WORKERS' COMPENSATION, 1995 WORKERS' COMPENSATION YEAR BOOK I-82, I-87 (John F. Burton, Jr. & Timothy P. Schmidle eds., 1994)). This conclusion does not extend to smaller firms because most of them are ineligible for firm experience ratings. WILLBORN ET AL., *supra* note 7, at 1024.

⁶⁴Margaret M. Blair & Lynn Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 431 (2001).

⁶⁵Hon. William A. Dreier, *Beyond Workers' Compensation: Workplace Comparative Fault and Third-Party Claims*, 20 GA. ST. U. L. REV. 459 (2003).

⁶⁶SULLIVAN ET AL., *supra* note 16, at 1266.

compensation for medical costs and lost wages up to a certain amount.⁶⁷ Most statutes also permit compensation for permanent disabilities, determined by a set benefit schedule.⁶⁸ Essentially, workers cannot obtain full compensation for their workplace injuries when their losses do not fall within recoverable categories for medical costs, lost wages, and permanent disabilities, or when their losses exceed the ceiling set for recovery.

The workers' compensation system also perpetuates the information gap that exists between employers and employees concerning workplace safety. Unlike tort litigation, workers' compensation is mostly performed administratively without the aid of the court system.⁶⁹ The lengthy process of discovery that occurs in typical tort litigation does not occur during workers' compensation proceedings because the only information required for recovery is the fact that a personal injury occurred on the job and in the course of employment. Without discovery, employees do not have access to critical workplace safety information that may otherwise be unavailable.⁷⁰ Without such critical safety information, employees cannot advocate improved safety measures within the workplace because they are unaware of both the current dangers to which they are exposed and the available safety measures that may be implemented.⁷¹

C. Collective Bargaining

Collective bargaining provides a third mechanism for employees to address workplace safety by serving as a vehicle for obtaining information and a channel for improving safety.

1. Historically

Congress passed legislation creating a system of collective bargaining to address the inequality in employee bargaining power. In 1935, Congress passed the Wagner Act, now known as the National Labor Relations Act (NLRA), which allows employee unionization.⁷² The Act recognized employees' rights to self-organize, to

⁶⁷*Id.* See also WILLBORN ET AL., *supra* note 7, at 1023 (noting that in order to meet the adequacy standard set by the National Commission on State Workers' Compensation Laws, an employer must provide workers' compensation benefits that equal only two-thirds of income lost due to workplace injuries).

⁶⁸SULLIVAN ET AL., *supra* note 16, at 1266.

⁶⁹Workerscompensation.com, Frequently Asked Questions, General Information Section A, <http://www.workerscompensation.com/federal> (last visited Feb. 14, 2005).

⁷⁰*Dan Ross*, *supra* note 1. In the case of Dan Ross, not until his wife filed suit and the trial entered discovery was it revealed that the chemical industry had known and concealed the dangers of its products for decades. *But see* FISHBACK & KANTOR, *supra* note 8, at 205 (contending that under workers' compensation, workers have a much greater incentive than under the tort system to report workplace accidents because all workplace accidents are potentially compensable). When more workplace accidents are reported, this increases inspectors' awareness of safety issues at the employer's workplace. *Id.*

⁷¹A full discussion of the unknown risks to which workers are exposed and the potential safety measures that could prevent them is provided in the text and endnotes listed herein under subheading A, titled "Proposed Solution."

⁷²SULLIVAN ET AL., *supra* note 16, at 251.

create labor organizations, and to bargain collectively.⁷³ Congress created the National Labor Relations Board (NLRB) to oversee execution of these rights.⁷⁴ The NLRB is responsible for enforcing these employee rights by exercising final decision-making power over collective bargaining charges filed in its office concerning violations of specified unfair labor practices.⁷⁵ The NLRB also oversees the establishment of unions seeking to create collective bargaining relationships with their employers.⁷⁶

In 1947, Congress passed the Taft-Hartley Act, in partial response to public sentiment that the labor movement had been abusing its power.⁷⁷ The Act left the core provisions of the NLRA text untouched and added a few sections.⁷⁸ The Act mainly served to protect employers' interests by "prohibit[ing] unions from coercing or discriminating against employees, from refusing to bargain, and from engaging in secondary boycotts."⁷⁹ The Act also explicitly stated that employees had the right to refrain from the collective bargaining activities listed within the Act.⁸⁰

2. The Contemporary Collective Bargaining System

Twelve years after the Taft-Hartley Act, Congress passed the Landrum-Griffin Act of 1959 and the text of the NLRA has remained essentially the same since its passage.⁸¹ The Landrum-Griffin Act expanded the secondary boycott prohibitions, regulated extended picketing, and restored voting rights to permanently replaced economic strikers.⁸² In 1974, Congress passed healthcare industry amendments to

⁷³Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533 (2002). The language of the Wagner Act as amended states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

⁷⁴SULLIVAN ET AL., *supra* note 16, at 252.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷MICHAEL C. HARPER ET AL., *LABOR LAW, CASES, MATERIALS, AND PROBLEMS* 92 (5th ed. 2003).

⁷⁸Estlund, *supra* note 73, at 1533-34.

⁷⁹*Id.* at 1534; Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U. L. REV. 699, 711-12 (1986). Secondary boycotts consist of any unilateral union activity designed to induce one employer to cease doing business with another employer. *Id.*

⁸⁰HARPER ET AL., *supra* note 77, at 92-93.

⁸¹Estlund, *supra* note 73, at 1535.

⁸²HARPER ET AL., *supra* note 77, at 94.

the NLRA that extended its reach to nonprofit healthcare institutions.⁸³ Since these amendments, Congress has passed no other legislation aimed at the NLRA.⁸⁴

Under the current NLRA, unions form under the administration of the NLRB.⁸⁵ When a group of employees seeks to attain union status, the NLRB oversees the determination of what group of employees comprises an appropriate bargaining unit and whether a majority of the employees want union representation.⁸⁶ An election is held and the winning union becomes the exclusive bargaining agent for the defined group.⁸⁷ The employer is then barred from bargaining or making agreements with other employee bargaining units.⁸⁸

The NLRA imposes an affirmative duty on both employers and unions to bargain “with respect to wages, hours, and other terms and conditions of employment.”⁸⁹ Management must “seek union participation, consultation, and consent before taking action” that falls within these areas of mandatory bargaining.⁹⁰ Safety is a permissive, not mandatory, bargaining subject. Employers and unions may, but are not required to bargain on permissive bargaining subjects.⁹¹

3. Advantages of the Contemporary Collective Bargaining System

The main advantage of collective bargaining is that the duty to bargain is intended to facilitate ongoing communication between the workforce and management in order to address concerns as they arise.⁹² This communication includes health and safety concerns.⁹³ Workers bring safety concerns to employers through their union representatives, who strive to negotiate better safety initiatives within the company, often times giving concessions in other areas of employment that are less important to workers.⁹⁴ In short, workers desiring to prevent workplace accidents and injuries may be able to obtain such prevention through the process of collective bargaining.⁹⁵

⁸³*Id.*

⁸⁴*Id.*

⁸⁵SULLIVAN ET AL., *supra* note 16, at 252.

⁸⁶*Id.*

⁸⁷*Id.* at 253.

⁸⁸*Id.*

⁸⁹MATTHEW BENDER, LABOR AND EMPLOYMENT LAW § 12.01 (2004), *LEXIS*, *Matthew Bender(R)*, *By Area of Law*.

⁹⁰Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 87 (1998).

⁹¹MATTHEW BENDER, *supra* note 89, at § 13.04.

⁹²*Id.* at § 12.05.

⁹³SULLIVAN ET AL., *supra* note 16, at 252.

⁹⁴*See generally* MATTHEW BENDER, *supra* note 89, at § 12.05 and § 13.04.

⁹⁵In addition, a study by Gray and Mendeloff reveals that OSHA may have less of an impact on reduction of workplace injuries in unionized, rather than non-unionized plants.

4. Disadvantages of the Contemporary Collective Bargaining System

Unfortunately, the disadvantages outweigh the advantages of collective bargaining in the context of workplace safety. To begin with, workplace safety is generally considered a subject of permissive bargaining because employers and unions may, but are not required, to bargain over safety issues.⁹⁶ To some workers, higher wages or increased benefits may be more desirable than enhanced workplace safety.⁹⁷ If workplace safety is not an issue that the majority of the workforce wants to pursue, then the workforce will not gain increased access to safety information through collective bargaining. Likewise, if the workforce as a whole desires workplace improvements other than safety, the union will negotiate with employers concerning these preferred issues, and the opportunity to encourage employers to increase safety within the workplace is wasted. In addition, even if workers prefer safety initiatives to other issues or benefits, their demands may be ignored because employers may legitimately refuse to bargain about nonmandatory bargaining subjects.⁹⁸ For this reason, collective bargaining is an unreliable process for ensuring prevention of workplace injuries.

Not only does collective bargaining fail to ensure prevention of workplace injuries, but it also fails to provide compensation for injuries. When employers put up roadblocks to a union's pursuit of safety initiatives in the workplace, injured workers are left without recourse through collective bargaining because the NLRA has no provision for private enforcement.⁹⁹ Instead, the NLRA is aimed at "illegal forms of employer opposition."¹⁰⁰ When workers feel that an employer has violated their rights or the NLRA, they may file a grievance with the NLRB.¹⁰¹ The NLRB's regional offices investigate the charge and determine whether to issue a complaint, which is then heard by Administrative Law Judges on the NLRB.¹⁰² After the hearing, a decision is issued by the NLRB, which seeks to remedy any unfair labor practices that occurred.¹⁰³ Workers may receive back pay if they were wrongfully

Wayne B. Gray & John M. Mendeloff, *The Differing Effects of OSHA Inspections on Manufacturing Injuries: 1979-1998*, 16 (no date) (on file with author).

⁹⁶Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and the Labor-management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159, 163 (1996).

⁹⁷See generally Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061 (1984).

⁹⁸MATTHEW BENDER, *supra* note 89, at § 13.04. If workers are unable to impose their safety demands through permissive bargaining, they are prohibited from using economic action, such as a strike, to enforce such demands. *Id.* This phenomenon is properly put into words by Finkin: "American workers will not be heard in the workplace unless American managers want to listen." Matthew W. Finkin, *Bridging the "Representation Gap"*, 3 U. PA. J. LAB. & EMP. L. 391, 415 (2001).

⁹⁹Estlund, *supra* note 73, at 1552.

¹⁰⁰*Id.* at 1537.

¹⁰¹HARPER ET AL., *supra* note 77, at 103.

¹⁰²*Id.*

¹⁰³*Id.*

discharged, but NLRB decisions do not contemplate providing compensation to injured workers.¹⁰⁴

Another disadvantage of collective bargaining is that it covers only ten percent of the workforce.¹⁰⁵ Although collective bargaining is available to every member of the workforce, in order to obtain union representation, a group must complete the process for becoming the company's sole collective representative.¹⁰⁶ Presently, ninety percent of the workforce is employed in companies where unions are not preferred.¹⁰⁷ These employees thus cannot pursue increased safety through a collective bargaining process.¹⁰⁸

D. *The Occupational Safety and Health Act*

The first major national attempt to address workplace safety occurred in 1970 with the passage of the Occupational Safety and Health Act (OSHA).¹⁰⁹

1. Historically

OSHA established three federal agencies responsible for executing federal policy in the area of occupational safety and health, covering nearly all private sector workers.¹¹⁰ First, OSHA created the Occupational Safety and Health Administration to determine standards, compliance, and violations.¹¹¹ Second, OSHA established the National Institute for Occupational Safety and Health to research and to propose new safety and health standards.¹¹² Finally, it created the National Advisory Committee on Occupational Safety and Health to advise the Department of Labor and Health and Human Services on OSHA.¹¹³ Through these agencies, Congress hoped to carry out the Act's essential purpose of improving workplace safety.¹¹⁴

2. The Contemporary Application of OSHA

OSHA regulates employers through specific enumerated safety standards and a 'general duty clause,' which requires a safe workplace even in the absence of specific standards.¹¹⁵ OSHA promulgates three types of standards, including interim

¹⁰⁴Estlund, *supra* note 73, at 1552.

¹⁰⁵*Id.* at 1546.

¹⁰⁶*See generally* SULLIVAN ET AL., *supra* note 16.

¹⁰⁷Estlund, *supra* note 73, at 1546.

¹⁰⁸*See generally* SULLIVAN ET AL., *supra* note 16.

¹⁰⁹*Id.* at 1293.

¹¹⁰WILLBORN ET AL., *supra* note 7, at 1026.

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴U.S. Department of Labor, *Occupational Health and Safety Administration*, at <http://www.osha.gov> (2005) (last visited Feb. 7, 2005); WILLBORN ET AL., *supra* note 7, at 1025. Since its inception, the Act has undergone minimal changes. *Id.*

¹¹⁵SULLIVAN ET AL., *supra* note 16, at 1295-96.

standards, which were issued during the first two years of the Act;¹¹⁶ emergency temporary standards, which can be issued with minimal procedure for up to six months; and permanent standards, which require a formal procedural process before being issued.¹¹⁷

OSHA enforces these standards by conducting inspections of workplaces and issuing citations for violations.¹¹⁸ OSHA conducts inspections pursuant to both regular inspection programs and employee complaints of violations.¹¹⁹ When violations are discovered, OSHA can require the employer to eliminate the violation within a specified period of time or fine the employer anywhere from \$0 to \$70,000 per violation, depending on the offense and its gravity.¹²⁰

3. Advantages of the Contemporary OSHA System

Since its passage, OSHA has reduced the number of injuries to workers. From 1970 through the present, workplace fatalities have dropped by over sixty percent and injuries have dropped by forty percent.¹²¹ This reduction has occurred in part because of the inspections and fines generated by the Occupational Safety and Health Administration.¹²² Large fines, sometimes as much as \$7,000 per day for failure to correct violations,¹²³ encourage employers to comply with OSHA standards. The fact that employers are prohibited from knowing when an inspection will occur¹²⁴ provides an incentive for employers to achieve and maintain compliance on a daily basis, not just during inspections.

Employees are active participants in ensuring that their employers comply with OSHA standards. When an employee files a request for inspection based on reasonable grounds for concluding that an imminent danger exists in the workplace, the Occupational Safety and Health Administration is required to conduct an inspection.¹²⁵ The employee is permitted to accompany the OSHA inspector during

¹¹⁶Considerable controversy erupted when the Act became effective in 1971, causing the numerous interim standards to be permanently adopted. WILLBORN ET AL., *supra* note 7, at 1027-28. Of the more than 4,400 standards, 600 were deleted in 1978 and another 153 in 1984. *Id.* Those interim standards that were not deleted remain in effect, constituting the majority of the OSHA standards presently in effect. *Id.*

¹¹⁷WILLBORN ET AL., *supra* note 7, at 1026-29.

¹¹⁸*Id.* at 1031.

¹¹⁹*Id.*

¹²⁰OSHA Statistics, <http://www.osha.gov/as/opa/oshafacts.html> (2003) (last visited Jan. 25, 2005). In 2003, OSHA conducted 39,798 federal and 59,290 state inspections, finding 227,637 violations and issuing fines of \$153,690,380. *Id.*

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.*

¹²⁴WILLBORN ET AL., *supra* note 7, at 1031.

¹²⁵SULLIVAN ET AL., *supra* note 16, at 1315-16. The imminent danger must be a danger of which workers are aware, consequently, requested inspections do not protect employees from dangers of which their employers, but not they, are aware. *Id.*

the inspection and bring an action for injunctive relief if she believes that the Secretary of Labor has improperly elected not to do so.¹²⁶

In addition to employee participation, OSHA helps prevent injuries to workers in the chemical industry by setting maximum exposure standards and warning requirements for harmful substances to which chemical workers may be exposed in the workplace.¹²⁷ In 1983, OSHA instituted a Hazard Communication Standard to ensure employees are advised of hazard information.¹²⁸ The purpose of the standard is to inform “workers of the effects of work-related hazardous chemical exposure... enabl[ing] workers to play a meaningful role in their own health management.”¹²⁹ Armed with this information, workers may be able to take action to protect themselves from exposure or choose jobs that entail lower risks of exposure.¹³⁰

4. Disadvantages of the Contemporary OSHA System

Although OSHA has helped to inform workers of safety risks and reduce workplace injuries, it is a flawed system.¹³¹ OSHA issues standards that provide employees with safety information, but OSHA's promulgation of standards lags behind the present day risks to which workers in the chemical industry are exposed. Since its inception, OSHA has issued only fifty permanent standards¹³² and twenty-four substance-specific health regulations.¹³³ With tens of thousands of chemicals being used in the workplace daily and more than 1000 new chemicals introduced into the workplace each year, OSHA is ill-equipped to conduct the research necessary to determine the danger and toxicity levels of every chemical and promulgate the necessary regulations.¹³⁴ Moreover, the National Cancer Institute has determined that for over half of the 110 chemicals it classifies as having or likely to have

¹²⁶*Id.* at 1316. Employee participation in OSHA enforcement also has a downside. First, the opportunity to accompany an OSHA inspector is typically provided “only to unionized employees in a plant that has an employee safety representative.” James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351, 367 (1998). Second, employees often hesitate to report safety problems at their workplaces because of “exclusion from participation in the inspection process, fear of retaliation, and unawareness of rights.” *Id.*

¹²⁷Edwards, *supra* note 27, at 5.

¹²⁸*Id.* (citing Hazard Communication, 29 C.F.R. § 1910.1200 (1986), effective November 25, 1983).

¹²⁹ Edwards, *supra* note 27, at 5, *citing* 45 Fed. Reg. 53, 281 (1983).

¹³⁰*See generally* Edwards, *supra* note 27.

¹³¹According to Gray and Mendeloff, the impact of OSHA inspections on reducing workplace injury rates has “declined substantially over time.” Gray, *supra* note 95, at 2.

¹³²WILLBORN ET AL., *supra* note 7, at 1030.

¹³³Shapiro & McGarity, *supra* note 6, at 2.

¹³⁴Virtual Hospital, A Digital Library of Health Information, Cancer Prevention: What You Need to Know, Occupational Cancer, <http://www.vh.org/adult/patient/cancercenter/prevention/preventionoccupational.html> (last modified April 2001).

carcinogens, OSHA has either no standards or insufficient standards.¹³⁵ The National Institute for Occupational Safety and Health has urged OSHA to modify “existing exposure limitations or promulgate new regulations for over 100 chemicals.”¹³⁶ As this evidence and the story of Dan Ross indicate, OSHA is unable to keep pace with the needs of regulation in the chemical industry to ensure that its standards and regulations protect workers from exposure risks.¹³⁷

A lack of resources also prevents OSHA from ensuring that businesses under its authority comply. As one OSHA administrator noted, “the current law is inadequate to deal with serious violators, repetitive violators, [and] situations where people are put at risk day after day.”¹³⁸ The Occupational Safety and Health Administration is responsible for ensuring the compliance of over six million entities, but it has less than 2000 federal inspectors available to conduct inspections.¹³⁹ In 2003, OSHA conducted almost 100,000 inspections,¹⁴⁰ which accounted for less than two percent of all of the establishments OSHA must regulate. The disparity between the number of inspections and the number of covered establishments, coupled with insignificant fines,¹⁴¹ allows for some companies to maintain substandard workplace safety conditions with little risk of serious OSHA sanctions.¹⁴²

¹³⁵Shapiro & McGarity, *supra* note 6, at 2. Another problem arises from the fact that the cost of compliance with such standards is often much more expensive than the regulatory fines that are actually imposed, encouraging some companies to rebuff compliance. David Barstow & Lowell Bergman, *Deaths on the Job, Slaps on the Wrist*, N.Y. TIMES, Jan. 10, 2003, at A1 [hereinafter *Deaths on the Job*].

¹³⁶Shapiro & McGarity, *supra* note 6, at 2.

¹³⁷Typically, manufacturing firms have more knowledge concerning the risks of their products and processes than the government and its administrative agencies. Firms are also able to gain this information more readily than the government, often through the normal course of business. Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 286 (2004).

¹³⁸MATTHEW BENDER, *supra* note 89, at § 197.01.

¹³⁹David Weil, *Assessing OSHA Performance: New Evidence from the Construction Industry*, 20 J. POL’Y & ANALYSIS & MGT. 651 (2001).

¹⁴⁰OSHA Statistics, *supra* note 120.

¹⁴¹Gray, *supra* note 95, at 1. According to Gray and Mendeloff, the penalties imposed for employer violations are low in comparison to the cost of reducing many workplace hazards. *Id.* This occurrence, along with the fact that many workplaces are not inspected, accounts in part for the decline in OSHA’s impact on workplace injuries during the last 20 years. *Id.*

¹⁴²McWane, Inc. is a prime example of how a company can fall through the cracks of OSHA enforcement. Since 1995, nine deaths, 4,000 injuries, and 420 OSHA violations have been recorded at the company. Nancy Ramsey, *Television Review: Violations, Fines and Business as Usual at an Iron Foundry*, N.Y. TIMES, Jan. 9, 2003, at E5. McWane’s federal health and safety violations number more than its six major competitors combined. David Barstow & Lowell Bergman, *At a Texas Foundry, An Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, at A1 [hereinafter *At a Texas Foundry*]. In 1999, one of McWane’s plants, Tyler Pipe, was cited by OSHA for “31 instances of inadequate guarding on machines.” *Id.* By the following year, 60 percent of the 70 maintenance workers in Tyler Pipe’s north plant had been injured on the job. *Id.* These workers were without protective equipment, including aprons, boots, and safety shields. *Id.* And, if the workers reported suffering injuries from the

Another disadvantage of OSHA is that it does not allow for enforcement through private lawsuits. OSHA provides no compensation and no personal avenue of recourse to employees who are injured in the workplace. The sole remedy for an injured worker is to complain to the agency and rely on workers' compensation for recovery.¹⁴³

E. Summary of Efforts to Address Workplace Safety

While tort litigation, workers' compensation, collective bargaining, and OSHA all provide incentives for employers to address safety within their workplaces, these mechanisms still fail to adequately reduce the information gap between employers and employees and to provide an effective channel for improving workplace safety. Ideally, tort suits function as a vehicle for obtaining information through discovery, but because they are difficult to bring, tort suits alone do not significantly reduce the information gap. Because workers' compensation systems do not involve any comparable process of discovery, they do not provide a means for disseminating safety information to employees. In addition, tort suits and workers' compensation systems fail to fully compensate workers injured on the job and to effectively incentivize employers to improve workplace safety. As I explained previously, where the risk of tort litigation and higher workers' compensation ratings do not outweigh the costs of added safety measures, employers will elect to forego the added safety. Collective bargaining does not force employers to consider workplace safety because safety is a permissive bargaining subject that employers can refuse to discuss. When employers refuse to discuss safety, collective bargaining performs neither a means for obtaining information nor a channel for improving workplace safety. Finally, while OSHA sets important standards and rules concerning workplace safety, inadequate resources prevent OSHA from setting timely standards in the chemical industry and from enforcing the regulations through inspections and fines. The end result is that OSHA does not provide timely information on chemical dangers or compel employers to meet or exceed OSHA standards.

An analysis of tort litigation, workers' compensation, collective bargaining, and OSHA reveals that existing mechanisms are not effective in conveying information to employees and promoting safety. This limitation is particularly true in the chemical industry where knowledge is key for workers like Dan Ross.¹⁴⁴ Unlike a

hazardous conditions of the plant, they were typically subject to discipline. *Id.* Company records show that more than 350 workers were subject to discipline after reporting injuries. *Id.* The situation at Tyler Pipe exemplifies the fact that 'the current law is inadequate to deal with serious violators, repetitive violators, [and] situations where people are put at risk day after day.' *Deaths on the Job*, *supra* note 134. It is the workers at these companies that are most at risk of experiencing occupational injuries and illnesses.

¹⁴³SULLIVAN ET AL., *supra* note 16, at 1319-20.

¹⁴⁴Private manufacturers prefer ignorance to research centered on the negative impact of their products because this research will negatively affect them. Wendy E. Wagner, *Common Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L. J. 1619, 1634-36 (2004). These negative affects include high out-of-pocket research costs, a lack of market benefits from conducting safety research, and an absence of certainty concerning what the testing results will indicate. *Id.* Industries are reluctant to conduct research or reveal known information concerning the long-term safety levels of their products or activities, and, they even "lobby against laws requiring them to share even basic internal information." *Id.* at 1637.

gaping hole on the shop floor, the dangerous propensities of chemicals may not be obvious to employees.¹⁴⁵ In some cases, no one knows the risks of certain chemicals.¹⁴⁶ In others, the chemicals are not adequately labeled. And in still others, employees are not fully informed of the risks of exposure.

These information gaps can leave employees vulnerable. When chemical workers do not have timely or complete information on the toxicity of chemicals to which they are exposed, they are unable to take steps to protect themselves.¹⁴⁷ Similarly, without accurate knowledge of the risks to which they are exposed, employees cannot demand comparable wages, and will assume more risk than they intend and incur injuries for which they will not be fully compensated.

It is easy for employers to exploit employees in the chemical industry. Employers may know of certain risks chemicals pose to their employees and fail to disclose these risks. Employers may also know of certain safety measures that would protect their employees, but choose not to adopt them.¹⁴⁸ This choice is particularly problematic when the potential protection is only available through the employers and the only way employees can protect themselves is to resign.

¹⁴⁵See generally RESTATEMENT (SECOND) OF TORTS § 343A (1965).

¹⁴⁶Environmental laws are limited concerning mandatory testing of toxic substances. Wagner, *supra* note 144, at 1666-67. Although it has the power to mandate testing for toxic substances, the Environmental Protection Agency rarely exercises this power, making such testing typically the exception, rather than the rule. *Id.* Manufacturers must report the 'adverse affects' of toxic substances that are on the market, but this requirement is not readily enforced. *Id.*

¹⁴⁷Edwards, *supra* note 27, at 10. And even when employees are informed of the risks, the steps they can take to protect themselves may be limited in comparison to the steps their employers could take to reduce the risk involved. *Id.* at 18.

¹⁴⁸Two safety measures chemical companies can utilize include industrial air filtration systems and biological testing. An industrial air filtration system would directly reduce the levels of exposure that workers endure. *Refinery Self-Cleaning Filters Cut Labor/Disposal Costs*, 15 WORLDWIDE ENERGY, Sept. 2004, available at LEXIS, News, Most Recent Two Years. Another option is for a chemical company to engage in biological chemical exposure testing of employees. See Francis H. Miller, *Biological Monitoring: The Employer's Dilemma*, 9 AM. J.L. & MED. 387 (1984). Monitoring employees can potentially uncover precursors of occupational diseases or reveal the development of diseases. *Id.* at 389. The incident rates of occupational diseases among workers can be reduced by removing the worker from a position where exposure occurs or by lessening the worker's on-the-job exposure. *Id.*

Another safety measure chemical companies can employ is a chemical surface exposure kit. For certain chemicals, such as beryllium, the greatest danger to workers exists from exposure to the dust emitting from the chemical, rather than exposure to the chemical itself. David Wichner, *Firm Develops Kit to Test for Toxic Beryllium*, THE ARIZ. DAILY STAR, Aug. 18, 2004, available at LEXIS, News, Most Recent Two Years. Berylliant Technologies has developed a simple kit that tests beryllium exposure on surfaces and produces results in under an hour. *Id.* Chemical companies may be able to prevent workers from developing serious chronic diseases from exposure to chemicals like beryllium by implementing the use of a testing kit comparable to the one developed by Berylliant Technologies.

III. WORKPLACE SAFETY ADVANCED THROUGH BOARD REPRESENTATION

A. *Proposed Solution*

There is a need for a better solution to the problem of workplace safety in the chemical industry;¹⁴⁹ a solution that reduces the information gaps that exist between employers and employees, provides a reliable means of encouraging employers to improve workplace safety, and adequately compensates workers when they are injured. The following proposal addresses the first and second prongs of this suggested solution. The third prong remains an important issue for which a better solution is also needed; however, this note focuses only on the first and second prongs because they are particularly important in an industry like the chemical industry, while the problem of workplace injury compensation applies universally.

In this section of the note, I propose a solution to the problem of information gaps and inadequate safety measures in the chemical industry. My solution is to provide a form of employee representation on the board of directors. This representation will enable chemical workers to gain access to critical safety information and to use that information to encourage employers to improve safety measures within the company.¹⁵⁰ Likewise, when exposure injuries occur, employee

¹⁴⁹This note focuses on the chemical industry and chemical exposure safety in order to exemplify the application of an employee representative model in the workplace and its strengths and weaknesses. This note focuses on workplace safety because it is a critical employment concern, demonstrated by the passage of OSHA and the establishment of the workers' compensation system. This topic is further narrowed to the chemical industry because chemical exposure risks and injuries are of particular concern in the area of workplace safety. The dangers chemicals pose are usually discoverable only through scientific research and testing. Scientific research continually reveals new risks of chemical exposure, even for chemicals to which workers have already repeatedly been exposed. Employers in the chemical industry often have more information than their employees concerning the risks of chemicals to which the employees are exposed. In addition, in many cases, employees can utilize increased safety measures that would reduce the risks of chemical exposure incurred by workers. Instituting an employee representative model in the chemical industry to address safety will help to lessen the information gap existing between employers and their employees and provide a forum for employees to encourage their employers to implement increased safety measures.

The employee representative model may have other potential applications outside of the chemical industry setting. The model is most appropriate in settings where (1) an information gap exists between employers and their employees with respect to a certain aspect of employment, and (2) workers stand to benefit when representation will reduce the information gap and provide workers with a channel for addressing improvements with respect to this particular aspect of employment. For example, the model could be used in other industries where safety is also of particular concern to workers. The model could be used in manufacturing industries where employees are at risk of being injured by the machines they operate. In addition, the model could also be used in other industries to target employment issues aside from safety, such as training, that are of particular concern to workers.

¹⁵⁰ Edwards, *supra* note 27, at 18-19.

Employees have relatively poor information about workplace risks and little control over them. Most workers facing toxic exposures do not understand the risks or the manner in which their own behavior can affect those risks. Furthermore, because of the nature of the employer-employee relationship, the worker may have little control over work practices or the types of materials or safety equipment used in his plant.

board representatives can bring the issue to the boardrooms, thereby encouraging the company to take steps to understand how the injury may be prevented in the future.

An important question that arises from this proposal is whether an employee representative can ever have enough of a voice in the board of directors to initiate changes to workplace safety. An employee representative is only one of many directors, holding a minority position on the board. It may be naïve to believe that one representative would be able to persuade all of the directors on the board to address particular safety issues or adopt increased safety measures. However, by raising safety issues not otherwise exposed, the employee representative may force board members to confront these critical issues. Over time, the repeated voicing of concern about safety in the workplace could create a change in board culture concerning how the board views and approaches workplace safety. While not a panacea, this effect is valuable in the long run for promoting and improving workplace safety in the chemical industry.

B. Explicit Role of the Employee Representative

Providing employees with representation on the board of directors will give them increased access to information on the risks to which they are exposed in the workplace¹⁵¹ and the safety measures their employers could adopt to reduce such risks.¹⁵² Board representation will also equip employees with a means of encouraging their employers to adopt such safety measures.¹⁵³ The primary role of the employee representative will be to: (1) reduce the information gap that exists between workers and their employers concerning workplace safety and available safety measures; (2) use that information to encourage employers to implement safety measures, thereby reducing chemical exposure and injuries, and; (3) use the boardroom floor for initiating research on improving safety in the workplace.

In this section of the note, I discuss three models for employee representation on the board of directors. The first and most obvious method is allowing an employee of the company to serve on the board of directors. The second method is to allow an employee of the company to serve on the board of directors, but provide him with a professional consultant on which to rely. The third method is to hire an outside professional to serve on the board and represent the employees' safety interests.

C. Employee Representative on the Board of Directors

The first method of employee representation is having an employee of the company serve on the board of directors.

Moreover, even when hazards are known, workers may have insufficient bargaining power to obtain wage premiums.

Id.

¹⁵¹Robert N. Stern, *Participation by Representation, Workers on Boards of Directors in the United States and Abroad*, 15 WORK & OCCUPATIONS 396, 406 (1988).

¹⁵²*Id.*

¹⁵³EMPLOYEES AND CORPORATE GOVERNANCE 105 (Margaret M. Blair & Mark J. Roe eds., 1999).

1. Advantages of this Model

Employee representation on the board of directors provides workers with a strong voice that is heard through a formalized process.¹⁵⁴ Workers possess far greater knowledge of the production process than management.¹⁵⁵ A worker serving on the board will be able to bring this information to the boardroom, which will help the board to make more informed decisions concerning workplace safety. When making strategic decisions, directors will have the opportunity to consider the concerns of workers, concerns that are not heard through the traditional collective bargaining processes or the other avenues I have discussed.¹⁵⁶ Through participation on the board of directors, employees will be able to influence the decisions made by the firm.¹⁵⁷

The flow of information through board representation is two-fold. Not only will directors gain access to information possessed by workers, but workers will gain access to critical information possessed by directors and management that normally does not reach the workforce.¹⁵⁸ Because the employee director also works on the shop floor,¹⁵⁹ he will have continuous access to the workforce for disseminating the information gained through board participation. The workforce will also have easy access to the directors to communicate its safety concerns. The result is that employees will gain access to increased information concerning workplace safety risks and available safety measures and they will be able to use this information to encourage their employers to improve workplace safety.¹⁶⁰ Workers will also use the information to demand higher wages to compensate for the risks to which they are exposed.¹⁶¹

When employers improve workplace safety at the insistence of the employee director, the representation can benefit the workers and their firms. Increased workplace safety results in fewer occupational injuries and illnesses, and consequently, reduces the claims for compensation under workers' compensation or tort suits.

¹⁵⁴Stephen Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 985 (1998) [hereinafter *Privately Ordered*].

¹⁵⁵*Id.*

¹⁵⁶Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 901 (1993) [hereinafter *Human Capital*].

¹⁵⁷Steven Bainbridge, *Participatory Management within a Theory of the Firm*, 21 IOWA J. CORP. L. 657, 675 (1996) [hereinafter *Participatory Management*].

¹⁵⁸*Id.* at 690.

¹⁵⁹*Privately Ordered*, *supra* note 154, at 985.

¹⁶⁰*Participatory Management*, *supra* note 157, at 690.

¹⁶¹*Id.* at 722. Under many theories concerning workplace risks, it is generally thought that "[w]ithout full knowledge of the hidden but discoverable health risks that result from exposure to toxic substances, workers cannot be said to have accepted the risks voluntarily." Edwards, *supra* note 27, at 10.

2. Disadvantages of this Model

Although the employee director model has many advantages, it also has many disadvantages. Some of these disadvantages arise from the fact that the director is also an employee. An employee will possess a high level of knowledge concerning the workforce and operations at the plant level, but he may only be familiar with a small fraction of the firm's operation due to the limited scope of his job duties.¹⁶² And, because an employee director is primarily hired to perform his shop or plant job at the firm, he likely has no experience in performing company management functions. The employee director may not possess the level of sophistication necessary for forming company policy and making complex corporate decisions.¹⁶³

A second problem that could arise is alienation.¹⁶⁴ Other workers may perceive the director employee as a member of management and treat her differently than they treat other co-workers, which could impede the flow of information regarding their safety and other concerns. This alienation could prevent the worker representative from effectively performing her functions.

Another disruption will occur in the exchange of information if the worker representative chooses to act in his own self-interest.¹⁶⁵ Providing an employee with control rights in the company increases the employee's motivation to use his newfound authority irresponsibly.¹⁶⁶ If the worker believes that concealing certain information from management and the board is in his self-interest, his restraint may prevent the board from having the information necessary to make the best corporate decisions, including safety decisions.¹⁶⁷ Conversely, the employee director may take actions as a board member that benefit him, but are detrimental to his fellow workers.¹⁶⁸ Of course, if the employee representative acts in his own self-interest, he can easily be replaced by another employee.¹⁶⁹

¹⁶²*Privately Ordered*, *supra* note 154, at 985.

¹⁶³LARRY D. SODERQUIST ET AL., *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS* 137 (5th ed. 2001); *see also* Marleen O'Connor, *Employees and Corporate Governance: United States: Labor's Role in the American Corporate Governance Structure*, 22 *COMP. LAB. L. & POL'Y J.* 97, 100 (2000) [hereinafter *Employees and Corporate Governance*]. The employee likely will have no interest in corporate decisions, such as investment policies, that do not directly impact her working conditions or benefits. *Participatory Management*, *supra* note 157, at 723.

¹⁶⁴*Privately Ordered*, *supra* note 154, at 1000.

¹⁶⁵Two types of shirking that may affect the flow of information include negligence and laziness. *Participatory Management*, *supra* note 158, at 682.

¹⁶⁶*Privately Ordered*, *supra* note 154, at 1068.

¹⁶⁷*See generally id.* at 1011.

¹⁶⁸Contractarian corporate analysis assumes that all people are "rationally selfish actors." Blair & Stout, *supra* note 64, at 406. So, while trustworthy behavior does exist, it is always possible for people to act in their own rational self-interest. *Id.*

¹⁶⁹*See generally* MARIANNE JENNINGS, *THE BOARD OF DIRECTORS, 25 KEYS TO CORPORATE GOVERNANCE* 24 (2000).

The duty of loyalty is also a check on any director's decision to act in his self-interest.¹⁷⁰ As a fiduciary, the director owes certain duties to the company, one of which is the duty of loyalty.¹⁷¹ The duty of loyalty requires that a director exercise utmost loyalty to the company's shareholders.¹⁷² When a director has a conflict of interest, which includes self-interest in the decision or transaction, his actions under the duty of loyalty are judged by intrinsic fairness.¹⁷³ Intrinsic fairness allows for the punishment of directors who use their position to their own personal benefit by engaging in conflicted transactions that are not entirely fair to the corporation.¹⁷⁴

A final problem with having an employee serve on the board of directors is the potential for conflicts of interest. As a member of the board, the employee owes a fiduciary obligation to the company on whose board he sits, which includes the company's shareholders,¹⁷⁵ whose main goal is typically profit maximization.¹⁷⁶ The director also owes an obligation to his fellow workers to adequately represent their safety concerns and advocate to the board improved workplace safety. These safety interests may be inconsistent with the shareholders' goal of profit maximization.¹⁷⁷ Fortunately, corporate law provides much flexibility to directors, enabling them "to take actions that protect other corporate constituencies while reducing the value of the shareholders' economic interest in the firm."¹⁷⁸ Therefore, the director representative has the opportunity to persuade the board to make decisions

¹⁷⁰*Id.* at 40. Some of the other obligations that arise from directors' fiduciary duties include "exercising good business judgment, not seizing an opportunity from the company for their own profit, [and] watching carefully for conflicts in their work with the board." *Id.*

¹⁷¹SODERQUIST ET AL., *supra* note 163, at 137.

¹⁷²ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 182 (1995).

¹⁷³SODERQUIST ET AL., *supra* note 163, at 137.

¹⁷⁴*Id.* When a director violates the duty of loyalty, other members of the board, or shareholders, may file suit against him on the corporation's behalf. Blair & Stout, *supra* note 64, at 425.

¹⁷⁵Blair & Stout, *supra* note 64, at 431-35. Shareholders' interests are considered primary; however, directors may also consider the interests of other firm players who have a residual interest in the firm, including creditors, executives, and workers. The author further noted that in addition to shareholder's interests, corporate directors may also consider the interests of executives, employees, and equity investors as well. *Id.* at 435.

¹⁷⁶*Id.* at 431.

¹⁷⁷Loizos Heracleous & Lan Luh Luh, *Who Wants to be a Competent Director? An Evaluation Tool of Director's Knowledge of Governance Principles and Legal Duties*, 2 *CORP. GOVERNANCE* 17, 20 (2002). The role of employee representatives is to represent their fellow workers, however, the law requires board members to principally serve shareholders' interests. Bainbridge, *supra* note 154, at 725. Bainbridge also provides argument that the employee conflict of interest problem is overemphasized, because it is no more problematic than the conflicts faced by outside directors representing other constituencies. *Participatory Management*, *supra* note 157, at 725. In addition, Bainbridge's article cites Summers, who asserts that corporate law is well equipped to police conflicts of interest, rather than disallow them. *Id.*

¹⁷⁸Blair & Stout, *supra* note 64, at 428.

improving workplace safety at the cost of shareholder profits, as long as the firm remains profitable enough to retain its shareholders.¹⁷⁹

D. Consultant to Employee on the Board

Another option for employee board representation is to allow an employee to serve on the board, but to provide the representative with a professional consultant.

1. Advantages of this Model

The primary advantage of providing a professional consultant to the employee representative is that it ameliorates the problems created by having an unsophisticated employee on the board. The worker representative likely has no experience making complex management decisions and lacks the sophistication necessary to make such decisions.¹⁸⁰ However, a professional consultant will possess these skills. The professional consultant will be able to advise the employee director concerning matters of company policy, such as investment decisions, that the director would otherwise be ill-equipped to decide.¹⁸¹ The consultant can assist the director in advocating safety issues in the boardroom and advise the director on how to best encourage the board to make decisions improving workplace safety.

The employee director-consultant model also retains the advantages that the employee director model encompasses. The employee director-consultant model engages a formalized process of exchanging information between workers and the board.¹⁸² The worker representative will be able to bring his operations knowledge and worker safety concerns to the board¹⁸³ and she will be able to gain access to safety information from the board.¹⁸⁴ As a worker on the shop floor,¹⁸⁵ the representative will have continuous access to the workforce to disseminate this information and gather information on worker safety concerns. The employee director will be able to use all of the information gained to encourage the firm to improve workplace safety,¹⁸⁶ fulfilling the purpose of the representation.

¹⁷⁹*Id.* at 435.

¹⁸⁰According to John Witt's case study, workers who did not want to partake in participatory management "often cited lack of managerial expertise as the reason." Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 823 (1998).

¹⁸¹In Sweden, employees have had a statutory right to board representation since 1973. Klas Levinson, *Employee Representatives on Company Boards in Sweden*, 32 INDUS. REL. J. 264 (2001). Klas Levinson conducted a study of this representation and the statutorily created educational system developed to support it. The study revealed that over half of the employee board member participants preferred expert counseling as an aid to their representation. *Id.* at 273.

¹⁸²*Privately Ordered*, *supra* note 154, at 985.

¹⁸³*Id.*

¹⁸⁴*Participatory Management*, *supra* note 157, at 690.

¹⁸⁵*Privately Ordered*, *supra* note 154, at 985.

¹⁸⁶It is important to note that even when employees gain critical safety information through board representation, they many have a limited ability to take steps to reduce the risks they experience on the job because they likely have little control over the firm's operational

2. Disadvantages of this Model

Supplying the employee director with a professional consultant does not resolve all of the disadvantages that arise from having an employee serve on the board of directors. Other workers may still see the employee director as a member of management and alienate him, disrupting the information exchange process.¹⁸⁷ In addition, even with a professional consultant to rely upon, the employee director may decide to act in his own self-interest.¹⁸⁸ A professional consultant does not address the possibility that the employee will have a conflict between his duty to shareholders and his focus on safety. The employee director is primarily supposed to represent the safety interests of the workforce, but the employee also owes a fiduciary obligation to company shareholders.¹⁸⁹ Shareholder interests or profit maximization may be inconsistent with the safety interests of the workforce, imposing a conflict of interest problem on the employee director.¹⁹⁰

E. Outside Representative on the Board

Hiring an outside board representative is a better model than either the employee director or employee director-consultant model for providing board representation to address worker safety interests in the chemical industry.

1. Advantages of this Model

The outside director model has many of the advantages of the employee director and employee director-consultant models, plus some added advantages. To begin with, the outside director will serve an important informational and persuasive purpose. Through ongoing communication with employees in all aspects of the plant, the director will be able gain valuable knowledge concerning plant operations and worker safety concerns.¹⁹¹ The director will also collect key safety information held by the board and top management through board participation, which she can then communicate to the workforce.¹⁹² These exchanges of information will facilitate the director's representation of worker's safety interests, equipping her with the knowledge necessary to advocate safety initiatives within the firm. As a board member, the director will be able to use her position to encourage the firm to implement safety measures that would reduce or eliminate chemical exposure injuries and illnesses. When the company adopts these increased safety measures, the director's representation advances the prevention of chemical exposure injuries and illnesses.

practices or use of safety equipment. Edwards, *supra* note 27, at 18. This fact makes it important that the director representative not only provide workers with safety information gained through board membership, but also firmly push the company to increase the safety measures used. *Id.*

¹⁸⁷*Privately Ordered*, *supra* note 154, at 999.

¹⁸⁸Blair & Stout, *supra* note 64, at 406.

¹⁸⁹*Id.* at 435.

¹⁹⁰*Id.* at 431.

¹⁹¹*Privately Ordered*, *supra* note 154, at 985.

¹⁹²*Participatory Management*, *supra* note 157, at 690.

Unlike an employee director, the outside director will be able to more fully and purposely participate in all board decisions, even those not involving wages, benefits or working conditions.¹⁹³ The ideal outside director would have safety and worker representation experience¹⁹⁴ and also the skills and expertise to form company policy and make complex decisions, such as selecting officers, investments, and technology systems.¹⁹⁵

In addition, an outside director¹⁹⁶ may receive more respect than an employee director from other board members who view him as a professional equal. The board members may scrutinize the outside director with less wariness and more deference than an employee on the board.¹⁹⁷ The board will likely consider the director to have the skills and qualifications necessary for being a competent member of the board, capable of fully participating in the myriad of decisions made by the board each year.

Another advantage of hiring an outside director over an employee to represent worker's interests involves the self-interest problem. While, as previously explained, an employee may be tempted to act in his own self-interest once he obtains a powerful position within the firm, an outside director is less tempted to act in his own self-interest.¹⁹⁸ The director is paid to be a board member and represent employees' interests¹⁹⁹ and he probably does not have other self-interests relating to the particular company because his board position is the only position he holds within the firm.²⁰⁰ In contrast, an employee director may see his position on the board as less of an opportunity to serve worker safety concerns and more of an opportunity to secure extra benefits or better circumstances in his non-director employment position.²⁰¹ If a hired outside director does choose to act in his own self-interest, like an employee representative, he can always be replaced.²⁰² Hiring outside, rather than inside the company, also enables market forces to take affect, ensuring that the best representative holds the outside director position.²⁰³

¹⁹³Ruth Barratt & Nada Korac-Kadabadse, *Developing Reflexive Corporate Leadership: The Role of the Non Executive Director*, in 2 CORP. GOVERNANCE 3, at 3233 (2002).

¹⁹⁴JENNINGS, *supra* note 169, at 23-24.

¹⁹⁵*Id.*

¹⁹⁶An outside director serves on the firm's board of directors, but has no internal employment position within the firm. Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence*, 90 NW. U. L. REV. 898, 900 (1996). In contrast, inside directors hold some other employment position within the firm, usually in a management position. *Id.*

¹⁹⁷*See generally Participatory Management*, *supra* note 157.

¹⁹⁸*Id.* at 725.

¹⁹⁹*Id.* Workers assess their representatives mainly on the basis of their labor advocacy. *Id.* at 725.

²⁰⁰*See generally* JENNINGS, *supra* note 169.

²⁰¹*See generally Participatory Management*, *supra* note 157.

²⁰²JENNINGS, *supra* note 170, at 37.

²⁰³The suggestion of creating a market for a hired employee representative has been proposed in the union context. Thomas A. Kochan, *Reconstructing America's Social Contract*

Another aspect of board representation that prevents the outside director from acting in his own self-interest is the fact that, like an employee director, the outside director owes a fiduciary duty of loyalty to the company on whose board he serves.²⁰⁴ When an outside director engages in a conflicted transaction, including a self-interested transaction, he may be liable for a breach of the duty of loyalty if his actions are not entirely fair to the corporation.²⁰⁵

2. Disadvantages of this Model

There are some disadvantages to the outside director model. First, the outside director model poses an information dissemination problem. Because the director is not an employee, she has no direct or continuous contact with the workforce. Without some kind of regular and frequent contact with the workforce, the director will be unable to gain the knowledge possessed by the workforce. Also, it will be more difficult for the director to gather information concerning the workers' safety concerns and disclose safety information to the workforce acquired through the director's board position.

Alienation is another issue of concern in the information exchange process. Unlike an employee director, the outside director is not a member of the workforce, making it more likely that the workforce will perceive her as a member of management.²⁰⁶ If the workforce alienates the director hired to represent its interests, then it loses the opportunity to express its safety concerns and gain the critical safety information possessed by management and the board.

In order to overcome the information exchange problem, a formal system of communication between workers and the outside director representative must be organized. This system must ensure that workers have an ongoing means of communicating their operational knowledge, safety concerns, and other interests to the outside director and that in turn, the director has a means of conveying to workers important safety information acquired from the firm. The system should be organized to instill worker confidence in the director's competence and trustworthiness. If the workers have confidence in their representative, then they will feel comfortable being open with him and supporting his counsel, furthering the information exchange process.

In addition to information exchange, the potential for conflicts of interest is another factor with the outside director model. The outside director, like an employee director, is hired to represent worker safety interests, which may be in conflict with the interests of the firm's shareholders to whom the director owes fiduciary duties.²⁰⁷ However, as explained in the employee director model, corporate directors are allowed to consider the interests of other firm constituencies aside from

in Employment: The Role of Policy, Institutions, and Practices, 75 CHI.-KENT L. REV. 137, 147 (1999). Kochan advocates the creation of a market for full-service unions, which would provide employees with a complete package of services, including "individual representation and ... representation in corporate governance structures and processes." *Id.*

²⁰⁴ SODERQUIST ET AL, *supra* note 163, at 137.

²⁰⁵ *Id.*

²⁰⁶ *See generally Privately Ordered*, *supra* note 154, at 999.

²⁰⁷ Heracleous & Luh Luh, *supra* note 177, at 20.

shareholders.²⁰⁸ Although the board will have to mediate between the safety interests of employees, other constituencies, and shareholders,²⁰⁹ a director representative on the board will be able to bring employee safety concerns to the forefront of constituency considerations. By advocating employee safety concerns through board representation, hopefully, the director representative will encourage the board to favor worker interests over the interests of other constituencies.

Another conflict arises from hiring an outside director to represent employee safety interests; this conflict is the payment of compensation to the director. Although the director is hired to represent workers of a certain firm, it is the firm, and not the workers, that pays the director for his services.²¹⁰ Director compensation is far from nominal; the average compensation for a board member at one of America's 200 largest industrial companies was \$68,300 in 1995, according to Pearl, Meyer & Partners.²¹¹ The high level of compensation received by a director representative may encourage her to disregard employee safety interests in order to appease the firm and, consequently, to protect her own economic interests. If the director representative chooses to stifle her representation and advocacy of worker safety issues, then her representation will fail in its essential purpose.

Perhaps one of the best solutions to the conflicts of interest a director representative will confront is the extension of fiduciary duties to employees.²¹² Marleen O'Connor advocates extending director's fiduciary obligations to employees.²¹³ In fact, she claims that a precedent for such an extension already exists.²¹⁴ This new fiduciary law would force directors to strike an equitable balance between competing interests of employees and shareholders.²¹⁵ The new duty would

²⁰⁸Blair & Stout, *supra* note 64, at 428.

²⁰⁹*Id.* at 436.

²¹⁰*See generally* JENNINGS, *supra* note 169. Board members typically receive compensation for their services in the form of retainers or automatic annual fees; nominal fees paid for attendance at board and committee meetings; share payments; and incentive or benefit packages, which may include performance-based stock options, pension and retirement plans, and deferred compensation plans. *Id.* at 33-35.

²¹¹Charles M. Elson, *Director Compensation and the Management-Captured Board – The History of a Symptom and a Cure*, 50 SMU L. REV. 127, 155 (1996). Directors may also negotiate lucrative consultation agreements with the companies they serve. *Id.* at 156. It is estimated that consultation arrangements can increase a board member's compensation to well over \$250,000 per year. *Id.*

²¹²*Employees and Corporate Governance*, *supra* note 163, at 104. O'Connor explains that the three main advantages workers stand to gain from the extension of fiduciary duties include: 1) promotion of greater workforce-management cooperation; 2) increased rights to disclosure about corporate affairs that affect them; and 3) encouragement of "worker participation in strategic corporate decision making." *Id.* at 107.

²¹³*Human Capital*, *supra* note 156, at 958. "When shareholders' and employees' interests directly conflict ... studies indicate that directors refrain from expressing their moral sentiments about employees due to their belief that they have a legal obligation to maximize shareholder wealth." *Id.*

²¹⁴*Id.*

²¹⁵*Id.*

more formally legitimize the director representative's promotion of employee safety interests. This result contrasts with the informal rule allowing, but not requiring, directors to consider the interests of other constituencies besides shareholders. By formalizing the consideration of employee interests in the boardroom, the rule may reduce the outside director's perceived need for quieting his representation in order to preserve his economic interests in the firm. Extending fiduciary duties to employees will also reduce the barriers an employee representative faces as a minority on the board of directors because it will make all board members accountable to the interests of employees.

If board member's fiduciary duties are extended to employees and effective communication is maintained between the outside director and the workers he represents, the outside director model provides the most advantageous form of employee board representation. In addition to having the sophistication and experience of an outside consultant, the outside director will be able to fully participate in all board decisions.²¹⁶ Other board members may treat the outside director more like a professional equal than they would treat an employee.²¹⁷ Because the outside director is not otherwise employed by the firm, he will be less likely than an employee to view his position on the board as an opportunity to serve his own self-interests.²¹⁸

IV. CONCLUSION

An analysis of the current methods of addressing workplace safety reveals that a better approach is needed for the protection of workers like Dan Ross in the chemical industry. Contemporary compensation systems, which include tort litigation and workers' compensation, are inadequate at reducing the employer-employee information gap, incentivizing employers to prevent workplace injuries, and compensating employees for injuries. Legislatively introduced programs, which include collective bargaining and OSHA, provide insufficient means for employees to secure safety within the workplace.

In response to these failures, I suggest a proposal that makes employees active participants in improving workplace safety. I contend that having a director who represents employee safety interests on the board of directors is a viable solution to the problems of workplace safety in the chemical industry. Employee board representation will address safety in the chemical industry by reducing the information gap between employers and employees and by serving as a channel for improving workplace safety. Addressing workplace safety in the chemical industry is of particular concern because of the risks of exposure presented by chemicals and the inability of legislative standards to keep pace with the growing number of new and existing chemicals handled in the chemical industry each year.

I considered three different methods of providing this representation for workers in the chemical industry, including an employee representative, and employee representative aided by a professional consultant, and an outside director representative. The outside director model emerges as the best form of employee

²¹⁶Lin, *supra* note 196.

²¹⁷JENNINGS, *supra* note 169, at 24.

²¹⁸SODERQUIST ET AL, *supra* note 163, at 137.

representation, particularly if fiduciary duties are extended to employees. As a representative of worker safety interests, the outside director will serve as a facilitator of communication between workers and the board or firm management. The director will act as a voice on the board for workers and disseminate to workers critical safety information gained through board participation. The director will use the information gained through representation to encourage the employer to improve safety measures within the company. When the company implements safety measures that reduce the risks of exposure faced by chemical workers, the interests of workers are heard, more injuries and illnesses caused by chemical exposure are prevented, and compensation claims for workplace injuries are reduced.

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