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OVERWORK ROBS WORKERS' HEALTH: INTERPRETING OSHA'S GENERAL DUTY CLAUSE TO PROHIBIT LONG WORK HOURS

Tosh Anderson*

I. INTRODUCTION

Since World War II, worker productivity in the United States has tripled.¹ This maximization of productivity has been the result of the reorganization of work. The reorganization is characterized by long work hours and a dizzying array of new work arrangements that American capital, with the support of governmental policy and the judiciary, has utilized to demand ever-increasing productivity levels and squeeze more profit out of working people. These profit margins are obscured by a so-called “work-and-spend” economy that is characterized by long working hours, high-income growth, and high consumption.² For those workers marginalized by this work-and-spend economy, long hours have become increasingly necessary to supplement declining real wages and living standards.³ Now, long working hours are being linked to work-related injuries and illnesses, including stress, depression, fatigue, performance-impaired and overexertion injuries, repetitive motion and cardiovascular disorders, family conflict, and death.⁴ The demand for longer

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¹ Juliet Schor, The Kenneth M. Piper Lecture: *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT. L. REV. 157 (1994).

² *Id.* at 163.

³ KIM MOODY & SIMONE SAGOVAC, LABOR EDUC. & RES. PROJECT, TIME OUT!: THE CASE FOR A SHORTER WORK WEEK, 10-12 (1995). “[F]or the production and nonsupervisory employees that make up 80% of the labor force . . . just to reach their 1973 standard of living, they must work 245 more hours, or 6-plus extra weeks a year.” *Id.* at 10.

⁴ See LONNIE GOLDEN & HELENE JORGENSEN, ECON. POL'Y INST. BRIEFING PAPER, TIME AFTER TIME: MANDATORY OVERTIME IN THE U.S. ECONOMY 1 (January 2002); see also Linda M. Goldenhar et al., *The “Goldilocks Model” of Overtime in Construction: Not Too Much, Not Too Little, But Just Right*, 34 J. SAFETY RES. 215 (2003); INST. FOR WORK-

and longer hours represents a national crisis that is taking its toll on working people, slowly depriving them of control over their health, as well as their time.

U.S. domestic law provides little in the way of economic and social rights to working people. Therefore, wherever affirmative obligations on the part of government or employers to ensure access to such rights exist, an opportunity exists to expand the parameters of the law. One such instance is the “general duty” clause of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (hereinafter “Act”), which provides: “Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”⁵ This article argues that excessive work hours, resulting from mandatory and even so-called voluntary overtime, violate the Act’s general duty clause.

The statute requires an employer to furnish both employment and a place of employment that are free from hazards. However, case law interpreting the general duty clause has focused on the employer’s affirmative obligation to ensure a safe place of employment to the exclusion of an employer’s affirmative obligation to ensure that terms and conditions of employment are also free from recognized hazards. This has led the judiciary and OSHA to take a narrow view of the use of the general duty clause in ensuring workers’ health and safety.

The problem lies in the conceptual limitations that courts and regulators have placed on what is deemed a recognized hazard and the judicial preoccupation with equating that hazard with the physicality of the workplace. Thus, an injury or illness is generally thought to arise from an accident or exposure caused by some physical imperfection at the workplace under the employer’s control, such as inadequate safety equipment or a toxic substance. The likely reason for this tendency in the case law is the nature of the injuries that have been litigated and the absence of a meaningful national debate about the epidemic of overwork⁶ as a social prob-

PLACE STUDIES, CORNELL UNIV., N.Y. ST. SCH. OF INDUS. & LABOR RELATIONS, OVERTIME AND THE AMERICAN WORKER (1999); Paul A. Landsbergis, *The Changing Organization of Work and the Health and Safety of Working People: A Commentary*, 45 J. OCCUPL. & ENVTL. MED. 61 (2003).

⁵ Occupational Safety Health Act (OSHA) § 5(a), 29 U.S.C. § 654(a) (2003).

⁶ I use the term “overwork” to refer to: (1) workers having to endure an intensified pace of work demanded by employers over the course of a workday; (2) the practice of mandatory overtime used by employers to force workers to work additional

lem, much less as a source of work-related injuries and illnesses. It cannot be overemphasized that section 5(a)(1) does not expressly limit the scope of a recognized hazard to physical imperfections in the workplace, but requires that all the working conditions encountered by employees in the course of their employment be free from such hazards.⁷ Therefore, even though the employer practice of mandating or permitting long work hours constitutes an “intangible” employer policy affecting the terms and conditions of work, rather than a tangible imperfection in the workplace, workers who suffer injuries and illnesses as a result of such practice should no longer be denied protection under the general duty clause.

This article will first outline the need for OSHA to include long working hours within its scope of authority, as illustrated by current research demonstrating the clear connection between contemporary practices of long working hours and work-related injuries and illnesses. Second, the article will develop the legal basis for an expanded OSHA mandate using statutory language, legislative history, and case law, recognizing that federal law already limits work hours in some industries based on health and safety considerations. Third, this article will discuss existing or recently proposed legislation regulating work hours as a means of protecting worker health and safety and the inadequacies of these interventions, followed by a brief description of similar efforts in other countries. The article will conclude by defining the contours of a policy, which OSHA could fashion, to hold employers accountable under the general duty clause for excessive work hours resulting from their imposition of mandatory overtime. The implementation of such a policy can unleash the full power of the general duty clause.

II. THE CASE FOR LONG HOURS AS A RECOGNIZED HAZARD UNDER THE ACT'S GENERAL DUTY CLAUSE

A. *Expanding the Notion of Sweatshop Conditions: Overtime as a Form of Hazard Pay*

In the last few decades, the relationship between capital and labor changed significantly with respect to the division of labor and

hours over their regularly fixed workday (overtime constituting all hours worked over forty in one week); (3) having to work additional hours or job(s) in addition to a forty-hour per week full-time job in order to maintain existing or adequate income levels; or (4) additional family or household members being forced into the labor market to maintain existing income levels.

⁷ MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW Ch. 9 § 144 at 202 (1998).

the organization of production systems, resulting in increased workload demands and job instability. This reorganization of production—commonly referred to as “lean production”—uses technology and specialized worker skills to create flexible work arrangements that ensure the continuous flow of production through various forms of work organization, including outsourcing, casualization, speed-up systems, and longer hours which reduce labor costs and job stability, and maximize productivity, efficiency, competitiveness, and profitability.⁸ While these structural changes in the U.S. economy were occurring, inflation outpaced real wages and the state social welfare system suffered significant “reforms” and disinvestments. At the workplace level, the reorganization of the labor force resulted in fewer workers working longer hours.⁹

Overwork is a condition, created and sustained by employers, which benefits them in that it ensures a climate of job instability and declining wage rates. In describing this new labor supply regime, Bluestone and Rose explain that, instead of being forced to increase wages to attract labor, employers fill their labor demands with “incumbent” workers (those already in the labor market) who work the long hours in expectation of job loss or because of declining wage rates.¹⁰ Policies promoting deregulation and downsizing of government, the weakening of organized labor, and a legal sys-

⁸ See generally KIM MOODY, WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY (Verso 1997); see also NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH (NIOSH), DEP’T OF HEALTH AND HUMAN SERVICES, PUB. NO. 2002-16, THE CHANGING ORGANIZATION OF WORK AND THE SAFETY AND HEALTH OF WORKING PEOPLE: KNOWLEDGE GAPS AND RESEARCH DIRECTIONS 1 (2002); Wayne Lewchuk et al., *Quality of Working Life in the Automobile Industry: A Canada-UK Comparative Study*, 16 NEW TECH. WORK & EMP. 72, 81 (2001):

[Maximizing labor productivity] was pursued either by increasing the number of seconds worked in each minute, or by regaining management control over the workplace so as to reduce regulatory impediments to management assignment of shifts, overtime, and work tasks. These changes were articulated through [the] rhetoric of competitiveness and labour-management co-operation. Unions in these circumstances came under enormous pressure. Growing international competition for product markets undercut the bargaining strength of unions as did rising levels of unemployment in the 1980s. Employees became more vulnerable to company pressures to accept new organisational strategies which led to harder and longer work. *Id.*

⁹ See MOODY, *supra* note 8; see also Schor, *Worktime*, *supra* note 1, at 160; see generally BARRY BLUESTONE & STEPHEN ROSE, THE UNMEASURED LABOR FORCE: THE GROWTH IN WORK HOURS (Jerome Levy Econ. Inst. of Bard College, Public Policy Brief No. 40, 1998).

¹⁰ See BLUESTONE & ROSE, *supra* note 9, at 11-12, 42.

tem that has given its blessing to employer autocratic flexibility¹¹ have facilitated these developments. Accordingly, the strategy of overworking workers in the new labor supply regime plays a key role in lowering their expectations as workplace conditions deteriorate. The strategy proves particularly effective in pitting the overworked against the underemployed and the unemployed at the expense of all working people.¹²

Overtime constitutes an important part of lean production strategies and of the new labor supply regime because it allows firms to retreat to their "core competencies," yet remain profitable and competitive by maintaining productivity levels.¹³ Overtime functions as a buffer during market shifts and downturns by enabling employers to downsize their workforce while working that smaller workforce longer during market upturns or during more intensive production cycles.¹⁴ Overtime also saves costs associated with employing additional workers, such as fringe benefits, workers compensation, social security, and other employee costs.¹⁵ Moreover, the regular use of overtime increases the employment "rent," or the value of the job to the worker, based on her or his rate of compensation, thereby increasing the employer's control over that worker.¹⁶ This has in turn enabled employers to demand more productivity from workers.¹⁷ As one state labor official characterized

¹¹ See generally MARC LINDER, *THE AUTOCRATICALLY FLEXIBLE WORKPLACE: A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES* (Fanpihua Press 2002). Linder's use of autocratic flexibility refers to the power and right of employers to subject employees to their authority and control, the only limitations upon such power and right being minimally prescribed by law and regulation. Such power arises from capital's ability to legitimate itself as carrying on business for the benefit of the community at large. Generally, the law reinforces the notion that employers control the time and behavior of their workers while on the job.

¹² See BLUESTONE & ROSE, *supra* note 9, at 43 (finding that increased job instability creates a feast or famine situation for working people, which explains increases in voluntary overtime and higher rates of underemployment).

¹³ MOODY, *supra* note 8, at 95; see also Lewchuk, et al., *supra* note 8, at 73, 76 (finding (1) that workers have little control over their workdays since lean production methods have increased the intensity and duration of work while regulations governing work and the power of organized labor to resist these forms of managerial authority have been weakened, leaving workers without protection; and (2) that workers report having little control to vary their workplace or to change working conditions that they do not like while (3) a majority of workers across plants felt forced to work as fast as possible at least 50% of the time to avoid falling behind and found there to be inadequate relief staff to cover a worker during a bathroom break).

¹⁴ MOODY, *supra* note 8, at 95; see also MOODY & SAGOVAC, *supra* note 3, at 14.

¹⁵ JULIET SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 62 (BasicBooks 1992); see also MOODY & SAGOVAC, *supra* note 3, at 14.

¹⁶ SCHOR, *OVERWORKED*, *supra* note 15, at 62.

¹⁷ *Id.*

employers' motivation to demand overtime: "If I have two employees, I have to pay two Labor and Industries coverage, two medical care payments, two Social Security. . . . If I can take one employee and work the heck out of him, then my overall costs are going to be down."¹⁸ As the statement suggests, employers have an added incentive to maintain sweatshop conditions and to include overtime pay in their bottom lines as they are not held liable for the direct costs of work-related injuries and illnesses, which are borne in part by workers and by state workers compensation systems.

While the fast-growing service industry is famous for flexible work arrangements that lead to low wages and job instability, the manufacturing sector was the first industry in which downsizing produced increased productivity with fewer workers through longer work hours and intensified work pacing.¹⁹ For instance, 69% of manufacturing firms who are members of the American Management Association, downsized their workforces in the early '90s, and two thirds of these firms reported adverse effects on workloads as a result of this downsizing.²⁰ Today, the epidemic of overwork and long work hours reaches into a growing number of industries and occupations including, but not limited to, the automobile, home health, construction, garment, and service industries as well as the medical and legal professions.

As a result of the adoption of lean production, workers have little choice about not working the long hours demanded by employers and by lean production systems because of the fear of termination, unemployment, or because the prospect of similar working conditions in any new job leaves most workers resigned to such working conditions. Moreover, job insecurity and the financial strain of decreasing wages force many workers to desire overtime work as a way to supplement their wages. In a recent study, 46% of workers interviewed said they wanted to work more overtime.²¹ Respondents in the study, who represented unionized workers from several occupational categories, cited job insecurity and financial strains as the reason for wanting more overtime or for working second jobs despite an increase in family conflict and risk of divorce created by excessive work hours.²² Researchers also found that supervisory pressure to work overtime increased the

¹⁸ MARC LINDER, "MOMENTS ARE THE ELEMENTS OF PROFIT": OVERTIME AND THE DEREGULATION OF WORKING HOURS UNDER THE FAIR LABOR STANDARDS ACT 12 (2000).

¹⁹ MOODY, *supra* note 8.

²⁰ SCHOR, *Worktime*, *supra* note 1, at 160.

²¹ INST. FOR WORKPLACE STUDIES, *supra* note 4.

²² *Id.* (indicating that the percentage of workers reporting severe family conflict

likelihood of workers' stress, depression, and drinking as well as incidents of injury and illness.²³

The ability of workers (even those represented by unions) to bargain for improved working conditions traditionally protected by organized labor and by labor laws has been severely undermined as a result of the above-described structural changes in the U.S. economy. At the same time, capital's control over labor has been strengthened. An employer-friendly economic climate has been bolstered by inadequate government regulation of employers due to disinvestments in monitoring capacities as well as successful attempts at deregulation and by a judiciary that has consolidated these changes.²⁴ As workers find it increasingly difficult to maintain annual income earnings and their standard of living based on a forty-hour workweek, debate over whether overtime is employer-imposed or freely chosen becomes moot as the need to increase earnings effectively makes longer work hours necessary.²⁵ It is important to remember that the Fair Labor Standards Act (FLSA)

rose from around 5% for those working between forty and fifty hours per week to approximately 30% for those working over sixty hours).

²³ *Id.*; see also Landsbergis, *supra* note 4, at 63 (finding that job strain, "defined as the combination of high job demands and low job control, is an important risk factor for hypertension and cardiovascular disease (CVD)").

²⁴ See, e.g., *Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000) (holding that mandatory overtime was an essential job function).

²⁵ Michael L. Smith, Note: *Mandatory Overtime and Quality of Life in the 1990s*, 21 IOWA J. CORP. L. 599, 600 (1996). Critics could respond to the assertion that workers have no choice but to work long hours by arguing that the at-will employment doctrine protects the rights of the employer and the employee and that both serve at the other's will. However, as illustrated by the discussion of lean production in a labor supply regime characterized by employer flexibility and the facilitation of this new economy by government and the judiciary, workers' employment choices are greatly diminished by the importance of a job to meeting so many worker and family needs, including access to financial, health, human and social capital, as well as to use of personal time. Thus, employers' control over workers through the employment relationship is far-reaching and can negatively impact the health and safety of working people. Although controversial, I include so-called voluntary overtime within OSHA's mandate to regulate excessive hours. Much of "voluntary" overtime is, in fact, coerced because of the worker's financial straits or because long hours are an implied condition of employment or of career mobility. I therefore do not adopt Golden and Jorgensen's more conservative definition of mandatory overtime. Their definition does not include economic coercion or subtle forms of retaliation for refusal to work overtime, such as conditioning career advancement or employment at the point of hire on overtime work. See GOLDEN & JORGENSEN, *supra* note 4, at 2 (defining mandatory overtime as those hours "above the standard work week (usually forty) that the employer makes compulsory with the threat of job loss or the threat of other reprisals such as demotion or assignment to unattractive tasks or work shifts"). See also Anne Spurgeon et al., *Health and Safety Problems Associated with Long Working Hours: A Review of the Current Position*, 54 OCCUP. & ENV'T MED. 367, 370 (1997) (noting that "effects on well-being may be much less in those electing to work overtime, because of internal

does not give workers the right to refuse overtime. Accordingly, mandatory overtime should be understood as a broad category encompassing long hours worked as the result of explicit employer demands, as an explicit or implied condition of employment or career mobility, and as a necessary supplement to low wages.

Furthermore, as workers' ability to challenge employers' labor, health, and safety violations has been compromised across occupational categories because of structural economic changes and the lack of governmental regulation and enforcement, the presumption that workers have a choice of leaving undesirable work for a better job is suspect.²⁶ Indeed, the presumption of free-market economic theory, that workers freely accept employment, is as deeply ingrained as the notion that economic prosperity for all begins with policies favorable to business.²⁷ These values permeate any discussion of the employment relationship and represent a powerful ideological undercurrent against any proposed prohibition of excessive work hours. Given that this free-market, managerialist ideology currently enjoys unprecedented legitimacy, overtime—whether voluntary or mandatory—has been successfully characterized by employers and their political and judicial allies as a system that increases the employee's earnings and the employer's productivity and profitability, i.e., it's good for everyone.

Within this context of the changing organization of work which leaves many workers little choice but to work overtime and even less chance of finding new work that does not require it, long work hours are slowly killing working people. Using the general duty clause to enlist OSHA's authority to hold employers accountable for excessive work hours bolsters the Act. It also gives workers a substantive basis on which to launch their own workplace organizing struggles and can play a role in advancing a movement led by working people to take more control over their time. The legisla-

commitment or enjoyment of work, than in those compelled to do so because of work overload or company pressure").

²⁶ See Laureen Snider, *Theft of Time: Disciplining through Science and Law*, 40 OS-
GOODE HALL L. J. 89, 110 (2002).

(A lineman employed by Central Maine Power in 1999, for example, was killed when he grasped a 7200 volt cable without first putting on his insulating gloves. The man had worked two-and-a-half days with a total of five hours off; every time he went home to bed, he was called back to work. Had he refused, he certainly would have been disciplined, and might have been fired. The coroner's inquest identified fatigue as a cause of death.).

²⁷ James A. Gross, *The Kenneth M. Piper Lecture. 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, 370 (1998).

tive history of OSHA states that its purpose is to ensure that workers do not have to choose between their health and their work. A chemical industry worker characterized the relationship between worker choice and health and safety in an academic study: "the realities of life—family, the children, mortgage payment—impose certain limitations on the worker's right to just quit. I don't feel personally that people should have to quit to protect their health."²⁸

Long work hours is a condition of work that, like inadequate safety equipment or toxic exposure, endangers the health and safety of workers and is within the control of employers. Moreover, application of the general duty clause to long work hours, whether mandated by the employer or "voluntarily" worked by an employee, gives substantive limitations to the free market economic theory of hazard pay theory (that workers bargain for higher wages as additional compensation for exposing themselves to workplace hazards).²⁹ Overtime itself has become a type of hazard pay. Prohibiting excessive work hours would force employers to stop using overtime as a way to boost productivity thereby squeezing greater profits out of workers who are forced to pay with their health and lives.

Overtime then, like hazard pay, is an example of how workers are conditioned to assume the costs of employer-created working conditions with their health and lives. However, unlike the presumption behind hazard pay, workers have no effective bargaining power left to resist long work hours. Moreover, employers never assume the full social costs of the injuries resulting from the working conditions they create and control, since workers' compensation systems shield employers from liability for those injuries. Therefore, even where employers do pay the overtime premium to workers, this is ultimately cheaper than the direct cost of the injury which is primarily borne by the worker, and only partially absorbed by workers' compensation. Such cold, bottom-line business calculations exemplify the cruel and brutal consequences of employer au-

²⁸ *Id.* at 375.

²⁹ *Id.* at 374-76. Gross states that, according to free market theory, workers will bargain for these wage premiums, or hazard pay, as extra compensation for exposing themselves to workplace hazards and that employers will pay those wage premiums to attract those workers to hazardous jobs until the cost of removing or substantially reducing the hazards is less than the cost of the premium pay. . . . Free market economic theory assumes that employers have the right to expose workers to toxic substances and other hazardous conditions of work. *Id.*

tocratic flexibility and the dehumanizing way in which employers apply a cost-benefit analysis to the health and lives of working people.

The effectiveness with which employers have propagated this pro-business ideology is illustrated by the fact that it informs the judicial interpretation of the general duty clause. That is, courts have, to date, not viewed long work hours as a hazard, and, thus far, it has been extremely difficult to convince a judge that work place-related repetitive injuries and illnesses result from ergonomic hazards. In addition, courts have interpreted the general duty clause to apply only to recognized hazards which are *preventable*.³⁰ Courts are also unwilling to consider risks that are inherent in the conduct of business as violations of the general duty clause. Therefore, courts recognize the right of employers to expose workers to toxic substances and other hazardous conditions of work. This has in turn led to the normalization of sweatshop conditions and the conditioning of workers to have no choice but to accept such conditions.

One significant difference between long work hours and other workplace hazards such as toxic exposure or unsafe equipment is that the former impacts a much larger segment of the labor force.³¹ That is, overwork resulting from long work hours not only impacts low-wage workers who are disproportionately women, immigrants, and people of color, or the less-skilled, less-educated workers.³² The exemption of professionals from the FLSA's overtime provision illustrates how deeply ingrained the preference long work hours is for this segment of the labor force. Many so-called white-collar workers accept such conditions in order "to get ahead," or to avoid being perceived as not ambitious. Moreover, this coercive underside to so-called voluntary overtime is not uncommon among other workers who must weigh undesirable work

³⁰ See David J. Kolesar, Note, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079, 2093 (1992) (citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973)).

³¹ Gross, *supra* note 27, at 376. Gross notes that "hazard pay theory . . . affirms as proper a distribution of power, permitting CEOs and skilled and educated employees to buy more safety than less educated and less skilled workers."

³² See BLUESTONE & ROSE, *supra* note 9, at 27 (noting an increase in women working longer hours at the same time their proportion of the workforce is growing). While long work hours may affect a wider segment of the U.S. labor force than simply low-wage workers, these workers are probably the hardest hit by this form of overwork, with respect to injuries and illnesses caused by long hours. For instance, construction laborers are more at risk than carpenters for work-related injuries due to long work hours. Telephone Interview with Sue Dong, Data Center Director, Center to Protect Workers Rights (Oct. 16, 2003).

hours with career considerations.³³ For instance, one construction worker reports that, “[p]eople who won’t work overtime—it’s just kind of an unspoken thing. You’re not going to go forward if you won’t play by the rules.”³⁴

Overwork in the form of long work hours therefore reflects the downward spiral in working conditions of a large proportion of U.S. workers. This fact is important to building any social movement based on working people having more control over their work hours. While there may be class-based distinctions with respect to those who are subjected to the more coercive forms of mandatory overtime as opposed to those whose decision to work long hours is viewed as a free choice, this distinction is often exaggerated and obscures the lack of control most workers have over how many hours they work. Indeed, the tendency to compartmentalize the problem of sweatshop conditions as affecting only low-wage workers obscures the shared experience of overwork as a sweatshop condition for growing numbers of working people. As discussed above, these sweatshop conditions are impacting growing numbers of working people who find themselves unable to control their time, health, and lives as a result of being subjected to longer hours, lower wages and job insecurity. Regardless of whether overtime is viewed as an implied condition of employment, necessary to make ends meet, a system of mobility, or a blatantly coercive employer tactic, the employer’s need for and ability to extract long hours from workers constitute a sweatshop condition that threatens worker health and safety and which is within the control of the employer to abate.

Therefore, so-called voluntary overtime, which is often mischaracterized as lacking an overtly coercive component, can be just as detrimental to a worker’s health as mandatory overtime and under the theory developed in this article, should also fall within the scope of the general duty clause.³⁵ While including “voluntary”

³³ See Goldenhar et al., *supra* note 4, at 219. The authors found that construction workers report having no choice but to agree to work the overtime, both at the point of hire and upon actual requests by their supervisors. For example, one worker remarked, “In the interview process when you first come in, that’s usually the first question asked, ‘Are you willing to work a 50 to 60 hour workweek?’ If you say YES they’ll hire you . . . if you refuse they don’t hire you.” And another worker remarked, “I have, definitely [seen people laid off for saying no to working overtime].” *Id.* (alteration in original).

³⁴ *Id.*

³⁵ Some commentators are skeptical that a worker’s right to refuse overtime will in practice be effective and therefore argue for a cap on work hours. See LINDER, AUTOCRATICALLY FLEXIBLE, *supra* note 11; see also GOLDEN & JORGENSEN, *supra* note 4 at 4.

overtime within OSHA's mandate may appear to infringe upon a worker's right to contract, like the minimum wage, an employer should not be allowed to permit workers to waive their right to reasonable work hours and a safe and healthy workplace simply because the employer pays low wages, forcing a worker to endure long work hours either for individual short-term gain or just to survive.³⁶ Otherwise, the Act's intent could be easily undermined. It is true that many workers depend upon overtime pay simply to survive and support their families. But, even in such cases, because it is cheaper for employers to pay workers overtime and thus evade the direct costs of employer-created working conditions, permitting employers to overwork the underpaid does not disturb their bottom lines. Instead, workers who are compelled to work excessive hours and get injured bear the costs of their injuries, as workers generally receive only limited financial support from workers' compensation. It is also important to remember that there are currently systematic efforts in many states to restrict workers' compensation eligibility and limit benefits.³⁷ Moreover, if OSHA

Citing to the detrimental effects of long work hours on workers' health and family life, the authors recommend a cap on excessive work hours. However, the authors retreat from this recommendation in their conclusions, calling merely for the right to refuse mandatory overtime for all workers except essential personnel in emergency situations. *Id.* at 15. The authors use a 1977 Quality of Employment Survey conducted by the University of Michigan to estimate a baseline percentage of the U.S. workforce which is subject to mandatory overtime. The authors define mandatory overtime conservatively as overtime that is "mostly up to the employer" and which workers could not refuse without some kind of penalty, and they define voluntary overtime as that which is "mostly up to the worker." *Id.* at 5. The survey found that 16% of workers were subjected to such mandatory overtime. In another study one-third of union workers reported being compelled to work overtime, while 18% worked more overtime than preferable. *Id.* at 7. However, while the authors acknowledge that many workers may have to work long hours to supplement low incomes, they do not view this as mandatory overtime, and therefore do not analyze how consent or "choice" to work overtime can be economically coerced, making it effectively mandatory.

³⁶ See LINDER, *AUTOCRATICALLY FLEXIBLE* *supra* note 11, at 47. Linder argues that as workers are not allowed to waive their right to the minimum wage, they should not be allowed to waive their right to reasonable work hours. While many workers do work for less than the minimum wage, this merely illustrates that if the law permitted workers to waive this right, it would be even more of a widespread employer practice.

³⁷ See, e.g., Press Release, Office of the Governor, Statement by Governor Arnold Schwarzenegger on Passage of Workers' Compensation Reform Legislation (Apr. 16, 2004) (capping temporary disability at two years and giving incentives to employers to force injured workers back to work), available at http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp?BV_SessionID=@@@0352729255.1093019980@@@&BV_EngineID=cccccadcmfmiemfmcfnfcgkmdffidfog.0&CatTitle=Press+Release&FilePath=/Govsite/press_release/2004_04/20040416_GAAS15304_Comp_Statement.html&Title=statementfy+Governor+Arnold+Schwarzenegger+on+Passage+of+Workers'+Compensation+Reform+Legislation&iOID=56167; Al Baker, *Governor Calls for Changes in Workers' Compensation*, N.Y. TIMES, Mar. 24, 2004, at B6 (reporting that New York

were only to assume regulatory authority to issue citations in situations of mandatory overtime, an employer could evade the general duty clause by imposing low wages on workers and thus effectively compelling them to work long hours in order to supplement their regular wages. This employer practice of reducing wages, which results in employees working overtime, has not increased the overall wages of workers, only the number of work hours it takes to earn the equivalent of the pre-overtime wage.³⁸ In short, if courts and regulators applied the general duty clause to a narrow view of mandatory overtime, many low-wage workers who “voluntarily” work overtime to make ends meet would be excluded from OSHA protection.

In sum, while there are differing motivations for working long hours among workers, some of which derive from inspiration or a sense of advocacy, it is clear that the new labor supply regime, lean production, and the job instability associated with these structural economic changes are forcing working people to work longer hours simply to maintain existing income levels and standards of living. An expanded OSHA mandate to prohibit excessive work hours would appropriately address Congress' concern regarding employers' economic coercion of workers who need to earn a livelihood.³⁹

Expanding the parameters of mandatory overtime to include forms of overtime commonly viewed as “voluntary” and therefore within the purview of the general duty clause represents a significant step toward establishing the organization and control of time as a mechanism that can promote worker health and safety. Emphasizing time in this regard as a health and safety concern also reinforces other policy goals such as increasing worker autonomy, promoting a better balance between work and non-work life, chal-

Governor George Pataki proposed limiting lifetime benefits to injured workers with permanent partial disabilities to ten years); Glenn Whittington, *Changes in Workers' Compensation Laws in 2003*, MONTHLY LAB. REV., 31-2 (Jan. 2004) (remarking that Florida changed its law to limit eligibility by requiring injured workers to prove that their injuries resulting from work-related accidents be more than 50% responsible for that injury to be compensable).

³⁸ See LINDER, MOMENTS, *supra* note 18, at 19; *see also* Schor, *Worktime*, *supra* note 1, at 164.

³⁹ See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 15 n.20 (1980) (upholding an OSHA regulation giving employees acting with the reasonable belief that no less drastic alternative is available the right not to perform an assigned task because of a reasonable apprehension of death or serious injury). However, the Court cited the House Committee Report which commented, “[T]here is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood”; *see also* Am. Cyanamid Co., 9 O.S.H.C. 1596, 1597 (1981).

lenging the free-market biases that champion increased productivity and work-spreading, and lowering unemployment which occurs with shorter working hours.⁴⁰

Regulating excessive work hours for health and safety purposes is an important pro-worker policy that can both invigorate the general duty clause of the Act and serve to realign the increasingly diminished bargaining power of workers with regard to the employment relationship. Like many other government agencies charged with monitoring employers and places of employment, OSHA has failed to adequately protect workers.⁴¹ While placing long work hours within an expansive OSHA mandate will not tran-

⁴⁰ There is ongoing debate as to whether a shorter workweek or worksharing arrangements generate employment. See Schor, *Worktime*, *supra* note 1. But cf., DIMITRI B. PAPADIMITRIOU, JEROME LEVY ECONOMICS INSTITUTE OF BARD COLLEGE, FULL EMPLOYMENT HAS NOT BEEN ACHIEVED: FULL EMPLOYMENT POLICY: THEORY AND PRACTICE 13 (1999) (arguing that dealing with structural unemployment requires increasing the demand for labor rather than rationing work, and indicating that in Europe, reducing work hours failed to increase employment rates and resulted in loss of output, inflation, and imbalance of trade).

⁴¹ See Brett R. Gordon, Comment, *Employee Involvement in the Enforcement of the Occupational Safety and Health Laws of Canada and the United States*, 15 COMP. LAB. L.J. 527, 535, 536, 540 (1994). This article argues that while the Act's substantive provisions promised adequate protection for worker health and safety, ineffective enforcement "has largely eliminated any positive effect of the Act." *Id.* at 535. Gordon cites three primary enforcement problems: (1) a small number of inspectors charged with protecting millions of employees in a large number of workplaces, (2) OSHA's policy of "forced consultation," which seeks employer cooperation rather than issuing sanctions, and (3) the burden of persuasion placed on the worker to show retaliatory discrimination, which results in a low percentage of employee complaints being referred by OSHA to United States district courts. *Id.* at 535-40. These facts together ensure that only a small percentage of the workforce actually benefits from inspections or OSHA's enforcement power, and even fewer from follow-up inspections, and what inspection there is usually fails to result in fines, which gives employers little incentive to implement abatement measures. *Id.* In cases in which a fine is actually levied, employers can reduce the amount by appealing or by showing a "willingness to comply." The result of few inspections, the unfair employee complaint burden, and occasional slaps on the wrist is that poor safety records are obscured, enabling employers to enjoy relative immunity from the Act's reach and creating reluctance on the part of workers to file complaints "in fear of retaliation, despite a provision in the OSH Act which prohibits employer retaliation." *Id.*

As long ago as the mid-1980s, the Office of Technology estimated that 100,000 workers die each year from occupational diseases and 6,000 more die in work-related accidents. Gross, *supra* note 27, at 357. Despite these numbers, there is no resolve to address the issue of health and safety in the workplace. A 1999 Public Citizen report found that the total number of OSHA inspections had steadily declined since 1975 and was at its lowest during the Clinton Administration. PETER LURIE, MARTI LONG & SIDNEY M. WOLFE, PUBLIC CITIZEN, REINVENTING OSHA: DANGEROUS REDUCTIONS IN ENFORCEMENT DURING THE CLINTON ADMINISTRATION (1999), available at http://www.publiccitizen.org/publications/print_release.cfm?ID=6693. Accordingly, inadequate governmental regulation ensures employer impunity as approximately four thousand federal and state OSHA inspectors are tasked with inspecting six million workplaces

scend the agency's under-enforcement problems, it would serve to inform working people of the Act and its general duty clause, thereby making the agency more accountable to workers in their struggle to gain greater control over their health and lives.⁴² As James Gross has observed, OSHA's promise to workers to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions" has been transformed into a promise to employers that health and safety will not interfere with competitiveness, efficiency, and profitability.⁴³ Determining that long work hours violates the health and safety of working people challenges the prevailing view that grants employers ever-increasing autocratic flexibility and puts people before competitiveness, efficiency, and profitability.

1. Longer Hours and Mandatory Overtime

As discussed above, the rise in work hours is largely due to structural changes in the United States economy. In an effort to impose lean production systems, employers have sought to destroy the social wage, the agreement by which an employer sought to maintain dependable employees through the promise of higher wages and long-term employment. Overtime has been combined with many other employer strategies to increase job instability and reduce labor costs such as downsizing, subcontracting, outsourcing, women entering the workforce, and the use of temporary, contingent, and part-timer workers.⁴⁴ Moreover, longer working hours do not translate into an improved standard of living for working people.⁴⁵

in order to ensure the safety of ninety-two million employees. Gross, *supra* note 27, at 362

⁴² While the under- and non-enforcement of labor and health and safety law makes using the law to effect real change in the employment relationship suspect, it does not follow that progressive lawyers should not challenge the myriad ways the law reinforces social inequalities. Since the under/non-enforcement of labor and health and safety laws has become a primary strategy proponents of employer autocratic flexibility have used to lower workers' expectations of working conditions and thereby acquiesce to them, an important part of any movement led by working people to transform the employment relationship is to demand: (1) an end to the systematic under/non-enforcement of labor and health and safety laws, and (2) a re-elaboration of those laws in ways that institutionalize greater worker control over the employment relationship so that workers have more say over the social conditions that affect their lives.

⁴³ Gross, *supra* note 27, at 352, 357.

⁴⁴ See MOODY & SAGOVAC, *supra* note 3 (explaining how overtime is profitable for employers); see also Schor, *Worktime*, *supra* note 1, at 158 (discussing women entering the workforce as a reason for rising working hours).

⁴⁵ See BLUESTONE & ROSE, *supra* note 9, at 29 (noting that a little over 1% annual

Working hours for United States workers have risen over the last two decades. However, reliable comparative numbers of hours worked (voluntarily or involuntarily) are difficult to obtain either by industry or workers. The numbers available, however, regarding the increase in work hours, vary depending on the source, time period, and employee cohort as well as unit of analysis. For instance, one figure puts the annual average increase of 138 hours for workers generally.⁴⁶ Another study found that from 1967 to 1989 there was a sixty-six hour increase in annual work hours, with most of the rise coming from additional hours worked rather than additional weeks.⁴⁷ This same study showed that by the end of the 1980s, dual-earning couples were working an additional day-and-a-half per week which came out to an additional 684 hours annually, or four full months of full-time work.⁴⁸ Other figures, based on the workweek as the unit of analysis, indicate a rise in overtime; from one-and-a-half extra hours for workers generally⁴⁹ to 4.9 hours extra per week for employees in the manufacturing industry.⁵⁰ Other statistics show that the average number of overtime hours has jumped 48% since 1991, and that United States workers work 350 more hours, or *nine more full-time weeks*, than Europeans.⁵¹ One in five workers works more than forty-nine hours per week, while immigrant workers are forced to work upwards of eighty or ninety hours per week.⁵² Although several reports in the last few years have recognized the trend of longer working hours, the statistics used do not tell the story of many working people. A Bureau of Labor Statistics (BLS) report in the February 2000 Monthly Labor Review found that overtime hours worked in manufacturing during most of the 1990s had risen to almost five hours.⁵³ However,

increase in standard of living for prime-age working couples resulted not from “improved wages, but from increased work effort.”).

⁴⁶ Schor, *Worktime*, *supra* note 1, at 158.

⁴⁷ See BLUESTONE & ROSE, *supra* note 9, at 26.

⁴⁸ *Id.* at 28.

⁴⁹ GOLDEN & JORGENSEN, *supra* note 4, at 1.

⁵⁰ Ron L. Hetrick, *Analyzing the Recent Upward Surge in Overtime Hours*, 123 MONTHLY LAB. REV., at 30 (2000).

⁵¹ IT'S ABOUT TIME!—CAMPAIGN FOR WORKER'S HEALTH (2001), at <http://www.nmass.org/nmass/wcomp/workerscomp.html> (on file with the New York City Law Review).

⁵² *Id.*

⁵³ Hetrick, *supra* note 50. “[A]verage overtime is computed by dividing the total number of overtime hours in a given industry by the number of production workers in that industry, including those that work no overtime at all.” *Id.* Hetrick's calculation should be questioned, as this figure does not include overtime worked but not paid for, nor does it distinguish those types of workers who regularly work long hours.

this number does not reflect the long hours worked by many working people in the U.S. across industry and class. The same can be said for ILO statistics, which indicate that "annual work hours are four percent higher than they were in 1980, amounting to an extra one hour and 30 minutes at work per week, per average."⁵⁴

These statistics fail to capture the real work hours many working people are forced to endure either because they are mandated by employers or because they view overtime as a way to supplement their meager earnings. Behind these modest increases in work hours is the untold story of twelve-, sixteen-, or eighteen-hour work days and ninety to 100 hour workweeks to which workers in industries such as garment, telecommunications, auto, home health, meatpacking, poultry processing, and construction are subjected. In some of these industries in which low wage, immigrant, or women workers predominate, the overtime is not even paid.⁵⁵ Moreover, because the FLSA covers only 60% of wage and salary workers, these statistics obscure the millions of U.S. workers exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) which mandate time-and-a-half premium pay for all work performed over 40 hours.⁵⁶ Finally, the low statistical increases of overtime hours worked belie even the BLS's own findings that the economic recovery of the 1990s relied upon the use of increased overtime rather than hiring new employees.⁵⁷

2. Frenetic Work Paces, Work Speed-Ups, and Employee Monitoring

Though the purpose of this article is to formulate a legal argument for using the general duty clause to prohibit excessive work hours, any policy that would take shape around this idea must anticipate likely employer responses. One such likely response that is already widely used as part of the lean production trend in the economy is to simply make employees do more in less time through imposing work speed-ups, forcing employees to work at more frenetic paces,⁵⁸ and increased employee monitoring sys-

⁵⁴ GOLDEN & JORGENSEN, *supra* note 4.

⁵⁵ See generally Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 297 (2003).

⁵⁶ MOODY & SAGOVAC, *supra* note 3 at 13.

⁵⁷ Hetrick, *supra* note 50, at 33.

⁵⁸ See generally Lewchuk, et al., *supra* note 8; MOODY, *supra* note 8; see generally Marc Linder, *I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 CASE W. RES. L. REV. 33 (1995).

tems⁵⁹ to ensure adherence to these working conditions.

In fact, speed-up production is already an integral part of the lean production system that has workers working longer hours at more frenetic paces as a way to increase productivity while at the same time keeping labor costs down. In a 1990 survey of eighty-five manufacturers, managers reported using the following speed-up techniques: just-in-time (JIT) method 52%; total quality management (TQM) 56%; work teams 31%; and statistical process control (SPC) 79%.⁶⁰ These workplace organization techniques are based in differing degrees on employer-oriented flexibility designed to increase productivity. They are also part of a larger ideological war currently being won by employers and their political and judicial allies that characterizes workers' time on the job as the property of their employer.⁶¹ Any "misuse" of that time therefore constitutes a social problem deemed to be a "crime against capital."⁶² Their efforts to further institutionalize and prevent theft of employers' time through time management and lean production techniques have been legitimized by science and social science, enforced by the legal system, and disseminated by the mass media.⁶³ Consequently, greater employee monitoring can lead to worsening workplace conditions and increased injuries and illnesses, as well as to

⁵⁹ Snider, *supra* note 26. Snider reports that in white collar firms "45 percent of American companies now monitor all electronic communication," *id.* at 102, while office workers and on the shop and factory floors, "computer monitoring through automated time-and-attendance video display systems record employees' in-and-out times, compute hours worked, and individual and collective levels of productivity." *Id.* at 103. Other methods include electronic surveillance systems which monitor the coming and going of employees, the number of keystrokes, phone calls, and employee performance compared to expert-created projected goals. *Id.*

⁶⁰ MOODY, *supra* note 8, at 102. Many of these techniques enlist the employees themselves in finding ways to improve efficiency and performance and, one can argue, thereby effectively eliminating their own jobs. *See also* Snider, *supra* note 26, at 103.

⁶¹ *See* Snider, *supra* note 26, at 109 (Snider concludes, "It is ironic that theft of time has emerged as a social problem at a time when employers are increasingly stealing time from employees.").

⁶² *Id.* at 91-92. Snider writes,

Through deregulation, decriminalization, and downsizing, corporate crime vanished, ideologically, politically, and legally. However, at the same time that laws disciplining employers disappeared, laws disciplining employees were strengthened. The legal rights of employees, such as the right to resist sixty-hour work weeks, or refuse work in unsafe environments were eliminated, while new offences against employers were discovered and denounced. Theft of time, invented and brokered as a social problem by academics in business schools, organizational psychology, sociology, and criminology, is a quintessential example of this process. *Id.*

⁶³ *Id.* at 92-93.

overwork, the principal goal of the monitoring.⁶⁴

B. Existing Research Linking Overtime and Long Hours to Safety and Health

1. Long Hours Linked to Increased Risk of Safety Accidents, Injuries and Illnesses, and Fatigue and Stress

Long work hours are linked to increased risk of safety incidents, injuries, and illnesses, as well as increased fatigue and stress. Perhaps the most recent well-publicized example of the relationship between long work hours and stress and fatigue is in the health care industry, particularly as long hours impact the work of nurses⁶⁵ and medical residents.⁶⁶ In a petition to OSHA requesting that the agency use its regulatory authority to limit the number of hours medical residents could work, the drafters of the petition used research findings illustrating how excessive work hours (up to 130 hours per week) resulted in increased risk of auto crashes, negative mental effects, including sleep deprivation, fatigue, and depression, and obstetric complications including pre-term hospitalization, preeclampsia or eclampsia, decreased birth weights, intrauterine growth retardation, and preterm delivery.⁶⁷ Their petition requested, among other changes, limiting medical resident work hours to eighty hours per week with one shift lasting no more than twenty-four consecutive hours, and a minimum of ten hours off-duty time between shifts.⁶⁸ A study conducted by Wayne State University found that among medical residents, there is a 6.7 odd ratio increase of motor vehicle crashes due to falling asleep at the wheel during their residency compared to before

⁶⁴ *Id.* at 103. Snider explains,

Overall, nervous breakdowns increase with the level of surveillance, while general health deteriorates. Fatigue or exhaustion, depression, apathy, stress, anxiety, pain in shoulders and wrists, stomach and back, indigestion, nausea, and sleep disturbances are common. A workplace "syndrome" has been legitimized by the name "bathroom-break harassment," defined as the reluctance to take bathroom breaks for fear of losing one's job. *Id.*

⁶⁵ See California Nurses Association, *available at* <http://www.calnurse.org> (discussing California Nurses Association ("CNA") fight against mandatory overtime).

⁶⁶ See generally Petition to the Occupational Safety and Health Administration Requesting that Limits be Placed on Hours Worked by Medical Residents (Apr. 30, 2001) (hereinafter "Petition"), *available at* http://www.citizen.org/publications/print_release.cfm?ID=6771.

⁶⁷ *Id.*

⁶⁸ *Id.*

their residency.⁶⁹

Depression, sleep deprivation, and fatigue that result from long resident work hours increase the risk of accident and errors with regard to patient service delivery. In a study of 254 residents, 45% reported making mistakes, 41% of whom admitted their mistakes were due to fatigue and 31% of whom reported their errors resulted in patient death.⁷⁰ Despite the risks to both residents and patients, OSHA refused to exercise its regulatory authority, claiming instead that the Accreditation Council for Graduate Medical Education (ACGME) already regulated work hours.⁷¹ Although ACGME recently implemented limits on resident work hours to eighty hours per week, Public Citizen still advocates for a federal standard arguing that ACGME, a private entity whose accreditation is voluntary, does not have the enforcement power necessary to stop long work hours in the industry.⁷²

The California Nurses Association (CNA) has led its profession's attempts to limit nurses' work hours. Along with nursing associations from Massachusetts, Maine, and Pennsylvania, the CNA backed national legislation, H.R. 1289 (Registered Nurses and Patients Protection Act), that would amend the Fair Labor Standards Act of 1938 to prohibit mandatory overtime for licensed health care workers.⁷³ Recent victories in Long Beach and San Jose illustrate that the CNA is also winning mandatory overtime bans as part of hospital collective bargaining agreements.⁷⁴ Responding to nurses who report working sixteen, twenty, and twenty-eight-plus hours, the CNA advocates a ban on mandatory overtime because it sees a direct connection between long hours, nursing shortages, and patient safety.⁷⁵ CNA President Kay McVay observed that "[n]urses find that at the end of a long shift [they] are being man-

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Letter from John L. Henshaw, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, to Dr. Sidney Wolfe, Director, Public Citizen Health Research Group (Oct. 4, 2002) *available at* www.publiccitizen.org.

⁷² *Id.*

⁷³ Press Release, Cal. Nurses Ass'n, First Hearing Set on Bill to Ban Mandatory Overtime CNA: State Law Needed to Protect Patient Safety (Apr. 11, 2001) *available at* www.calnurse.org.

⁷⁴ See Press Release, Cal. Nurses Ass'n, No More Mandatory Overtime Long Beach Memorial RNs Reach Agreement, Cite Major Gains in Wages, Retirement Security (Dec. 8, 2002) *available at* www.calnurse.org; Press Release, Cal. Nurses Ass'n, Wage Increases & Ban on Mandatory Overtime Citing Gains, Newly Organized RNs at O'Connor Hospital Ratify New Contract (Sept. 19, 2002) (banning mandatory overtime except in declared emergencies) *available at* www.calnurse.org.

⁷⁵ See Cal. Nurses Ass'n, First Hearing Set, *supra* note 73.

dated to work another eight hours or more, when they no longer have the stamina and mental alertness to provide the quality care their patients need.”⁷⁶

Numerous studies demonstrate the detrimental effect of long work hours on worker health and safety.⁷⁷ Research indicates that overtime increases the risk of injury and illness. In a German study, researchers found that in the twelfth hour of work, the accident rate was double the rate of the first nine hours of work.⁷⁸ This was also the finding in a study using the National Census Household Survey that found the injury rate among all workers increased 50% after more than fifty work-hours per week.⁷⁹ Furthermore, the long work hours exacerbate existing workplace hazards such as repetitive motion disorder and the permissible exposure limits (PELs) to toxic substances.⁸⁰ It is important to remember that PELs designed to protect workers, are derived from a normal 40 hour workweek. Consequently, a worker who works in excess of forty hours will have an increased risk of injury or illness from this overexposure.⁸¹

Golden and Jorgensen also report that “frequent overtime and compressed work schedules that produce long workdays can be a major cause of the stress and chronic fatigue reported by many workers, as well as the ensuing occupational burnout or serious health conditions.”⁸² Long hours that produce such fatigue and exhaustion can also increase the risk of human error and performance-impaired and overexertion injuries. A common result of

⁷⁶ *Id.*

⁷⁷ To be sure, the relationship between long work hours and injuries and illnesses is complicated by other variables, such as industry and occupation-type, shiftwork, nightwork, physical demands of the job, age and gender, and other environmental stressors, such as working conditions of overtime work, noise, temperature, time pressure, distractions, and faulty equipment. For a survey of the current research, see GOLDEN & JORGENSEN, *supra* note 4; see also Spurgeon et al., *supra* note 25; Landsbergis, *supra* note 4.

⁷⁸ See Golden & Jorgensen, *supra* note 4, at 3 (citing a study by Hanecke et al., noting that the accident risk for German workers increased exponentially beyond the ninth hour at work).

⁷⁹ Dong, *supra* note 32.

⁸⁰ GOLDEN & JORGENSEN, *supra* note 4, at 3. See also Spurgeon et al., *supra* note 25, at 368. Spurgeon claims:

[i]t is arguable that the relation between hours of work and ill health is mediated by stress, in that long hours act both directly as a stressor, in increasing the demands on a person who attempts to maintain performance levels in the face of increasing fatigue, and indirectly by increasing the time that a worker is exposed to other sources of workplace stress.

⁸¹ Spurgeon et al., *supra* note 25, at 374.

⁸² GOLDEN & JORGENSEN, *supra* note 4, at 3; see also Spurgeon et al., *supra* note 25, at 369 (finding that, in response to stress, workers adopt coping strategies, or maladaptive behaviors such as substance abuse, which can exacerbate health problems).

working long hours is stress, which is estimated to cost \$200 billion a year by the ILO.⁸³ Another commentator reports that, “one U.S. survey found that almost a quarter of the workforce aged 25-44 suffered from stress-induced nervous strain severe enough to ‘diminish performance.’”⁸⁴ Stress due to long work hours has been linked to high blood pressure and cardiovascular disease.⁸⁵ For instance, a Northwestern National Life study “found that seven out of ten employees experiencing job stress suffered health ailment [and that] [f]requent mandatory overtime was one of the leading five factors that caused increased stress.”⁸⁶ Moreover, stress-related workers compensation claims tripled between 1980 and 1985.⁸⁷ Finally, a study published in the *Journal of Occupational and Environmental Medicine* found that working more than forty hours per week increased the chance of heart attacks and that men working more than sixty hours per week were twice as likely to suffer heart attacks as those working forty-hour weeks.⁸⁸

⁸³ Mara Eleina Conway, *Karoshi: Is It Sweeping America?*, 15 UCLA PAC. BASIN L.J. 352, 367 (1997).

⁸⁴ *Id.* at 374.

⁸⁵ GOLDEN & JORGENSEN, *supra* note 4, at 3; see Spurgeon et al., *supra* note 25, at 371 (citing a study that found that

in 100 coronary patients under the age of 40 the presence of severe occupational strain—that is, very long working hours—was more than four times that in a control group. Seventy-one percent of the coronary group had for a prolonged period, either worked both days and evenings or had worked more than 60 hours a week.).

Another study detailed by Spurgeon “concluded that the mortality risk from coronary heart disease was greater in men under the age of 44 who worked more than 48 hours a week in certain occupations, notably those not involving heavy physical work, a factor which seemed to offer some protection.” *Id.*; see also Landsbergis, *supra* note 4, at 65.

⁸⁶ GOLDEN & JORGENSEN, *supra* note 4, at 3 (“Employees who worked overtime on a regular basis were twice as likely (62% vs. 34%) to report that they found their jobs to be highly stressful.”).

⁸⁷ Conway, *supra* note 83, at 353. Stress is a compensable factor in the U.S. workers compensation system. See generally *id.* at 353-379. Two tests for determining whether stress is compensable are used in most workers compensation system jurisdictions: the unusual stress test and the objective causation test. *Id.* at 377. “Under the unusual stress test, ‘an employee’s recovery depends not only on whether gradual stress actually caused her injury, but also on whether the stress she suffered differed from that experienced by her co-workers.’” *Id.* On the other hand, the objective causation, “simply requires the disabled worker to establish a causal connection between the workplace and the mental injury; she need not establish that the stress that caused the injury is unusual or extraordinary.” *Id.*

⁸⁸ Maxine Frith Heart, *Attacks Linked to Long Hours at Work*, THE EVENING STANDARD (London) July 10, 2002, at 15. The study went on to find that

[t]he risk trebled for men who had less than five hours’ sleep a night for at least two days in the working week. Researchers said the results were so significant that people should work no more than 40 hours a week

The relationship between overwork and health is recognized in some countries. In 2001, the Australian Industrial Relations Commission ruled that “people could not be forced to work excessive overtime if it affected their family responsibilities or their health and safety.”⁸⁹ In Japan, laws have been enacted to regulate work hours and minimize *karoshi*, which means death from overwork.⁹⁰ For instance, a government study found that ten women died from overwork in 2001 and twenty-two others suffered mental problems, including stress and depression due to overwork.⁹¹ In that same year, Japan’s Health, Labor, and Welfare Ministry reported receiving almost seven hundred submissions of *karoshi* and determined that 143 deaths were caused by overwork, as determined by new standards adopted in December 2000.⁹² The National Institute of Public Health indicates three contributory factors to *karoshi*: “heavy physical labor; long hours of overtime, working without days off; late night work and other factors that obstruct biological rhythms; and excessive stress resulting from factors like overly intense work responsibilities, solitary job transfers and undesired job assignments or transfers.”⁹³ The new standards

and have at least two weekdays off a month to reduce the chances of heart disease. Researchers in Japan studied the lives of 260 men between the ages of 40 and 79 who had suffered a first heart attack, and compared them to 445 men of a similar age with no history of heart disease. They found that the heart attack victims were significantly more likely to have been working longer hours, having fewer days off and less sleep than the healthy men. Study author Dr. Suminori Kono, from Kyushu University in Japan, said: “These findings suggest that chronic overwork and sleep deprivation confer an increased risk of heart attack.” Previous studies have found that overtime work can increase blood pressure and heart rate and cause chest pain, depression and fatigue. Lack of sleep can also lead to a rise in blood pressure and heart abnormalities which can cause cardiac arrest. *Id.*

⁸⁹ Melissa King & Miles Kemp, *Long Working Hours; Living to Work*, THE ADVERTISER, August 29, 2002, at 19.

⁹⁰ Conway, *supra* note 83, at 359. Japanese labor laws permit an employer to require employees to work longer than the eight-hour day, forty-eight-hour workweek maximum, if there is a written agreement between the employer and labor union or a representative of a majority of employees specifying the limits and reasons for the extension. See also Spurgeon et al., *supra* note 25, at 372 (noting that in Japan, long working hours are thought to be a major contributory factor to *karoshi*, which is “a sociomedical term referring to a range of cardiovascular attacks such as strokes, myocardial infarction, or acute cardiac failure resulting from hypertensive or arteriosclerotic disease”).

⁹¹ *More Japanese Women Suffering Mental Problems from Overwork*, JAPAN ECONOMIC NEWswire, February 17, 2003.

⁹² *Record 143 Overwork-Related Cases Recorded in FY 2001*, JAPAN ECONOMIC NEWswire, May 22, 2002.

⁹³ Conway, *supra* note 83, at 355, 356. The American Heart Association (AHA)

provide that “death or severe effects caused by overwork are determined to be the cause if a person works more than 100 hours of overtime in the month before she or he dies, or suffers severe effects.”⁹⁴ The standard allows an examiner, when determining whether *karoshi* has occurred, to consider the working conditions of the employee for up to six months prior to the employee’s death.⁹⁵ It is estimated that over one-fifth of Japanese male workers work more than eighty hours of overtime per month, the threshold at which the government says overwork becomes dangerous.⁹⁶

Many U.S. industries are especially hard-hit by long work hours, particularly where ever-increasing productivity levels are prioritized over the health of workers. In the garment industry, well known for its exploitive subcontracting system that employs mostly immigrant labor, workers are subjected to compulsory long work hours accompanied by intimidation, constant surveillance, restrictions on movement, non-payment of wages, heavy lifting, and repetitive work.⁹⁷ Workers fear retaliation and termination for reporting injuries to employers who maintain tight controls over them through low wages, constant monitoring, and abusive supervision. Shift workers are similarly overworked to the point of exhaustion. A recent study concluded that job cuts increased overtime hours and accidents due to human error caused by stress and overwork.⁹⁸ The study found the number of shift workers

identifies these same factors as those contributing to heart failure in America. *Id.* at 375. In fact, Conway remarks that the AHA study concluded that, “where the ability to describe the causal connection between the ailment and the injury or death exists, the statistics tend to show proof that this is a serious problem that arises from stress.” *Id.*

⁹⁴ *Record 143 Overwork-Related Cases Recorded in FY 2003*, *supra* note 92 (“The new standards also take into consideration fatigue over a six-month period.”).

⁹⁵ *Man’s Death Acknowledged as Stemming from Overwork*, JAPAN ECONOMIC NEWSWIRE, May 29, 2002. Significantly, the court acknowledged death from overwork as a result of accumulated fatigue due to excessive work even though the decedent had only worked for the employer for 52 days as a part-time employee. *Id.*

⁹⁶ Shane Green, *Rising Overtime Drives Workers To Death Zone*, THE AGE (Melbourne) Oct. 29, 2002, at 12. The article adds, “Japanese courts are also showing a willingness to force companies to pay compensation to bereaved families.” *Id.*

⁹⁷ Helen Chen, *Caucus Undertakes Workplace Health Safety Issues*, THE REPORTER. (Asian Law Caucus) July 2002, at 1 & 4; *see also* Lung, *supra* note 55, at 297.

⁹⁸ *Cutbacks Hit 24-Hour Facilities*, THE DALLAS MORNING NEWS, Dec. 1, 2002, at 9L; *see also*, *Survey Finds Staffing Levels Stretched Too Thin*, NUCLEAR NEWS, Jan. 2003, at 18 (Reporting results from the same study, “2002 Shiftwork Practices,” conducted by Circadian Technologies, Inc. (CTI) of managers from 623 facilities, representing nearly 120,000 employees, from a range of 24/7 operations including utilities, manufacturing, process production, public safety, health care and service industries. The survey reports that “other studies also have demonstrated that mandatory overtime is costing employers in the United States \$150 billion per year in occupational accidents and injuries.”).

working more than four hundred annual hours of overtime had increased 45% and employee fatigue 101% since 2000. Seventy-three percent of facilities reported using holdovers (where the shift length is increased or doubled) to cover needed overtime, while those workplaces reporting no employee fatigue have decreased by 52%.⁹⁹

Workers in other industries experience the same increased risk of injury due to accidents resulting from excessive work hours. In the auto industry, Moody reports that the average incidence of illness and injuries in the early 1990s was five times the average level of the early and mid-1980s.¹⁰⁰ Autoworkers who work overtime are more likely to experience fatigue and depression and suffer from "impaired performance in attention and executive functions."¹⁰¹ Accident rates for autoworkers increase during overtime hours.¹⁰² The injury rate for auto assemblers rose from five in 1985 to 28.3 in 1991, an increase of 460%. In 1992, the rate increased to 32.3%.¹⁰³ Moreover, during this same time period, productivity levels rose 81%, exemplifying the direct correlation between speed-up production practices and long work hours.¹⁰⁴

In a study of nuclear power plant safety, the more overtime hours an operator worked, the more safety performance problems occurred due to fatigue-induced operator errors.¹⁰⁵ Construction workers report suffering from sleep deprivation, fatigue, and work-related stress both on the job and in their personal lives.¹⁰⁶ Studies in the transportation industry demonstrate an increased risk of accidents after eight or nine-and-one-half hours of driving. One study found that the accident rate doubled after 12 hours.¹⁰⁷ The Federal Motor Carrier Safety Administration (FMCSA) found that commercial drivers were sixteen times more likely to have a fatal accident during the thirteenth hour of driving than during the first hour.¹⁰⁸ Another study of commercial drivers concluded that risk

⁹⁹ *See id.*

¹⁰⁰ MOODY, *supra* note 8, at 191. *See also* Lewchuk et al., *supra* note 8, at 79 (citing a study that showed that nearly half of automobile plant employees worked in physical pain or discomfort at least half the time).

¹⁰¹ GOLDEN & JORGENSEN, *supra* note 4, at 3.

¹⁰² GOLDEN & JORGENSEN, *supra* note 4, at 3.

¹⁰³ MOODY & SAGOVAC, *supra* note 3, at 32.

¹⁰⁴ *Id.*

¹⁰⁵ Kathryn Baker et al., *Work Practices, Fatigue, and Nuclear Power Plant Safety Performance*, HUMAN FACTORS, 244, 251 (1994).

¹⁰⁶ Goldenhar et al., *supra* note 4, at 220-21.

¹⁰⁷ Petition, *supra* note 66.

¹⁰⁸ *Id.*

of accident rose 50% after the first four driving hours, 80% between the 7th and 8th hour, and 130% until the end of 9th hour.¹⁰⁹ The FAA found that 21% of aviation accidents were due to fatigue.¹¹⁰

New research is beginning to show the direct connection between increased risk of injury and illness and the new forms of lean production and flexible work arrangements, particularly overtime and work intensification due to downsizing. For instance, downsizing, resulting in reduced staffing and subsequent longer hours due to increased workloads, has been associated with increased rates of fatal injuries, high blood pressure and cardiovascular disease, and work-related musculoskeletal disorders (WMSDs) in a wide range of industries and occupations.¹¹¹ Work intensification and long hours are correlated with low job control, suggesting that excessive hours may not be as stressful or as hazardous where there is greater worker autonomy and decreased job strain.¹¹²

Injuries and illnesses have become the norm in many U.S. industries as a result of the physical demands placed on workers who have no choice but to submit to the overwork and speed-up production techniques imposed by employers. To illustrate the extent to which so many workers continue to live and work in pain, Moody and Sagovac report that in 1992, "half of the over two million non-fatal occupational injuries resulting in days off work involved sprains and strains; a third of these were cumulative trauma disorders."¹¹³ Despite employer attempts to squeeze more work out of workers through longer work hours at a more frenetic pace, there is research that suggests that such short-term increases in profitability and productivity create long-term harm by "decreasing quality, increasing mistakes, and reducing productivity."¹¹⁴ In fact, workers reported that even their short-term productivity suffered as a result of overtime.¹¹⁵ It is estimated that job stress alone costs

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Landsbergis, *supra* note 4, at 66.

¹¹² *Id.*

¹¹³ MOODY & SAGOVAC, *supra* note 3, at 32.

¹¹⁴ GOLDEN & JORGENSEN, *supra* note 4, at 3.

¹¹⁵ Goldenhar et al., *supra* note 4, at 221. With regard to the adverse effects of overtime on their productivity, one worker interviewed stated, "when you do continuous overtime—60 hours a week. It's not that much work being done when you're working all of those hours and the body becomes stressed. You tend to stop a lot, take more breaks than normal." See also Spurgeon et al., *supra* note 25, at 372-73 (describing early studies that demonstrate reducing overtime and work hours (from between five and twenty hours) did not reduce productivity levels and in some cases increased productivity while at the same time it reduced absenteeism).

U.S. industries \$150 billion a year in absenteeism, health insurance premiums, diminished productivity, workers' compensation claims, and direct medical costs.¹¹⁶ The problem has even prompted insurance companies to warn policy holders that permitting or mandating excessive work hours can lead to increased injuries and financial costs.¹¹⁷

Nevertheless, employer and government responses to injuries and health problems that result from long working hours have been woefully inadequate. This is in large part because long work hours benefit employers and play a crucial role in the new labor supply regime of providing necessary labor while controlling inflation.¹¹⁸ Moreover, the problem remains obscured by the U.S. government's failure to systematically track overtime hours by industry. However, the National Occupational Research Agenda (NORA), a National Institute for Occupational Safety and Health (NIOSH)-affiliated project designed to guide and organize research efforts in occupational health and safety, has recently called for more targeted and comprehensive studies on the relationship between long work hours and worker health and safety and has established a working group to continue to work on this issue.¹¹⁹ While this is promising, future research must address and identify interventions that remedy the causes of health problems due to long work hours, such as overexertion injuries, cumulative trauma, mental health, and cardiovascular disorders, stress, fatigue, exhaustion, and even diabetes, rather than be used solely to treat the symptoms of overwork by emphasizing improved safety training, increased supervision, stress and time management, or by addressing

¹¹⁶ GOLDEN & JORGENSEN, *supra* note 4, at 3; *see also* NUCLEAR NEWS, *supra* note 98 (indicating that "other studies have demonstrated that mandatory overtime is costing employers in the United States \$150 billion per year in occupational accidents and injuries").

¹¹⁷ Goldenhar et al., *supra* note 4, at 223 (citation omitted).

¹¹⁸ *See* BLUESTONE & ROSE, *supra* note 9.

¹¹⁹ NIOSH, *supra* note 8, at 15. The authors call for research focusing on increased risk of injury and illness resulting from the demands and fatigue associated with long work hours and identify the need to develop improved methods for measuring work hours with particular attention to safety outcomes and populations especially subject to working long hours. *Id.* Specific research areas identified include:

(1) The effects of modest increases in working hours. (2) How effects of long work hours might be modified by alternative work schedules and work-rest regimens, and varying domestic demands. (3) Task-specific effects of long work hours (e.g., effects of long work hours for physically demanding tasks and other hazardous exposures). (4) The effects of unplanned and mandatory overtime. *Id.*

workplace violence or substance abuse.¹²⁰ Such policy responses further institutionalize and normalize long work hours. Instead, a national consensus must be built that recognizes “50 hours as a threshold” after which work hours become excessive and “detrimental to health and well-being” by increasing the risk of work-related injuries and illnesses.¹²¹

III. INTERPRETING THE GENERAL DUTY CLAUSE TO PROHIBIT LONG WORK HOURS

A. *Statutory Basis for Including Long Hours Within OSHA’s Mandate*

1. General Duty Clause

The general duty clause of the Act was intended to apply to serious hazards to which no specific standard already applies.¹²² While the Occupational Safety and Health Review Commission (OSHRC)¹²³ and the courts have disallowed 5(a)(1) citations when there is an applicable standard, no OSHA standard exists for the regulation of work hours for employees generally. Furthermore, it would be impossible to formulate precise standards establishing hazardous levels of work hours applicable across industries and occupations or, for that matter, which could even differentiate between job duties within a single workplace. Therefore, expanding OSHA’s mandate to the regulation of excessive work hours is most appropriately achieved through the general duty clause.

The purpose of the Act was “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”¹²⁴ The Act’s Congressional Findings and Purpose demonstrate that Congress intended the Act to provide the regulatory basis upon which the American workplace could realize optimal health and safety.¹²⁵ In this spirit, the general duty clause protects workers from *recognized*

¹²⁰ See Goldenhar et al., *supra* note 4, at 224; see also Spurgeon et al., *supra* note 25, at 370.

¹²¹ Spurgeon et al., *supra* note 25, at 371, 374.

¹²² ROTHSTEIN, *supra* note 7, at 197.

¹²³ Section 12 of the Act establishes the Occupational Safety and Health Review Commission (OSHRC). 29 U.S.C. § 661 (2000). The OSHRC is a three-member independent administrative body which adjudicates disputes arising from citations or penalties imposed by OSHA. The OSHRC chairman appoints administrative law judges (ALJs) who have life tenure and who hear the disputes and render decisions. *Id.*

¹²⁴ See 29 U.S.C. § 651(b).

¹²⁵ *Id.* § 651(b)(5)-(7). This section calls for providing research in the area of occupational health and safety; developing new and innovative methods for addressing health problems; discovering latent diseases and establishing causal connections between diseases and work; and providing medical criteria to assure that no employee

hazards, a measure intended to adjust to advances in science and changes in industry practices, employer policies, and employment conditions. The general duty clause was Congress' attempt to hold employers to the common law standard of general care to refrain from actions causing harm to others and to encourage them to reduce safety and health hazards at the workplace.¹²⁶ While employers' general duty of care under 5(a)(1) applies only to an employer's own employees, an employer can be held liable for hazards affecting its employees in workplaces not under that employer's exclusive control.¹²⁷

An employer violates the general duty clause when the OSHA Secretary can prove "(1) that the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm."¹²⁸ This general duty requires employers to eliminate "feasibly preventable" hazards.¹²⁹ The Secretary must demonstrate, by specifying the particular steps that should have been taken, feasible and reasonable measures that would materially reduce the likelihood of injury resulting from the cited hazard.¹³⁰ A safety measure is feasible when safety experts determine it to be so and not when the precaution is customary in the industry.¹³¹ A violation pursuant to the general duty clause "does not require the actual occurrence of an accident, nor does the occurrence of an accident, by itself, prove the existence of a violation."¹³² Therefore, the inquiry turns on the likelihood of an injury if an incident occurs rather than the likelihood

suffers diminished health, functional capacity, or life expectancy due to her or his work experience.

¹²⁶ *Id.* § 651(b)(1); see also *Nat'l Realty & Constr. Co. v. Occupational Safety and Health Review Comm'n*, 489 F.2d 1257, 1265 n.34 (D.C. Cir. 1973). The court refers to the House and Senate Committee reports on the Act that state the common law standard of care was not one of reasonableness, but rather a standard of care based on a "general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment." *Id.* (citing H.R. REP. NO. 91-1291, at 21 (1970); and S. REP. NO. 91-1282, at 9 (1970), reprinted in 1970 U.S.C.C.A.N. 5177, 5186). The court then states "[t]hat employers must take more than merely 'reasonable' precautions for the safety of employees follows from the great control which employers exert over the conduct and working conditions of employees." *Nat'l Realty*, 489 F.2d at n.34.

¹²⁷ ROTHSTEIN, *supra* note 7, at 202.

¹²⁸ See *National Realty*, 489 F.2d at 1265.

¹²⁹ *Getty Oil Co. v. Occupational Safety and Health Review Comm'n*, 530 F.2d 1143, 1145 (5th Cir. 1976).

¹³⁰ *Champlin Petroleum Co. v. Occupational Safety and Health Review Comm'n*, 593 F.2d 637, 640 (5th Cir. 1979).

¹³¹ See *National Realty*, 489 F.2d at 1266, n.37.

¹³² ROTHSTEIN, *supra* note 7, at 198.

of an incident.¹³³ The focus is then on the existence of hazardous conditions rather than the occurrence of an accident. In this respect, opponents of expanding the general duty clause to include the prohibition of excessive work hours could not defeat such a mandate by claiming that the causal connection between long hours and a particular or likely injury is too attenuated.

The Act granted employees a certain bundle of rights which were included to ensure the full effect of the general duty clause by enabling employees to monitor and ensure enforcement of employers' general duty requirement.¹³⁴ Employees have, for example, the right to request a workplace inspection because of an imminently dangerous workplace condition or practice;¹³⁵ to accompany OSHA inspectors during their workplace inspections;¹³⁶ to be informed of their protections under the Act;¹³⁷ to have access to toxicity exposure reports conducted by employers;¹³⁸ to refuse work duties that would reasonably cause death or serious injury;¹³⁹ to protection against retaliation;¹⁴⁰ and to bring an action to compel the Secretary of Labor to seek injunctive relief if the employee believes the Secretary wrongfully declined to do so.¹⁴¹ While these rights¹⁴² are limited either by statute or by case law, they indicate

¹³³ The *Duriron Company, Inc.* 11 O.S.H. Cas. 1405 (BNA) (1983). Regarding the meaning of "likely" in the general duty clause, the Commission reasoned: "However, the Commission has held that the term 'likely' in the general duty clause does not refer to the likelihood of an incident occurring but to the likelihood of serious injury in the event an incident occurs." *Id.* at 1407.

¹³⁴ Courts require OSHA to have administrative probable cause in order to obtain a warrant to search an employer's workplace based on an employee's complaint of a general duty clause violation. See *Reich v. Kelly-Springfield*, 13 F.3d 1160, 1166 (7th Cir. 1994) (finding that, "[a] mere allegation of danger from an employee without sufficient documentation or supporting data is insufficient; in order to establish 'administrative probable cause,' the warrant application must 'support[] a reasonable belief or lead[] to a reasonable suspicion that the OSH Act or its regulations have been violated.'" (citing *In re Midwest Instruments Co.*, 900 F.2d 1150, 1153 (7th Cir. 1990))). Such probable cause, the court found, "requires OSHA to perform a sufficient investigation to confirm the validity of the complaint, for instance, interviewing the complainant, interviewing other employees, checking medical records when possible, or contacting the employer to allow it to explain and/or respond to the alleged unsafe conditions." *Reich*, 13 F.3d at 1166.

¹³⁵ 29 U.S.C. § 657(f)(1) (2001).

¹³⁶ 29 U.S.C. § 657(e).

¹³⁷ 29 U.S.C. § 657(c)(1).

¹³⁸ 29 U.S.C. § 657(c)(3).

¹³⁹ 29 C.F.R. § 1977.12(b)(2) (2003).

¹⁴⁰ 29 U.S.C. § 660(c)(1).

¹⁴¹ 29 U.S.C. § 662(d).

¹⁴² Generally, I believe that statutory rights of employees to police the workplace, though important to a comprehensive remedial scheme, too often become the primary enforcement mechanism against employer misconduct, due to the abdication of

that Congress, OSHA, and the courts recognize the Act's "remedial orientation is prophylactic in nature," i.e., that its purpose is to "prevent deaths and injuries from ever occurring."¹⁴³

2. OSHA's Jurisdiction to Prohibit Excessive Work Hours

OSHA is authorized to prohibit excessive work hours because the agency regulates employment performed in workplaces with respect to the health and safety of employees if not preempted by any other federal agency.¹⁴⁴ The Act does, however, expressly contemplate preemption in 29 U.S.C. section 653(b)(1) by providing that:

[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

OSHA will be preempted in cases where a statute, involving the jurisdiction of another federal agency, is solely concerned with regulating the health and safety of workers or authorizes that agency to regulate an aspect of public safety or health, and employees receive the statutory protection directly (as opposed to incidentally).¹⁴⁵

Section 4(b)(1) of the Act expressly prohibits OSHA from exercising its statutory authority when other federal agencies promulgate specific regulations regarding the working conditions at issue or assert comprehensive regulatory jurisdiction over working conditions of employees.¹⁴⁶ In *Chao v. Mallard Bay Drilling*, the Supreme Court held that "mere possession by another federal agency of unexercised authority to regulate certain working conditions is

government responsibility to inspect, monitor, and enforce the law. Indeed, it is hypocritical to prioritize employees as the lead watchdogs vis-à-vis workplace health and safety when the Act itself emerged out of the need to protect employees deemed "ill-equipped" to ensure workplace health and safety. Therefore, one primary purpose in reinvigorating the general duty clause is to strike a more effective and fair balance between employers' and employees' obligations under the Act. While advocating with and on behalf of workers to "know their rights" with regard to occupational health and safety is important, this can never be allowed to substitute for government enforcement of employers' affirmative obligations to employees pursuant to the Act. Otherwise, employees are asked to police workplaces in the absence of full knowledge, equal bargaining power, and effective enforcement mechanisms.

¹⁴³ See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980).

¹⁴⁴ 29 U.S.C. § 653(a) (limiting the scope of OSHA's authority to employment performed in a workplace). To the author's knowledge, there has never been a citation or worker claim contending that long work hours violates the general duty clause.

¹⁴⁵ See ROTHSTEIN, *supra* note 7, at 23-24.

¹⁴⁶ See *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 244 (2002).

insufficient to displace OSHA's jurisdiction."¹⁴⁷ The court further reasoned that:

minimal exercise of some authority over certain conditions . . . does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes clear that OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated, and if such regulations 'affect occupational safety or health.'¹⁴⁸

Therefore, although some industries may regulate work hours, thus possibly preempting an OSHA work-hours standard in that industry, there is no federal statute that has occupied the field for workers generally.

There is no precedent within OSHA's existing regulatory regime that could be used to justify the prohibition of excessive work hours. However, the standard used in industries where workers are exposed to lead, constitutes recognition that working more than eight hours can lead to overexposure and therefore requires employers to adjust the permissible exposure limit (PEL) based on the number of hours worked.¹⁴⁹ This means that if employers cannot reduce the PEL to an acceptable level, the employer is required to implement engineering, administrative, or work practice controls to reduce the PEL.¹⁵⁰ The regulation even contemplates temporary removal of employees due to elevated blood-lead levels.¹⁵¹ Thus, there is already a willingness to require employers to adjust work hours when they exceed the normal eight-hour day, forty-hour workweek and place workers' health and safety at greater risk.

B. Legislative History of OSHA and the General Duty Clause

The legislative history of the Act is ambiguous with regard to the intent behind the general duty clause. This is in part because

¹⁴⁷ *Id.* at 241 (citing 29 U.S.C. § 653(b)(1)).

¹⁴⁸ *Id.*

¹⁴⁹ 29 C.F.R. § 1910.1025(c) (2003). This section states:

- (1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air ($50 \mu\text{g}/\text{m}^3$) averaged over an 8-hour period.
- (2) If an employee is exposed to lead for more than 8 hours in any work day, the permissible exposure limit, as a time weighted average (TWA) for that day, shall be reduced according to the following formula: Maximum permissible limit in ($\mu\text{g}/\text{m}^3$) = $400 \div$ hours worked in the day.

¹⁵⁰ 29 C.F.R. at § 1910.1025(e)(1)(i).

¹⁵¹ 29 C.F.R. at § 1910.1025(k)(1)(i).

Congress did not consider the Act in its final form until after the Senate and House bills were finalized in the Conference Committee Report.¹⁵² Specifically, the general duty clause was redrafted and amended.¹⁵³ Both the Joint House-Senate Conference and the Senate Labor and Public Welfare committees, however, recognized the common law bases of the general duty concept.¹⁵⁴ For instance, the Senate Labor and Public Welfare Committee recognized the common law basis for the Act in the general duty of care and simply regarded the Act as extending to employers the same degree of care defined as "this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment."¹⁵⁵ Federal and state laws also existed to provide employees with a safe and healthy workplace.¹⁵⁶

The Supreme Court, in *Whirlpool Corp. v. Marshall*, which upheld workers' right to refuse to do a job that presents an immediate danger of death or serious injury, emphasized the preventative nature of the Act.¹⁵⁷ The Court cites examples from the legislative record where the members of Congress referred to the preventative purpose of the Act and the "tragedy of each individual death or accident."¹⁵⁸ Writing for the Court, Justice Stewart recited the declaration of Senator Yarborough, a sponsor of the Senate Bill, who reminded his colleagues that:

[w]e are talking about people's lives, not the indifference of

¹⁵² For a discussion regarding the legislative intent behind the general duty clause, see NICHOLAS A. ASHFORD & CHARLES C. CALDART, *Crisis in the Workplace: Occupational Disease and Injury in TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT* 183 (Nicholas A. Ashford, ed.) (Island Press, 1996).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 184.

¹⁵⁵ *Id.*; see also, S. REP. NO. 91-1282, at 9 (1970) reprinted in 1970 U.S.C.C.A.N. 5177, 5186, where the Senate Committee on Labor and Public Welfare reported:

The committee has concluded that such a provision is based on sound and reasonable policy. Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment "which is free from recognized hazards so as to provide safe and healthful working conditions," merely restates that each employer shall furnish this degree of care.

¹⁵⁶ ASHFORD & CALDART, *Crisis*, *supra* note 152, at 184.

¹⁵⁷ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980).

¹⁵⁸ *Id.* at 12, n.16; see also, Am. Cyanamid, 9 O.S.H.C. 1596 (1981).

some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact.¹⁵⁹

Justice Stewart's analysis of the legislative history of the Act placed the right to refuse to work OSHA regulation in the context of the general duty clause. Specifically, he argued that section 1977.12 gave "appropriate aid to the full effectuation of the . . . 'general duty' clause."¹⁶⁰ In fact, a House Committee Report recognized the danger of employees who may be economically coerced into self-exposure to earn a livelihood.¹⁶¹ Although this comment was made in the context of the "strike with pay" provision which was later deleted, the acknowledgement that the Act's purpose is to protect employees from coercive employer practices that led to hazardous working conditions was not lost on members of Congress.¹⁶²

The Act's legislative history illuminates the distinction between hazards in *employment* and hazards in *place of employment* as discussed in the introductory remarks of this article. In *American Cyanamid Co.*, the Occupational Health and Safety Review Commission addressed what constituted a condition of employment, whether that condition had to occur within the workplace to fall within the Act, and which conditions of employment constituted a hazard within the meaning of the Act.¹⁶³ The case focused on whether an employer's fetal protection policy violated the Act when female employees, in order to comply with the policy and maintain their jobs, underwent surgical sterilizations outside the workplace.¹⁶⁴

The Commission seems to have held that employee compliance with an employer policy constitutes a condition of employment within the meaning of the Act as long as the policy operates directly upon the employee in the workplace while working.¹⁶⁵ Based on the legislative history, the Commission found that Congress had not contemplated such a policy as falling within the scope of the Act because the policy did not operate directly upon employees engaged in work or work-related activities.¹⁶⁶ In addi-

¹⁵⁹ *Whirlpool*, 445 U.S. at 12 n.16 (citation omitted)

¹⁶⁰ *Id.* at 12. See 29 C.F.R. § 1977.12(b)(2) (providing employees with the right to refuse work under hazardous conditions that will reasonably cause death or serious injury).

¹⁶¹ *Whirlpool*, 445 U.S. at 14 n.20.

¹⁶² *Id.* at 16.

¹⁶³ See *Am. Cyanamid*, 9 O.S.H.C. at 1600.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

tion, the Commission distinguished between temporary labor camp conditions, which do bear a direct relationship to employment and therefore fall within the Act, from the fetal protection policy, which does not.¹⁶⁷ The Commission determined the “decision to undergo sterilization . . . grows out of economic and social factors which operate primarily outside the workplace [and which] the employer neither controls nor creates as he creates or controls work processes and materials.”¹⁶⁸ The Commission deemed the fetal protection policy as neither a work process nor work material, finding that the policy did not “alter the physical integrity of employees while they are engaged in work.”¹⁶⁹ Therefore, the Commission reasoned that, although Congress

intended to protect employees from reduced functional capacity as a result of the work experience . . . it does not follow that the general duty clause applies to an employment policy whose physical impact on employees is indirect and derives not from work processes and materials but from social and economic factors outside the workplace.¹⁷⁰

¹⁶⁷ See *id.* n.23.

¹⁶⁸ *Id.* But see Richard Lewis, Comment, *OCAW v. American Cyanamid: The Shrinking of the Occupational Safety and Health Act*, 133 U. PA L. REV. 1167, 1179 (June 1985) (arguing that “it is nonsense to characterize a policy designed, implemented, and enforced by the employer as external to the workplace”).

¹⁶⁹ *Am. Cyanamid*, 9 O.S.H.C. at 1600.

¹⁷⁰ *Id.*

Congressional floor debates, committee reports, and individual and minority views reported in the legislative history are replete with discussions of air pollutants, industrial poisons, combustibles and explosives, noise, unsafe work practices and inadequate safety training, and the like. The effects on employees which Congress hoped to alleviate are described in general terms such as accident, disease, industrial injury, reduced life expectancy, crippling, maiming, disablement and death, and in specific terms such as cancer, allergy, heart disease, respiratory impairment, chemical poisoning, burns, broken bones, and the like. Repeated reference is made to the fact that congressional action with regard to occupational safety and health received its impetus from the vast numbers of on-the-job injuries and deaths reported each year. In the words of Congressman Anderson, “the worker’s surroundings and the conditions under which he works are of crucial importance in the whole environmental question for it is in this environment that he spends one-third of his day. The air he breathes and the tools and materials he handles can pose a direct threat to his health, safety, and well-being if adequate precautions are not taken. This is really what we are talking about today in considering the need for national industrial health and safety standards.” From this it is clear that Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.

Id. at 1599-1600 (internal citations omitted).

The Review Commission thus rejected the secretary of labor's argument that "any condition of employment which can ultimately result in reduced functional capacity is a hazard within the meaning of the general duty clause."¹⁷¹ The Commission's decision was later upheld in an opinion by Judge Bork of the D.C. Circuit Court of Appeals (hereinafter "*OCAW*").¹⁷² The court held that the general duty clause applied to hazards resulting from the physical condition of the workplace that employees are exposed to during their daily tasks.¹⁷³

Although one commentator interprets Bork's decision to exclude employer policies from the scope of the general duty clause, a close reading of his decision does not support such a view.¹⁷⁴ It is true that Judge Bork, at one point in his opinion, excludes employer policies generally from the general duty clause;¹⁷⁵ however, in other instances in which he discusses the employer policy at issue, he favorably refers to the Commission's decision which did not preclude employer policies per se from coverage under the Act.¹⁷⁶ The Commission limited its holding to employer policies that "cannot alter the physical integrity of employees while they are engaged in work or work-related activities."¹⁷⁷ Certainly, it cannot be said

¹⁷¹ *Id.* at 1600.

¹⁷² *Oil, Chem. & Atomic Workers v. Am. Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984).

¹⁷³ *Id.* at 448.

¹⁷⁴ See Lewis, *supra* note 168, at 1170-1174 (arguing that Judge Bork erroneously used precedent, congressional intent, and policy to limit employer liability and thereby misconstrued the Act).

¹⁷⁵ *Oil Chem. & Atomic Workers v. Am. Cyanamid Co.*, 741 F.2d at 448 ("It follows, therefore, that the general duty clause does not apply to a policy as contrasted with a physical condition of the workplace.").

¹⁷⁶ *Id.* at 445, 447, 449; see also *Am. Cyanamid Co.*, 9 O.S.H.C. 1596, 1599 (1981) ("We agree with CRROW that it is employee implementation of the policy that is at issue here and to that extent the policy is a condition of employment within the meaning of the Act.").

¹⁷⁷ *Oil Chem. & Atomic Workers v. Am. Cyanamid Co.* at 445, 447, 449. Specifically, Bork, quoting from the Commission's decision, writes: "[t]he fetus protection policy,' by contrast, does not affect employees while they are engaged in work or work-related activities. The decision to be sterilized 'grows out of economic and social factors which operate primarily outside the workplace,' and hence the fetus protection policy 'is not a hazard within the meaning of the general duty clause.'" *Id.* at 447. "We agree with this conclusion. Were we to decide otherwise, we would have to adopt a broad principle of unforeseeable scope: any employer policy which, because of employee economic incentives, left open an option exercised outside the workplace that might be harmful would constitute a 'hazard' that made the employer liable under the general duty clause. It might be possible to legislate limitations upon such a principle but that is a task for Congress rather than courts. As it now stands, the Act should not be read to make an employer liable for every employee reaction to the employer's policies. There must be some limit to the statute's reach and we think that limit surpassed by petitioners' contentions." *Id.* at 449.

that an employer's policy can never alter the physical integrity of employees while engaged in work. In fact, the *American Cyanamid* decisions in both the lower and D.C. Circuit did not disturb the finding that temporary labor camp conditions,¹⁷⁸ policies that provide for the temporary removal of workers with elevated blood lead levels from jobs involving lead exposure,¹⁷⁹ travel to and from the worksite,¹⁸⁰ and prophylactic chelation drug therapy used to reduce blood lead levels,¹⁸¹ were properly within the scope of the Act. *OCAW/American Cyanamid* upheld OSHA's regulatory authority over these conditions of employment even though they involved a policy or affected workers outside the workplace because they all bore a "direct relationship" to the workers' employment.¹⁸²

It has been argued elsewhere that mere silence on the part of Congress with regard to whether employer policies are within OSHA's jurisdiction does not indicate a Congressional intent to exclude intangible hazards from the scope of the Act.¹⁸³ Thus, while the legislative history is not conclusive and the *American Cyanamid* reasoning by both the Commission and Judge Bork is muddled, there is sufficient basis to argue that regulation of excessive work hours is distinguishable from the fetal protection policy and therefore within the Act's scope as a condition of employment that can alter the physical integrity of employees engaged in work.

Though initially the meaning of the provision "recognized hazards" in the general duty clause was debated, its legislative intent is now well-settled. During House debates, Representative William Steiger argued that "recognized hazards" applied only to those hazards which could be detected by the human senses.¹⁸⁴ However, Representative Steiger's argument was rejected by the OSHRC and the federal courts. A recognized hazard is now understood to mean a hazard that is common knowledge within the employer's industry or a hazard where the employer had actual knowledge of the hazardous condition or practice.¹⁸⁵ In its Compliance Operations manual, OSHA establishes its interpretation of the recognized hazard standard. The Manual states:

¹⁷⁸ See 29 C.F.R. § 1910.142.

¹⁷⁹ 29 C.F.R. § 1910.1025(k).

¹⁸⁰ Sugar Cane Growers Coop. of Fla., 4 O.S.H.C. 1320 (1976).

¹⁸¹ 29 C.F.R. § 1910.1025(j)(4)(i).

¹⁸² *Am. Cyanamid Co.*, 9 O.S.H.C. 1596, 1599 (1981).

¹⁸³ Lewis, *supra* note 168, at 1174.

¹⁸⁴ *Am. Smelting & Refining Co. v. Occupational Safety and Health Review Comm'n*, 501 F.2d 504, 509 (1974).

¹⁸⁵ ROTHSTEIN, *supra* note 7, at 204.

[a] hazard is “recognized” if it is a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs, and (b) detectable (1) by means of the senses (sight, smell, touch and hearing) or (2) is of such wide general recognition as a hazard in the industry that *even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence which should make its presence known to the employer*.¹⁸⁶

In *American Smelting and Refining Co.*, the Eighth Circuit upheld the OSHRC’s position, stating that non-obvious hazards were contemplated by the Act.¹⁸⁷ The court adopted a broad interpretation of the recognized hazards provision of the general duty clause, concluding that a narrow interpretation would endanger the purpose and intent of the Act—protecting workers’ health.¹⁸⁸ The court found it significant that Congress changed “readily apparent hazards” to “recognized hazards.”¹⁸⁹ Another court has recognized that actual knowledge of the hazardous condition by the employer satisfies the recognized hazard clause.¹⁹⁰

The Act’s legislative history has been construed to strip employers of the common law defenses of contributory negligence, fellow servant negligence, and assumption of risk.¹⁹¹ Although employers are not held strictly liable but are only required to eliminate feasibly preventable hazards, the Act clearly sought to intervene in the employment relationship so as to ensure that employers no longer controlled employees to the degree that workers suffered diminished health, functional capacity, and life expectancy as a result of the work experience.¹⁹² Indeed, Commissioner Burch’s assessment of the legislative history indicated that it was intended to retire conceptions of master and servant in the employment relationship and to “supersede and remove . . . vestiges of the industrial revolution from the field of occupational safety and health.”¹⁹³

¹⁸⁶ ASHFORD & CALDART, *Crisis*, *supra* note 152, at 184 (quoting OSHA’s *Compliance Operations Manual*).

¹⁸⁷ *Am. Smelting & Refining Co. v. Occupational Safety and Health Review Comm’n*, 501 F.2d 504, 511 (1974).

¹⁸⁸ *Id.* at 511.

¹⁸⁹ *Id.*

¹⁹⁰ *Brennan v. OSHRC*, 494 F.2d 460 (8th Cir. 1974).

¹⁹¹ *Nat’l Realty & Constr. Co., Inc.*, 1 O.S.H. Cas. (BNA) 16548, *6 (1972).

¹⁹² 29 U.S.C. § 651(7) (2000).

¹⁹³ *Nat’l Realty*, 1 O.S.H. Cas. (BNA) at *6.

C. *Current Federal Regulation of Work Hours in Certain Industries*

The federal government recognizes the relationship between long work hours and diminished health and safety. In fact, during the 1990s, the Department of Transportation (DOT) spent more than \$30 million researching the effects of fatigue.¹⁹⁴ Departments within DOT are reportedly “in the process of proposing new hours-of-service regulations, developing fatigue countermeasures, and forging partnerships with industry and labor to collaboratively study work-hour issues.”¹⁹⁵ In 1989, the National Transportation Safety Board (NTSB) made recommendations to the DOT “to investigate fatigue and its relation to safety, to educate transportation industry workers on work and its relation to health, and to revise current hours-of-service regulations to maximize the safety of its workers and the people they serve.”¹⁹⁶ The NTSB has issued more than seventy fatigue-related safety recommendations to the DOT since 1989.¹⁹⁷

Currently, the federal government regulates work hours in several industries, including highway, aviation, railroad, and maritime industries.¹⁹⁸ All of these industries fall within the jurisdiction of the DOT or one of its departments. For instance, the Federal Aviation Administration (FAA) prohibits pilots from flying more than thirty-hours per week or eight-hours in a single day.¹⁹⁹ The Federal Motor Carrier Safety Administration (FMCSA) limits drivers in commercial industries, such as truck and bus drivers, to a maximum of eleven driving hours or fourteen-hours on-duty following a minimum of ten-hours off-duty.²⁰⁰ Significantly, in discussing the process by which the revised hours of service regulations were developed, the FMCSA reports the crucial role that sleep research and studies of fatigue and driver performance played in formulating the standards.²⁰¹ Operators in the railroad and maritime industries are regulated by the Federal Railroad Administration (FRA). Although less strict, the FRA regulations limit work hours to fourteen-hours within a twenty-four-hour period and require a ten-hour

¹⁹⁴ See Petition, *supra* note 66.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ For the revised hours of service regulations issued by FMCSA in April 2003, see Federal Register, *Hours of Service of Drivers*, 68 Fed. Reg. 81, 22456 (Apr. 28, 2003) (to be codified at 49 C.F.R. pts. 385, 390, 395), available at http://www.fmcsa.dot.gov/Home_Files/hos/hos_reg.pdf.

²⁰¹ See *id.* at 22459.

rest period following twelve hours of work.²⁰²

D. Case Law Interpreting the General Duty Clause Supports Overwork as Falling Within the Provision's Purview

This section will address some likely arguments against reading the general duty clause more expansively than it has previously been read so as to include the regulation of work hours within its mandate. First, the general duty clause is safety legislation that is construed liberally by federal courts in order to effectuate Congressional purpose.²⁰³ Moreover, the rules of progressive construction²⁰⁴ dictate an interpretation of the Act, and the general duty clause specifically, which includes long work hours as within OSHA's scope of regulatory authority. Long work hours are a hazard that, although not a circumstance specifically addressed in the legislative history or the case law thus far, is substantially comparable to the hazards actually contemplated by Congress.²⁰⁵ Despite the government's recognition of the hazards of long work hours as demonstrated by the regulation of work hours in some industries, OSHA's authority to regulate this hazard through inspection, citation, and enforcement pursuant to the Act has been compromised as a result of the narrow scope given to the general duty clause.

1. Employment and Place of Employment

As noted in the introduction, section 5(a)(1) requires employers to ensure that the employment *and* the place of employment are free from recognized hazards. While some courts fail to distinguish between "employment" and "place of employment" in their reasoning, there is case law concerning conditions of employment as it pertains to an employer's general duty under the Act which suggests that a distinction is recognized.²⁰⁶ Moreover, Congress' intention that a distinction be made is based on the well-settled rule

²⁰² See Petition, *supra* note 66.

²⁰³ See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (citing *United States v. An Article of Drug Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *Lilly v. Grand Trunk W.R.R. Co.*, 317 U.S. 481, 486 (1943)).

²⁰⁴ "A statute can operate prospectively so as to include circumstances unknown at the time of enactment . . . where the language of the statute, as illuminated by legislative history and other extrinsic aids, can be read fairly to include the unforeseen circumstances." *Am. Cyanamid Co.*, 9 O.S.H.C. 1596, 1600 (1981).

²⁰⁵ *Id.* ("Whether an unforeseen circumstance can be read fairly to fall within the ambit of a particular statute depends not only on policy considerations, but on whether that circumstance is 'substantially comparable' to those actually contemplated by Congress.")

²⁰⁶ See generally *Am. Cyanamid*, 9 O.S.H.C. 1596 (1981); *Whirlpool Corp.*, 445 U.S. 1.

of statutory construction that effect must be given, if possible, “to every clause and word of a statute.”²⁰⁷ Thus, the contention made here is that the general duty clause contemplates long working hours as a recognized hazard since it is a condition of employment.

Remembering the reasoning in *American Cyanamid Co.* (the employer fetal protection policy case), the OSHRC held that, although the sterilization policy was a condition of employment within the meaning of the Act, Congress did not intend the Act to extend to “every conceivable aspect of employer-employee relations.”²⁰⁸ The Commission concluded therefore that the sterilizations that plaintiff female employees underwent to keep their jobs was an employment condition with “unique characteristics” which did not constitute a hazard within the meaning of the general duty clause. In order to reach this conclusion, the Commission sought to distinguish between employer policies that directly caused hazards and those that indirectly caused hazards. Not surprisingly, the fetus protection policy fell in the latter category.

Opponents may argue that long work hours similarly constitute a “unique characteristic” outside the purview of the Act. However, the reasoning of *American Cyanamid* supports the contention that long hours are a condition of employment that directly affects employees and that the regulation of hours is within the control of employers, thus surviving the *American Cyanamid* standard. First, long work hours are either mandated or permitted by the employer and therefore constitute an employment condition controlled by the employer. Second, long work hours operate directly upon employees engaged in work or work-related activities by compromising employee work performance and functioning or employee health. Moreover, long work hours, as an employer-controlled employment condition, operating directly upon employee work activities, function, like air-quality or temperature, as a work process that causes injury or disease. Long work hours therefore: (1) are controlled by the employer, and (2) directly alter the physical integrity of the employee engaged in work. Thus, existing precedent is not disturbed by OSHA exercising regulatory authority over excessive work hours.

2. Free From Recognized Hazard

The “free from recognized hazards” provision of the general duty clause serves an important due process function. It gives em-

²⁰⁷ *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

²⁰⁸ *Am. Cyanamid Co.*, 9 O.S.H.C. at 1598.

employers fair notice of the conduct they must avoid, conditions they must prevent, and hazards they must eliminate. To be a recognized hazard the alleged hazardous condition or practice must be preventable and either be a subject of common knowledge within the employer's industry or actually known to the employer. Nothing in the case law suggests that long work hours *per se* are inconsistent with the meaning of recognized hazard. However, this aspect of the general duty clause may prove to be a more difficult obstacle to OSHA exercising its regulatory authority over excessive workplace hours. First, the preventability requirement has proven difficult to overcome as the OSHRC has construed this standard to permit employers to escape liability under the general duty clause for "industrial activities [which] are dangerous by nature, involving risks inherent in the conduct of business."²⁰⁹

Opponents could apply this reasoning to long work hours and argue that mandatory overtime is an essential job function and therefore is a risk incident to the business.²¹⁰ However, a plaintiff could show that long work hours, even if an essential job function, is not a risk incident to the business, like typing or loading boxes onto trucks, because it does not constitute a normal occupational task, but rather a work process or policy. To be sure, this aspect of the general duty clause involves a public education campaign on the negative effects of long work hours as much as it does a complicated legal strategy.

A good deal of effort is required to: (1) convince safety experts to include reduced work hours as part of their recommended safety programs and (2) as a way to develop the requirement of common knowledge, raise public awareness that reducing work hours can materially reduce the likelihood of work-related injuries. Once safety experts deem reduced work hours as a "necessary and valuable" component of any employer safety program, then the objective determination of common or actual knowledge by the employer will more likely be satisfied.²¹¹ An important aspect of raising public awareness is for the scientific and academic commu-

²⁰⁹ Kolesar, *supra* note 30, at 2095 ("To permit the normal activities in . . . an industry to be defined as a 'recognized hazard' within the meaning of [the general duty clause] is . . . almost to prove the Secretary's case by definition, since under such a formula the employer can never free the workplace of inherent risks incident to the business.") (quoting Pelron Corp., 1986-1987 O.S.H. Dec. (CCH) ¶27,605, 35,872 (June 2, 1986)).

²¹⁰ This argument has already gained acceptance in the courts. See generally *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000).

²¹¹ Kolesar, *supra* note 30, at 2093.

nity to study and disseminate research across all industry and occupational sectors, which identifies a threshold level at which long work hours becomes hazardous.

3. Feasibility of Abatement Measures

OSHA must also show the feasibility of abatement measures, i.e., what the cited employer should have done to reduce the risk of harm.²¹² Analysis of the feasibility of preventing hazards in violation of the general duty clause was first outlined in *National Realty*.²¹³ Under *National Realty*, the court looks at various factors to determine the feasibility of an employer's preventative measures. It will consider the judgment of safety experts and whether they would account for the hazard in designing a safety program.²¹⁴ Idiosyncratic or implausible hazardous conduct is not considered preventable, and employers are not obliged to adopt untested or prohibitively expensive measures that experts would agree are infeasible.²¹⁵ However, the court qualified the scope of what it considered feasible and therefore preventable, stating that general industry-wide usage is not required and that expense does not render a measure infeasible.²¹⁶ The court suggested that in cases where the measure threatens an employer's economic viability, the Secretary "should propose the precaution by way of promulgated regulations, subject to advance industry comment, rather than through . . . the general duty clause."²¹⁷ The Secretary must show that "demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred."²¹⁸ Although the courts have not precisely defined the parameters of the feasibility requirement with regard to abatement methods, there is considerable acceptance of the *National Realty* analysis.²¹⁹

A major challenge to establishing long work hours as a feasibly preventable hazard is proving that an employer can comply with

²¹² *Id.* at 2096.

²¹³ *Nat'l Realty & Constr. Co. v. Occupational Safety and Health Review Comm'n*, 489 F.2d 1257, 1265 (D.C. Cir. 1973).

²¹⁴ *Id.* at 1266.

²¹⁵ *Id.*

²¹⁶ *Id.* at 1297.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1267.

²¹⁹ See, e.g., *Beverly Enters., Inc.*, 19 O.S.H. Cas. (BNA) 1161, 121 (Oct. 27, 2000); *Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) 1993, *160 (Apr. 26, 1997); *Champlin Petroleum Co. v. Occupational Safety and Health Review Comm'n*, 593 F.2d 637, 640 (5th Cir. 1979).

the work hours regulation without jeopardizing long-term profitability and competitiveness and that if such precautions prove costly, the employer can pass any burdensome cost-increase on to the consumer.²²⁰ These are two primary factors in determining whether the costs of compliance are economically feasible. However, it would be a heavy burden for employers to show that reduction in hours was not feasible and that therefore noncompliance could not be prevented, thereby relieving them of liability. In essence, an employer would have to show that long hours were necessary in order to remain in business. Indeed, some pro-employer case law suggests such an argument could prove successful.

In *Davis v. Florida Power & Light Co.*, the 11th Circuit did rule in an anti-retaliation discrimination suit that overtime was an "essential job function" and justified the employer's termination of the plaintiff for refusing to work the overtime.²²¹ Using *Davis*, the employer could argue that since overtime is an essential job function, it is central to the maintenance of the business and long hours are therefore not a feasibly preventable hazard. However, even if the *Davis* reasoning is accepted by a court, it does not follow that simply permitting an employer to mandate overtime for one particular job position because it is essential transforms that overtime work into a necessary condition for the success of the employer's entire business. Moreover, *Davis* could be challenged on the policy grounds that Congress, in enacting FLSA, never intended overtime to become an essential job function as it was designed as a premium penalty to discourage employer use of overtime, particularly when the long hours endanger the health of employees.

Another likely challenge to the feasibility of reducing work hours is the argument that it is impossible to determine exactly when long hours become hazardous or at what threshold work hours are likely to cause death or serious injury.²²² But this argu-

²²⁰ *Sec'y of Labor v. Waldon Healthcare Ctr.*, 16 O.S.H. Cas. (BNA) 1052, 1063 (Apr. 2, 1993) (citing *Sec'y of Labor v. Walker Towing Corp.*, 14 O.S.H. Cas. (BNA) 2072, 2077 n.9 (Feb. 15, 1991)).

²²¹ See generally *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000).

²²² In fact, this argument initially had success in the fight by employers to evade the general duty clause with regard to repetitive or cumulative trauma disorders associated with ergonomic hazards. See Linder, *I Gave My Employer a Chicken*, *supra* note 58, at 117-18. However, in 1997, OSHA announced that ergonomic hazards were violations under the general duty clause. See OSHA Rev. Comm'n, *Commission Decides Ergonomics Hazards Citable Under the "General Duty Clause,"* Apr. 28, 1997, available at OSAHRC LEXIS 1997. This change in policy was the result of the Pepperidge Farm decision in which the OSHRC held that abatement of ergonomic hazards could be

ment confuses the difficulty in defining the threshold of the recognized hazard with the feasibility of abating the hazard. Establishing a hazard as recognized and feasibly preventable within the meaning of the general duty clause does not require knowledge of the precise threshold at which the work process or material becomes hazardous. Rather, to establish feasibility, the Secretary must only show that demonstrably feasible measures would have materially reduced the likelihood of injury caused by the hazard, i.e., such as preventing long hours and either hiring more workers or introducing new technology to maintain current productivity levels. Moreover, even if excessive hours are determined to be only a contributory factor, reducing work hours still constitutes a feasible precautionary measure. Aside from the fact that employers must be given fair notice to comply with the free-of-recognized-hazards provision of the clause, the Secretary does have authority, as indicated in *Pepperidge Farm*, to require an employer to embark upon a process of abatement when actual injury causally related to the hazard has been demonstrated, even when the threshold level of the hazard is unknown.²²³ As *Pepperidge Farm* reasoned, "the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances."²²⁴

The feasibility analysis in section 5(a)(1) is similar to section 5(a)(2) cases concerning OSHA's standard-setting authority. The

required under the general duty clause. *Pepperidge Farm*, 17 O.S.H. Cas. (BNA) at *160.

²²³ See, e.g. *id.* at *79, *81, *165. Courts generally uphold subsequent citations against an employer if the hazard is defined with sufficient specificity to give the employer fair notice that it or the industry recognizes the process or material as a hazard. Therefore, the Secretary would not be required to define the threshold over which work hours becomes hazardous since actual injuries can be scientifically linked to long hours. For instance, in *Pepperidge Farm*, the OSHRC reasoned that:

[t]he inability to quantify a threshold may be of great significance when there is little evidence that the putative hazard may cause injury to humans, or where the question is whether it should be presumed that the risk should be controlled to the full extent feasible. It is of less significance where, as here, human injury is allegedly manifest. Thus, where substantial injury is actually occurring, neither precedent nor common sense require that the finding of hazard be foresworn until there is determination of the threshold at which there occurs a substantial risk of injury.

Id. at *81. Another case, *Kastalon Soc'y of Plastics Indus., Inc. v. OSHA*, in which the court found that "[n]one of the physicians or scientists who testified could identify a safe level of exposure to VCM, nor the precise mechanism by which it produces cancer; yet expert after expert recommended that this 'very virulent' carcinogen be restricted to the lowest detectable level." 509 F.2d 1301, 1308 (2d Cir. 1975).

²²⁴ *Pepperidge Farm*, 17 O.S.H. Cas. (BNA) at *80.

general rule courts use to determine the economic feasibility of a standard is that it cannot threaten the entire industry's long-run profitability or competitiveness, but an individual firm that is forced out of business as a result of the costs of compliance will not defeat the standard.²²⁵ The courts have generally held that OSHA may impose standards on employers and industries regarding health and safety, but that they must be economically feasible.²²⁶ Such a cost-benefit standard reduces worker health and safety to a commodity subject to market forces and erroneously presumes health and safety can be optimized as a bargained-for condition.²²⁷ Nevertheless, the industry-wide analysis required by the economic feasibility standard will make it difficult for employers to prove prohibition against long hours threatens profitability and competitiveness. Moreover, research shows that, despite employer practices pointing to the contrary, reducing overtime or work hours does not necessarily result in lower production levels.²²⁸ Therefore, applying the general duty clause to instances of excessive work hours does not contravene this economic feasibility standard.

4. Cause or Likely to Cause Death or Serious Injury

To establish a general duty clause violation, the hazard must also cause or likely cause death or serious injury. The causal connection between the workplace condition and the physical harm must be determined to be plausible²²⁹ and the physical harm serious, i.e., harm in which a body part is rendered "functionally useless" or is "substantially reduced in efficiency."²³⁰ The first part of the test is rather easily met, though opponents would likely try to distort the required causal connection—arguing the test should be the likelihood of injury due to long hours, rather than the likeli-

²²⁵ See *Am. Iron & Steel Inst. v. OSHA*, 577 F.2d 825, 835-36 (3d Cir. 1978); *AFL-CIO v. Brennan*, 530 F.2d 109, 122-23 (3d Cir. 1975); *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 477-78 (D.C. Cir. 1974).

²²⁶ Typically, employers will challenge standards that require significant new costs in order to maintain compliance. Regulating work hours—in theory—should be no different, since it will negatively impact profit margins and raise employer costs of doing business.

²²⁷ See generally NICHOLAS A. ASHFORD & CHARLES C. CALDART, *TECHNOLOGY, LAW AND THE WORKING ENVIRONMENT* 229-258 (Island Press, 1996).

²²⁸ See, e.g., Goldenhar et al., *supra* note 4, at 221.

²²⁹ *Waldon Healthcare*, 16 O.S.H. Cas. (BNA) at 1060 (1993) ("[T]he existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible circumstances.") (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973)).

²³⁰ Kolesar, *supra* note 30, at 2100 (citing OSHA, Revised Field Operations Manual IV-21 (1989)).

hood of injury if an accident occurs.²³¹ As for the second part of the test, long work hours, as discussed above, can lead to occupational fatalities, musculoskeletal and cumulative trauma disorders as well as stress, fatigue, sleep deprivation, and impaired performance which can lead to various health problems, including heart attacks, high blood pressure, and cardiovascular disease. Therefore, a plaintiff working long hours could plausibly claim that such overwork could lead to serious physical injury or death.

5. Whirlpool's *Relevance to OSHA's Regulation of Work Hours*

Although an expanded OSHA mandate that would prohibit excessive work hours would give the OSHA Secretary the authority to demand abatement measures from employers to correct or eliminate the hazard of long work hours, it should also permit workers themselves the right to refuse to work under such conditions. Such an OSHA regulation already exists and has been upheld by courts. The case that will most inform OSHA and the judiciary's response to workers' right-to-refuse authority stemming from an OSHA mandate to prohibit excessive work hours is *Whirlpool*.²³² In *Whirlpool*, the Supreme Court upheld C.F.R. section 1977.12 which grants employees the right to refuse to work under hazardous conditions.²³³ The decision demonstrates that the Act was designed to prevent injuries and death even if it meant workers walking off the job in order to protect their safety and health.²³⁴ The Court con-

²³¹ See *The Duriron Company, Inc.* 11 O.S.H. Cas. 1405, 1410 (BNA) (1983) (Rowland, Chm., dissenting).

²³² See generally *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

²³³ *Id.*

²³⁴ For a critical analysis of the judiciary's limitations on the right-to-refuse provision, see Gordon, *supra* note 41, at 539 (noting the extent to which the right-to-refuse provision has been limited by case law). Gordon states,

Employees in the United States have a right to refuse unsafe work in cases where the employee has a reasonable belief that performance of the work constitutes an imminent danger of death or serious physical injury. This has proven to be a strict standard that is rarely met by the employee. The employee has the burden of showing a reasonable belief under the circumstances and that the action was taken in good faith as "any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith." More importantly, the regulation "does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger," but an employer must offer the employee other available work. In practice, the employee is forced to choose to either remain at a task while exposed to a substantial risk of harm, or be without work for a period of time until the dispute is resolved. An employee in these circumstances has little incentive to refuse unsafe work because the slim chance of proving the reasona-

strued the so-called self-help regulation as fully effectuating the general duty clause by giving employees the right to refuse and protection against discriminatory retaliation for such refusal to work in dangerous conditions. The Court believed such protection necessary to supplement the monitoring of OSHA inspectors who cannot be in all workplaces at all times.²³⁵

The *Whirlpool* decision established that employers cannot subject employees to work conditions the employee believes represent a reasonable risk of danger of death or serious injury.²³⁶ The Court clearly placed the health and safety of employees over that of unfettered employer power to subject workers to unsafe conditions. Significantly, the Court dismissed *Whirlpool's* argument that a worker's unilateral authority to refuse hazardous work was tantamount to authority to shut down the employer's plant. The court found the right-to-refuse provision to be "a permissible gloss on the Act" and was satisfied that a worker's authority to refuse hazardous work was adequately balanced by the threat of discharge for acting in bad faith.²³⁷ However, renewed focus on this provision will be important if workers are to effectively avail themselves of OSHA protection against long hours. Therefore, based on *Whirlpool* and the legislative intent of the Act, the general duty clause appears to place limits on an employer's extraction of labor when those work hours become excessive and put the worker at risk of injury or illness, even when it results in lost production time and loss of employer profits.²³⁸

bleness of the belief in court does not outweigh the greater potential for lost pay.

Id.; see also Gross, *supra* note 27, at 382 (commenting on the right-to-refuse limitation, and concluding that "[t]he dominant values here, of course, are the maintenance of employer control and authority at the workplace and a fear and distrust of workers' motives.").

²³⁵ *Whirlpool*, 445 U.S. at 13.

²³⁶ *Id.* at 21.

²³⁷ *Id.* at 12, 21.

²³⁸ Opponents of an expanded OSHA mandate will argue that, in *Whirlpool*, the court appeared to give weight to Congressional concerns over giving federal officials unilateral authority to temporarily shut down plant operations in situations of imminent danger because it would impair an employer's business without judicial safeguards (due process considerations) and it "might jeopardize the Government's otherwise neutral role in labor-management relations." See *id.* at 21. They will likely contend that authority to reduce work hours is tantamount to such an administrative shut-down power. However, the issue of unilateral authority of a federal agency and its agents was not at issue in *Whirlpool*, only a worker's right to refuse hazardous work conditions, so this Congressional concern did not figure in the holding. In any case, authority to reduce work hours is not comparable to authority to shut down plant operations.

Opponents of OSHA exercising its regulatory authority in the area of work hours may argue that *Whirlpool* and section 1977.12 only permit an employee to walk off the job for health and safety reasons *after* the “employee has sought from his employer, and been unable to obtain, a correction of the dangerous condition.”²³⁹ The implication is that section 1977.12 itself is a work hours regulation and such a regulation, as contemplated by the Act, can only be triggered in emergency situations created by employer non-responsiveness. That is, section 1977.12 is triggered as a consequence of an uncorrected hazard as opposed to the circumstance of long work hours which is itself the hazard. Regulating work hours for safety reasons seeks to prevent a violation and does not entail an employee refusing to work because of an already-existing employer-imposed uncorrected hazard. Therefore, an employer may argue that a worker who refuses to perform a dangerous task may be blocked from protection under section 1977.12 if there was a reasonable and less drastic alternative available. However, the limitations on this worker self-help provision cannot be used to deny OSHA authority to prohibit excessive work hours. This interpretation confuses the hazard with the response to the hazard.

IV. EXISTING LEGISLATIVE EFFORTS TO REGULATE WORK HOURS AS A MEANS OF PROMOTING WORKER HEALTH AND SAFETY

A. *Current and Past Legislation Linking Long Hours to Safety and Health Hazards*

1. Federal Legislation

There is Congressional movement on the issue of legislating limits on mandatory overtime, although the proposed bills only cover licensed health care workers such as nurses. In March 2001, Representative Tom Lantos introduced H.R. 1289, known as the Registered Nurses and Patients Protection Act, that would amend the Fair Labor Standards Act of 1938 to prohibit mandatory overtime for licensed health care workers. The bill would prohibit employers from requiring an employee to work more than eight hours in any workday or eighty hours in any fourteen-day work period except in the case of a state of emergency. In November 2001, Representative John Conyers introduced HR 3236, the Patient and Physician Safety and Protection Act of 2001, which would limit resident physician work hours to eighty per week and no more than

²³⁹ 29 C.F.R. §1977.12(b)(2) (2003); *Whirlpool*, 445 U.S. 1.

twenty-four per shift. The bill recognizes that “excessive hours worked by resident-physicians lead to higher rates of medical error, motor vehicle accidents, depression and pregnancy.” A more limiting proposal was the Safe Nursing and Patient Care Act of 2001 which was introduced in both houses and would amend the Social Security Act to limit the mandatory overtime hours of nurses reimbursed under the Medicare program.

2. State Legislation

A few states have sought to prohibit mandatory overtime for wage-earning employees.²⁴⁰ The most important proposed bill prohibiting mandatory overtime was introduced by Assemblywoman Cathy Nolan of New York in 2001.²⁴¹ The Bill is significant because it prohibits mandatory overtime in the context of the overhaul of the state workers’ compensation system, which is plagued with delays and low benefit rates.²⁴² Thus, the Bill explic-

²⁴⁰ See GOLDEN & JORGENSEN, *supra* note 4, at 11-14 for a general discussion of state legislation regarding overtime.

²⁴¹ A.B. 8260 2003-04 Reg. Assem. Sess. (N.Y. pending). The relevant provisions of the Bill, contained in section 3, state,

Mandatory overtime prohibited.

1. As used in this section, unless the context otherwise indicates, “overtime” means the hours worked in excess of forty hours in a calendar week.
2. An employer may not require an employee to work overtime.
3. An employer shall not retaliate or discriminate against an employee for refusing to work overtime. An employer shall not coerce an employee to work overtime.
4. Any person or corporation that violates this section is guilty of a misdemeanor. A repeat offender, who has violated this statute twice, is guilty of a felony. In addition, an employee whose rights are violated by the statute shall be entitled to a private right of action that includes damages equal to fifty dollars for the initial hour that the employee was forced to work and one hundred dollars for each additional hour forced to work in violation of this statute. An employee whose rights are violated by this statute shall also be entitled to punitive damages and attorneys fees for such a claim.

²⁴² This legislation was developed in 2001 by the It’s About Time! Campaign for Workers’ Health and Safety. This campaign is led by injured workers fighting to overhaul the New York State workers’ compensation system and to give more control to working people over their time, health, and lives. In New York, the Workers’ Compensation Board (WCB) uses systematic delays and other strategies to discourage, intimidate, and frustrate workers who are filing claims. These tactics result in reductions in employer workers’ compensation premiums and increasing profits for insurance companies, both of which help the state attract new business. Ultimately, WCB policies reward employers for the sweatshop conditions they create and profit from while transferring the costs of employer-created hazards onto the workers themselves and the taxpayers, as injured workers are forced to utilize public assistance programs because of the delays and unfair case closures that occur in the workers’ compensation

itly connects workplace injuries to the long working hours employees are forced to work. The Bill as a whole also gives workers an independent right to be free from mandatory overtime.²⁴³ Specifically, it protects workers from discrimination or retaliatory action for such refusal.²⁴⁴ It does not limit the prohibition to hourly workers, but applies to all workers. The Bill does not prohibit voluntary overtime. Washington Senate Bill 6120 prohibits mandatory overtime for all hourly workers, but permits voluntary overtime work and overtime worked by salaried workers. West Virginia proposed a similar statute in H.B. 2018 that prohibited employers from mandating overtime for hourly workers and included a provision giving workers the right to refuse overtime work.

Some states have or have recently proposed statutes that limit mandatory overtime for workers generally. Maine limits the mandatory overtime hours an employer can require to no more than eighty hours in any consecutive two-week period.²⁴⁵ Salaried and seasonal employees, medical interns and residents, and employees performing essential public services are exempt from the restriction. Interestingly, the statute provides a form of a "right to refuse work" to nurses by prohibiting disciplinary action against them by employers who demand more than 12 consecutive hours of work. Other states have proposed more restrictive limits on the overtime hours an employer can mandate. For example, New York Senate Bill 160 restricted an employer's ability to demand overtime to no more than ten hours of overtime per week without written consent of the employee. Pennsylvania House Bill 428 would give employees the right to refuse work in excess of eight hours of overtime per week. However, another bill, HB 1253, would ensure an employee's right to refuse overtime in excess of eight hours by protecting the employee against retaliatory firing.

In 2001, legislation in many different states proposed prohibitions against or limitations on mandatory overtime for health workers.²⁴⁶ Connecticut's proposed Senate Bill 5698 would prohibit

context. Nat'l Mobilization Against Sweatshops, *It's About Time! Campaign for Workers' Health* (2001) at <http://www.nmass.Org/nmass/wcomp/workerscomp.html> (on file with the New York City Law Review).

²⁴³ A.B. 8260 2004-04 Reg. Assem. Sess. (N.Y. pending).

²⁴⁴ *Id.* at § 3(A)(3).

²⁴⁵ 26 M.R.S. § 603 (2003).

²⁴⁶ In New York, the legislature amended the health code in 1989 limiting medical residents to an eighty-hour workweek averaged over a four-week period, but despite some citations issued by the Department of Health and surviving a legal challenge from the Hospital Association of New York, the provisions are largely ignored by hospitals and suffer from a culture of compliance on paper, but violation in practice.

mandatory overtime for hourly health care workers. Bills in New Jersey, Ohio, and Wisconsin would prohibit licensed health care facilities from requiring employees to work more than eight hours per day or forty hours per week. Hawaii's Senate Bill 62 would prohibit employers from mandating nurses to work more than forty hours per week or "longer than the number of hours regularly scheduled for a particular workday."²⁴⁷ New York Senate Bill 1380 proposed limiting the on-duty hours of nurses to sixteen hours per day or sixty hours per seven-day period. New York Senate Bill 3515 would restrict on-duty hours to no more than eight per day, forty hours per week. California Senate Bill 1027 proposed prohibiting mandatory overtime for nurses beyond eight hours in one workday or forty hours in one workweek, except under natural or state-declared emergencies. However, this bill exempted voluntary overtime. Nevertheless, the bill's sponsor Senator Gloria Romero argued that the legislation's purpose was to address the dangers of overtime for nurses and patients as well as the shortage of nurses in the state.²⁴⁸ Unfortunately, although a version of the bill passed both houses, Senator Romero has put this bill on her inactive list as of 2003.

As of late 2002, Maine, Maryland, Minnesota, New Jersey, Oregon, and Washington had legislation limiting mandatory overtime applicable to nurses. Generally, these laws limit the overtime an employer can mandate by either: (1) expressly giving the worker the right to refuse overtime or by providing the worker protection from discrimination or retaliation for refusing to work overtime;²⁴⁹ or by (2) prohibiting employers from requiring overtime²⁵⁰ or scheduling employees beyond their pre-determined or regularly scheduled hours.²⁵¹ Minnesota's statute²⁵² appears only to give nurses the right to refuse overtime when it endangers patients' health, while Maryland does not explicitly prohibit overtime but

Dori Pagé Antonetti, Comment, *A Dose of Their Own Medicine: Why the Federal Government Must Ensure Healthy Working Conditions for Medical Residents and How Reform Should be Accomplished*, 51 CATH. U. L. REV. 875, 888-89 (2002).

²⁴⁷ GOLDEN & JORGENSEN, *supra* note 4 at 11.

²⁴⁸ Press Release, California Nurses Association, Assembly Passes Bill to Bar Mandatory Overtime for Nurses (Sept. 13, 2001) at <http://www.calnurse.org/cna/press/91301.html>.

²⁴⁹ ME. REV. STAT. ANN. 26 § 603(5) (1988); N.J. STAT. ANN. § 34:11-56a34(b) (West Supp. 2003).

²⁵⁰ OR. REV. STAT. § 441.166(2) (2001); WASH. REV. CODE ANN. § 49.28.140 (West 2002 & Supp. 2003).

²⁵¹ MD. CODE ANN., LAB. & EMPL. § 3-421(b) (Supp. 2002); N.J. STAT. ANN. § 34:11-56a34(a) (West Supp. 2003).

²⁵² MINN. STAT. ANN. § 181.275 Subd. 2 (West Supp. 2003).

only hours beyond the “regularly scheduled hours according to the predetermined work schedule.”²⁵³ Strangely enough, overtime is regarded by many of these statutes as hours above twelve hours per day rather than the normal eight.²⁵⁴ Moreover, most of the statutes provide an exemption to the mandatory overtime regulation in cases of unforeseeable emergent circumstance or emergency:²⁵⁵ where the employer makes reasonable efforts to avoid the overtime hours;²⁵⁶ where the employee voluntarily consents to such overtime;²⁵⁷ where the overtime is necessary to complete a procedure in progress and the employee’s absence could adversely affect the patient;²⁵⁸ or where a special category of health care worker is involved such as an on-call,²⁵⁹ community-based care nurse,²⁶⁰ or certain assisted-living facility or nursing home employees.²⁶¹

In September 2002, California Governor Grey Davis vetoed a law that would have strengthened protections for workers who refused to work under unsafe working conditions and were retaliated against by their employers.²⁶² Significantly, the bill allowed workers the right to file civil actions against employers who retaliated against such employees and subjected employers to possible fines and misdemeanor convictions for such discriminatory actions.²⁶³ Although this bill did not recognize long work hours as an unsafe

²⁵³ MD. CODE ANN., LAB. & EMPL. § 3-421(b) (2002).

²⁵⁴ This is the case under the statutes of Maine, Minnesota, Oregon, Washington, and possibly Maryland.

²⁵⁵ ME. REV. STAT. ANN. tit. 26, § 603(5) (West 2002); MINN. STAT. ANN. § 181.275 (3) (West 2002); MD. CODE ANN., LAB. & EMPL. § 3-421(c) (2003); OR. REV. STAT. § 441.166(3) (2001); N.J. STAT. ANN. § 34:11-56a34(c)(2) (West 2003); WASH. REV. CODE ANN. § 49.28.140(3)(a) (West 2003).

²⁵⁶ MD. CODE ANN., LAB. & EMPL. § 3-421(c) (2003); N.J. STAT. ANN. § 34:11-56a34(c)(2) (West 2004); WASH. REV. CODE ANN. § 49.28.140(3)(c) (West 2004).

²⁵⁷ N.J. STAT. ANN. § 34:11-56a34(b) (West 2004); WASH. REV. CODE ANN. § 49.28.140(2) (West 2004).

²⁵⁸ WASH. REV. CODE ANN. § 49.28.140(3)(d) (West 2004).

²⁵⁹ MD. CODE ANN., LAB. & EMPL. § 3-421(d)(1) (2004); N.J. STAT. ANN. § 34:11-56a34(c) (West 2004); WASH. REV. CODE ANN. § 49.28.140(3)(b) (West 2004).

²⁶⁰ MD. CODE ANN., LAB. & EMPL. § 3-421(d)(2) (2003).

²⁶¹ MINN. STAT. ANN. § 181.275 (West Supp. 2003); N.J. STAT. ANN. § 34:11-56a36(b) (2002).

²⁶² See Official California Legislative Information, *Bill Information*, available at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_2751-2800/ab_2752_bill_20020928_history.html.

²⁶³ A.B. 2752 2001-02 Reg. Assem. Sess. (CA vetoed). The relevant provisions of the Bill, contained in Section 3(d)(1), state:

For purposes of this section, “refused to perform unsafe work” means a refusal to perform work she or he reasonably believed to be unsafe or dangerous, created a real and apparent hazard, or was likely to cause death or serious physical harm to the employee, her or his fellow employees, or the employees of another employer.

working condition, its definition of such a condition could be construed as including long work hours.

In sum, the scope of state laws prohibiting or limiting mandatory overtime is limited to nurses or health care workers. Their efficacy in preventing workplace injuries and illnesses is further diminished by numerous exceptions and the fact that they generally permit “voluntary” overtime. Moreover, the right of these workers to be free from the long hours resulting from overtime is weakened by the language of the statutes. That is, the statutes may not explicitly prohibit employers from mandating overtime but merely give employees protection against discriminatory retaliation for refusing to work long hours. In addition, in the case of many of the statutes the overtime prohibition is not triggered until after a worker has worked a 12-hour day. Other statutes exempt employers from complying with the prohibition against mandating overtime in the event that a worker consents to the overtime or reasonable efforts are taken by the employer to avoid the need for mandatory overtime. Regrettably, the full implications of these provisions will not be known until a court interprets them.

B. Regulation of Work Hours in Foreign Countries

The European Union (EU) appears willing to contemplate and enforce a more expansive worker health and safety regime. The European Council (hereinafter “Council”) passed Council Directive 93/104/EC, or the Working Time Directive (hereinafter “Directive”), in November 1993.²⁶⁴ The Directive was based on article 118a of the Treaty on European Union (TEU) which encouraged member states to improve the “working environment” with regard to health and safety of workers.²⁶⁵ The Council’s Direc-

²⁶⁴ 1993 O.J. (L 307) 0018-0024.

²⁶⁵ See The European Council, *The Treaty on European Union*, available at http://europa.eu.int/comm/employment_social/health_safety/intro/art118a_en.htm (last visited Feb. 12, 2004) (on file with the New York City Law Review) (stating:

[a]rticle 118a of the TEU reads in relevant part:

- (1) Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.
- (2) In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consulting the Economic and Social Committee, shall adopt by means of directive, minimum requirements for gradual implementation, having regard to the conditions and technical

tive placed significant limits on work hours and expressly linked work hours to health and safety. The Directive mandated that every worker: (1) receive a minimum of eleven consecutive hours of rest per twenty-four-hour period with a rest break for work days longer than six hours; (2) be given a minimum of one twenty-four-hour uninterrupted rest period per seven day work week; and (3) enjoy an average workweek of forty-eight hours (calculated over a fourteen-day period) and a minimum of four weeks paid annual leave. The Directive also recognized the special health hazards that accompany extensive work in the areas of shift and night work and therefore authorized regulatory action with regard to the amount and patterns of work in these areas.²⁶⁶

When the United Kingdom (UK) challenged the Council's broad interpretation of article 118a, the Court of Justice of the European Communities (ECJ), in *United Kingdom v. EU Council*, agreed with the Council and interpreted article 118a expansively. Ironically, the United Kingdom had initially scoffed at the Directive as an hours-spreading strategy and did not realize its implications for domestic health and safety regimes because it deemed its own health and safety laws as superior to those on the continent.²⁶⁷ The U.K. argued that article 118a's "working environment" meant only the physical space of the workplace. However, the ECJ rejected this narrow definition of health and instead held that article 118a embraced "all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time."²⁶⁸ Thus, the ECJ defined health according to the World Health Organization's preamble to its constitution, which states that health is "a state of complete, physical, mental and social well-being that does not consist only in the absence of illness or infirmity."²⁶⁹ In an advisory opinion, Advocate General Leger contended that the Danish origins of "working environment" included non-traditional measures of health and safety such as work

rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings.).

²⁶⁶ Greg A. Friedholm, Note, *The United Kingdom and European Union Labor Policy: Inevitable Participation and the Social Chapter Opportunity*, 22 B.C. INT'L & COMP. L. REV. 229, 236 (1999).

²⁶⁷ *Id.* at 236-37.

²⁶⁸ Case 84/94, *United Kingdom v. Council*, 3 C.M.L.R. 671, 710 (1996); see also Friedholm, *supra* note 266, at 238.

²⁶⁹ Friedholm, *supra* note 266, at 238.

hours.²⁷⁰ The ECJ therefore found that “a sufficient nexus existed between the regulation of working hours and employee health and safety so as to fall within the scope of article 118a.”²⁷¹

Significantly, many European countries had annual limits on overtime hours prior to the Directive coming into force. For instance, as of 1992, Spain limited its annual overtime hours to eighty, France to 130,²⁷² Greece to 150, Portugal to 160, and Ireland to 240 hours.²⁷³ Moreover, the Directive does not attempt to reconcile these variations in annual limits on overtime hours mandated by the various countries, but it does require any overtime hours to be included in the calculation of the 48-hour workweek.²⁷⁴ These annual limits are an important safeguard for workers’ health and safety since the 48-hour workweek is merely an average calculated over a 14-day period and therefore does not function as a real maximum.²⁷⁵ For example, under the Directive’s 11-hour rest requirement per 24-hour period, a worker could still work five 13-hour days in one week totaling a 65-hour workweek as long as she worked a 30-hour workweek the following week.²⁷⁶ Thus, the Directive stops short of imposing a supranational maximum workweek.²⁷⁷ This is largely due to: (1) the Directive’s authority arising from the basis of worker health and safety articulated in article 118a, rather than the explicit objective to anchor the provision in a worker autonomy/work hours maximum perspective, and (2) the competing EU policy of ensuring employer flexibility and competitiveness, as is the case in the United States.²⁷⁸

Thus, the ideological currency of employer flexibility is equally persistent in the EU and has ensured that derogation and even an opt-out from the Directive’s article six forty-eight-hour averaged maximum workweek is possible and expected.²⁷⁹ Indeed,

²⁷⁰ *Id.* at 238 n.80.

²⁷¹ *Id.* at 239.

²⁷² Craig S. Smith, *Shortened Workweek Shortens French Tempers*, N.Y. TIMES, Jan. 10, 2003, at A3. In 2000, France passed a thirty-five-hour standard workweek law. However, the motivation for the shorter workweek appears to have been a work-spreading initiative designed to lower high unemployment which had reached 13%.

²⁷³ See LINDER, AUTOCRATICALLY FLEXIBLE, *supra* note 11, at 403.

²⁷⁴ *Id.* at 403-404. Linder faults the Directive for masquerading as a health and safety provision when in fact its real impetus was to serve a work-spreading function.

²⁷⁵ *Id.* at 406.

²⁷⁶ See *id.* at 402.

²⁷⁷ *Id.* at 406.

²⁷⁸ *Id.* at 404.

²⁷⁹ *Id.* at 406-407. For instance, Linder points out that the Directive exempts transportation workers and authorizes a reference period of up to four months during which the average of forty-eight-hour weeks can be set. *Id.* at 406.

this technique of limiting overtime based on averaging workweek hours over multiple weeks or even months already exists in the laws of several EU member states.²⁸⁰ Most alarming is France's working time law that phases in a thirty-five-hour law and caps annual overtime work hours at 130, but does not include within this calculation voluntarily worked overtime.²⁸¹

Recent changes in the overtime laws in Ontario, Canada also demonstrate that employer flexibility is repeatedly privileged over workers' health and safety. In July 2000, the Legislative Assembly enacted a working time law that allowed employers to work employees up to sixty hours per week and beyond in excess of the eight-hour, forty-eight-hour workweek, contingent upon employee consent and governmental approval.²⁸² Moreover, an employer may escape the overtime premium penalty normally triggered at forty-four hours if the employee does not work more than 176 hours over a four-week period.²⁸³ Thus, an employer can now work an employee up to sixty hours in one week without paying any overtime premium. In addition, the law permits employers to require employees upon hire to sign an agreement consenting to averaging, thus effectively waiving their right to overtime premium pay.²⁸⁴ Prior to the 2000 working time law permitting a sixty-hour workweek averaged over three weeks, the eight-hour day, forty-eight-hour week maximums had been consistently evaded by employers who applied for government-issued permits authorizing longer workweeks. This is a permissible practice sanctioned under the Employment Standards Act of 1944.²⁸⁵ Significantly, Linder notes that right-to-refuse overtime provisions in the Ontario law have proven inaccessible to overworked, non-unionized Canadian workers, and only have been accessible to unionized workers as individuals.²⁸⁶ Interestingly, Canadian employers argued that deregulation

²⁸⁰ *Id.* at 409-12. For instance, the German Working Time Law of 1994 states that "daily working time may not exceed eight hours, but it permits a ten-hour day, provided that the average workday does not exceed eight hours over a period of six calendar months or twenty-four weeks," whereas the Netherlands' "Working Time Law of 1996 provides for a maximum shift of nine hours and a maximum workweek of forty-five hours so long as these hours do not exceed an average of forty hours per week during a period of thirteen weeks." *Id.* at 409. Spain, Italy, and France also have working time laws that make stated maximums easy to evade. *Id.* at 410-11.

²⁸¹ *Id.* at 411.

²⁸² *See id.* at 434.

²⁸³ *Id.* at 435.

²⁸⁴ *Id.* at 434-437.

²⁸⁵ *Id.* at 420-27.

²⁸⁶ *Id.* at 445-6 and 459. Linder concludes:

The right to refuse to work overtime, as the example of more than a

lation of hours and greater employer flexibility were necessary in order to compete with U.S. capital.²⁸⁷

The Ontarian and French working time laws illustrate how ineffective caps on overtime are when they do not impose real limits on employers' ability to force workers to work long hours. Right-to-refuse work laws and policies, either within the legal regimes of health and safety or hours regulation, are inadequate devices to halt employer use of long work hours when it is employers who have the ability to set (i.e., lower) wages, thus making overtime effectively mandatory. These laws, as well as the averaging methods used by many EU states and by the Directive, represent failed attempts at effective prohibitions against long work hours, and demonstrate the raw power and currency that the ideology of employer flexibility enjoys in the Western world. Nevertheless, the Directive does represent an advance over current U.S. health and safety laws in that it at least recognizes (1) the connection between long work hours and worker health and safety, and (2) considers work hours to be within the realm of working conditions and therefore an appropriate regulatory domain that can promote worker health and safety.

V. DEFINING AN EXPANDED OSHA MANDATE

A. *The General Duty Clause Revisited*

In today's economy, characterized by the dramatic reorganization of production, employers are increasingly using overtime as a form of hazard pay. Overtime complements other employer-created, labor-cost-reducing tactics that have the overall effect of shifting the costs of poor working conditions onto workers. Clinical and epidemiological research exists linking long work hours to work-related injuries and illnesses. Federal agencies regulate work hours for health and safety reasons while workers' compensation systems

half-century of experience in Ontario demonstrates, is not an unambiguously positive instrument of achieving a normal working day or week. Because the laissez-faire underpinnings of the right to say no are inextricably linked to the right to say yes, its libertarianism not only makes it possible for workers to become complicit in the race to the bottom that compulsory labor norms are designed to prevent, but also makes effective enforcement against employers intent on using subterfuges to transmogrify coercion into consensualism difficult and sometimes impossible. These perverse outcomes should be contrasted with the operation of an absolute maximum-hours law, which is designed to create an 'overwhelming societal obstacle' to such transgressions.

Id. at 460.

²⁸⁷ *Id.* at 414.

deem stress due to overwork a compensable injury. While there will certainly be opposition to the idea, legislative history, the plain reading of the general duty clause, and the subsequent case law interpreting its scope all support an expanded OSHA mandate regulating excessive work hours. Furthermore, rules of statutory construction and case law suggest that OSHA and the courts can read the general duty clause to encompass the regulation of excessive work hours as a recognized hazard even though it was not a type of hazard initially imagined by the legislators who enacted the Act more than thirty years ago.²⁸⁸ In *American Smelting and Refining Co.*, the court justified its finding that non-obvious hazards were contemplated by the Act by concluding that a broad interpretation of the general duty clause was crucial if the Act were to give adequate protection to workers.²⁸⁹

The Act sought to extend to employers the duty of care “to bring no adverse effects to the life and health of their employees through the course of their employment.”²⁹⁰ The essential goals of the Act were: (1) to relieve workers of the double bind of choosing between their health and their job; (2) to rebalance the unequal bargaining power of workers vis-à-vis their employers; and, as the general duty clause explicitly states, (3) to place affirmative obligations on employers to provide safe and healthy employment and places of employment.²⁹¹

With regard to the first goal, courts have already construed OSHA to prohibit an employer from forcing workers to choose between their health and their job.²⁹² In *Whirlpool*, the Court upheld section 1977.12, which gives workers, at least in theory, the right to protect their health and safety by refusing to work under dangerous conditions.²⁹³ The Court upheld the anti-retaliation provision

²⁸⁸ See *Am. Cyanamid Co.*, 9 O.S.H.C. 1596 (1981).

²⁸⁹ *Am. Smelting & Refining Co. v. Occupational Safety and Health Review Comm'n*, 501 F.2d 504, 511 (8th Cir. 1974).

²⁹⁰ *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (quoting R. Rep. No. 91-1291, Committee on Education and Labor, 91st Cong., 2d Sess., 21 (July 9, 1970); S. Rep. No. 91-1282, 91st Cong., 2d Sess., 9 (Oct. 6, 1970)).

²⁹¹ See Lewis, *supra* note 168, at 1177. “Legislative history and judicial precedent indicate that the OSH Act is intended to prohibit employers from forcing workers to choose between their health and their jobs.” *Id.* (citing H.R. REP. NO. 1291, 91st Cong., 2d Sess. 29 (1970);). “The district courts have sanctioned an employer’s right to make workers choose between their jobs and their lives. We cannot agree that the statute was ever intended to require placing an employee in such an untenable position.” *Id.* at 1178 (citing *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 717 (6th Cir. 1979), *aff’d*, 445 U.S. 1 (1980)).

²⁹² See generally *Whirlpool Corp. v. Marshall*, 445 U.S. at 13.

²⁹³ *Id.* at 22.

prohibiting employers from discriminating against workers who avail themselves of protection under section 1977.12.²⁹⁴ Thus, these rights could realistically be triggered when an employer attempts to subject a worker to overtime, a second shift, or holdover when such work places the worker in immediate danger of death or serious injury.

With no alternative, a worker's right in such a situation would presumably trump an employer's right to require performance, even at the expense of the employer's output or production demands. Although by itself the right to refuse overtime (if OSHA were to deem long hours a recognized hazard) may not provide adequate worker protection, as similar provisions in Ontario have gone under-utilized, *Whirlpool's* section 1977.12 is still useful if it can give workers a basis to keep their job and health while seeking protection against the coercive practices of an employer. Therefore, *Whirlpool's* interpretation of section 1977.12 and the general duty clause stands for the proposition that worker health and safety can be prioritized over employer's autocratic flexibility to maximize productivity and profitability.

By giving workers as well as OSHA inspectors authority to curb employers' use of excessive hours, an expanded OSHA mandate represents one step in rebalancing the unequal bargaining power between workers and employers. Even the conservative rulings from the OSHRC and Judge Bork in *American Cyanamid Co.* do not disturb the notion that a condition of employment, including an employer policy that operates directly upon workers and reduces their functional capacity, is a hazard within the meaning of the general duty clause. Taking the unilateral authority to set work hours away from employers in recognition of how such power deprives workers of their health and safety gives working people a new way to fight for control over their lives.

In addition, an expanded OSHA mandate that prohibits excessive work hours places an affirmative obligation on employers to prioritize the health and safety of their workers over the benefits of lean production and the new labor supply regime which have resulted in workers being forced to work long hours. Proponents of employer autocratic flexibility will likely use *American Cyanamid* and *Davis* to preclude employer liability for an employer policy that effectively functions as a mandatory condition of employment, but such arguments should be fairly easily discounted and those cases distinguished. In essence, where employment conditions operate

²⁹⁴ *Id.* at 21.

directly upon workers, precedent suggests that courts will hold that workers cannot be held captive to employer practices that place them in danger.²⁹⁵ Therefore, employer fears of lost profits resulting from abatement measures that reduce work hours should prove unavailing in courts, particularly when studies actually show that reducing work hours can increase productivity.

Safety experts play an important role in substantiating the claim that long work hours is a workplace hazard and feasibly preventable. While it is doubtful that a significant number of health and safety experts currently incorporate long work hours into their health and safety programs, or recommend to employers that they reduce excessive work hours, or view long hours as the sole cause of work-related injury or illness, there is general acceptance that long hours constitute a contributing factor to work-related injuries and illnesses.²⁹⁶ As a contributory factor, many experts view long hours as hazardous, but are less likely to view this hazard as rising to the level of a 5(a)(1) violation.²⁹⁷ However, Bill Kojola of the AFL-CIO believes there are some people (in the health and safety field) who would now classify long hours as a hazard, since standing alone, excessive hours have been linked to increased risk of work-related injuries and illnesses.²⁹⁸ Therefore, it is not unforeseeable that safety experts would take into account the hazard of excessive hours when prescribing a safety program and view the precaution of reducing work hours as a feasible method to abate the hazard.

New research, looking at work-related injuries and illnesses within the context of how work is organized, has exposed the hazards associated with lean, flexible work arrangements.²⁹⁹ Such findings characterize the new labor supply regime as a consolida-

²⁹⁵ See generally *Whirlpool Corp. v. Marshall*, 445 U.S. 1; *Am. Cyanamid*, 9 O.S.H.C. 1596 (1981).

²⁹⁶ This assessment is based on informal conversations the author had during the fall of 2003 with several health and safety practitioners while doing research for this article, among them Tom Broderick, Executive Director, Construction Safety Council, and Bill Kojola, Industrial Hygienist, Safety and Health Department, AFL-CIO.

²⁹⁷ Telephone interview with Tom Broderick, Executive Director, Construction Safety Council (Oct. 17, 2003) in which Broderick observed that "while you can get a fair number of health and safety experts to say that working long hours in the heat or cold [or in conjunction with bad elements or some other contributory working condition] is hazardous, it would be difficult [to get a significant number to say] that working long hours as a stand-alone hazard rises to the level of a general duty clause violation."

²⁹⁸ Telephone Interview with Bill Kojola, Industrial Hygienist, Safety and Health Department, AFL-CIO (Oct. 21, 2003).

²⁹⁹ See generally NIOSH, *supra* note 8.

tion of employer autocratic flexibility and the maximization of production and profit. Numerous studies have shown that reducing work hours can reduce the risk of injury and illness resulting from overexertion, exhaustion, fatigue, stress, and accidents due to impaired functioning. One study in particular encouraged employers not to work employees over forty hours per week as the risk of injury and illness greatly increased after that many hours of work. In support of this study, a German study found the accident rate rose exponentially after the ninth hour of work.³⁰⁰ Another study found that the injury rate increased by 50% across all workers beyond a fifty-hour work week, which corresponds to the findings of other experts who set the threshold level at which work hours become hazardous.³⁰¹ It would take a certain kind of boldness, not uncommon among employers and proponents of employer flexibility, to argue that compliance with the spirit of the FLSA's forty-hour workweek and with OSHA's duty of care to protect worker health and safety is prohibitively expensive and thus infeasible. However, it is quite another matter for employers to convince safety experts that reducing such long work hours is not feasible.

In fact, a primary goal of the NORA is to address the health and safety ramifications of the changing organization of work. One area of research identified by NORA is the link between the increase in working time and its adverse impact on worker health and safety,³⁰² particularly with regard to remedies for the hazard of long work hours.³⁰³ NORA's 2002 report stated that "an urgent need exists to implement data collection efforts to better understand worker exposure to organizational risk factors for illness and injury, and how these exposures may be changing."³⁰⁴ Inevitably, opponents attempting to derail an expanded OSHA mandate to prohibit excessive work hours will argue that long hours alone can never rise to the level of a recognized hazard.³⁰⁵ This effort to confuse the causal connection necessary to establish a violation of the general duty clause should not be legitimized by multivariable research that confuses or underestimates the relationship between excessive hours and worker health and safety. Thus, while future

³⁰⁰ See Golden & Jorgensen, *supra* note 4, at 3 and accompanying text.

³⁰¹ Dong, *supra* note 32; Spurgeon et al., *supra* note 25.

³⁰² NIOSH, *supra* note 8, at 12.

³⁰³ *Id.* at 20.

³⁰⁴ *Id.* at vi.

³⁰⁵ Spurgeon et al., *supra* note 25, at 370, 372. The authors speculate that other variables, such as personality type (e.g., competitiveness), determine a worker's susceptibility to working excessive hours and that it is the personality type which influences the greater risk of health problems. *Id.* at 372.

research should consider more than the stand-alone role of excessive hours, multivariable studies, which are nothing more than disguised attempts to sabotage a work-hour regulation, should not be allowed to drive such research or case law.

More studies identifying the threshold level at which long work hours become a hazard in particular industries, occupations, and work environments are certainly needed to give OSHA and judges the basis to uphold general duty clause violations for excessive work hours. Once the research identifies trends, it will be easier for inspectors to defend their citations. To be sure, existing studies demonstrate that serious injury or death is a plausible consequence of working excessive hours. Moreover, these studies indicate that long hours can substantially reduce the efficiency of, or render functionally useless, a worker's body part. Therefore, it is reasonable for OSHA to conclude from existing research that reducing work hours is a feasible precaution and can materially reduce the likelihood of a serious injury or death resulting from the hazard of excessive work hours.

B. Making Sense of the Existing and Proposed Legislation and Foreign Country Regulation of Working Hours

Recent proposed federal legislation and existing state laws limiting work hours do not adequately reflect the Act's goals of protecting worker health and safety and therefore do not provide useful guidance to formulating an OSHA standard regulating work hours. A few states have proposed legislation that would prohibit mandatory overtime, but permit voluntary overtime.³⁰⁶ Consensual overtime, right to refuse, and anti-retaliation provisions are insufficient to protect workers from long working hours when there is no understanding on the part of working people of the dangers that come with working excessive hours. While proposed federal legislation and state laws recognize the link between long work hours and health, all but one are narrowly focused on nurses or health care workers.³⁰⁷ Furthermore, the effectiveness of the current state laws has been diluted because of the built-in loopholes employers can use to evade the regulations that represent attempts to placate powerful business interests.

³⁰⁶ See *infra* Part IV(A)(2) for a discussion of proposed state legislation.

³⁰⁷ The one exception is Maine's law, which applies to workers generally, but which caps overtime hours at a preposterous eighty hours over a two-week period—clearly not a law designed to ensure worker health and safety. ME. REV. STAT. ANN. LABOR AND INDUSTRY 26, § 603 (2004).

Moreover, some of these proposed or existing laws, presumably in an effort to gain political and popular support for such regulations, appear to be based more on the need to protect the health and safety of the consuming public (which is at risk because of excessive work hours), rather than workers' health and safety. Consequently, these laws not only exclude too many workers but they diminish the priority of protecting the health and safety of workers as workers.³⁰⁸ While protecting public safety may be a legitimate endeavor, consumer or product safety should not be accomplished by way of worker health and safety regulation if one wishes to avoid the latter being subordinate to the former.

Bias toward the interest of consumer protection is likely motivated by many considerations, most of which can be traced to the interests of capital. The inevitable result will be that this bias will privilege the consumer over the worker. For instance, one problem with conflating worker and public safety is the promulgation of laws such as the Minnesota statute, which gives nurses the right to refuse overtime *only* when it will not endanger a patient's health. The same is true for existing federal regulation of work hours in certain transportation-related industries. That the Department of Transportation (DOT) and its subordinate departments have regulated the work hours of their employees for years demonstrates the federal government's acknowledgement of the detrimental effects of long hours on worker safety and health. However, this instance of governmental regulation reflects the fact that worker health and safety is intimately connected to public safety in commercial industries. Moreover, regulating work hours to protect public safety in the transportation industry, like the medical industry, is one key way to avoid increases in insurance costs and lawsuits brought due to human error. For instance, based on an Institute of Medicine report which found that between 44,000 and 98,000 patients die annually due to medical error, the Department of Health and Human Services spent \$50 million to research ways to reduce medi-

³⁰⁸ See Antonetti, *supra* note 246, at 910. Antonetti faults the Petition, *supra* note 66, for: (1) being concerned only with medical resident health and safety; (2) designating OSHA as the enforcement agency because OSHA has not demonstrated a commitment to enforce the Act; and (3) not regulating work hours. I would argue that she puts too much faith in compliance with work hours regulation when tied to federal funding, particularly when the emphasis is on public health and safety. For an alternative perspective regarding which agency should be tasked with enforcement of worker health and safety and what the consequences are when that enforcement authority is given to the agency responsible for the quality of the product rather than the health of the worker, see Linder, *I Gave My Employer a Chicken*, *supra* note 58.

cal errors.³⁰⁹

Based on this review of proposed and existing work hours regulations at both the state and federal level, it is important that the proposed regulation of work hours with the goals of protecting worker health and safety should not distinguish between voluntary and mandatory overtime and should not subordinate worker health and safety to economic considerations. Accordingly, any standard regulating work hours is more properly situated within the jurisdiction of OSHA because it is charged with ensuring the health and safety of workers, rather than the Department of Health and Human Services, which is responsible for "improving the nation's health."³¹⁰

In the international context, the Directive and its subsequent judicial interpretation in the ECJ, although problematic since it still permits relatively long hours, is instructive in that it adopts the World Health Organization's expansive definition of health as well as a liberal conception of the workplace environment that includes working time. However, referencing the Directive and other European and Canadian work hour regulatory regimes still requires caution. As previously discussed, many of these laws are informed by the same ideologically and economically driven notions of employer-oriented flexibility exemplified by limiting overtime based on averaging workweek hours over multiple weeks or even months, or exempting voluntary overtime from regulation.

Whether in the international or domestic context, the problem with regulating work hours in the context of worker health and safety is that the crafters of these regulations too often underestimate the power and control employers exert over workers in terms of workers' time and wages. The exemption of voluntary overtime and the limitation of overtime by granting workers the right to refuse such overtime both ignore the fact that so many workers are forced daily to work overtime just to supplement their low wages set by profit-maximizing employers. Therefore, any regulation must recognize that workers should not be allowed to give up their health and safety for either short-term economic gains or simply for economic survival. After all, the purpose of the Act was to eliminate the double bind faced by so many workers forced to choose between their health and their job.

³⁰⁹ Antonetti, *supra* note 246, at 903-04.

³¹⁰ Antonetti, *supra* note 246, at 912.

C. *Formulating an OSHA Policy Using the General Duty Clause to Prohibit Excessive Work Hours*

In fashioning a policy by which OSHA could use the general duty clause to prohibit excessive work hours, it is important to acknowledge the need for more research to bolster the argument that excessive work hours require regulation in order to ensure worker health and safety on the job. To be sure, the impact of excessive hours can be a contributing factor exacerbating other workplace hazards. However, as long as hours are viewed as simply one variable among many, and not a hazard in its own right, long work hours will continue to constitute a serious impediment to worker health and safety. Although more clinical and epidemiological research is needed to better understand the relationship between excessive hours and particular work-related injuries and illnesses,³¹¹ there is sufficient supporting research to use the general duty clause to cite employers for permitting excessive work hours and for the Secretary of Labor to require employers to engage in an abatement process including reduction in workers' hours.³¹²

Additional targeted research in this area can also be helpful in expanding how we define a healthy workplace. The World Health Organization considers health as "a state of complete, physical, mental and social well-being that does not consist only in the absence of illness or infirmity."³¹³ As opposed to the narrow conceptions of a workplace put forth by Justice Bork and other U.S. judges, the workplace must be re-elaborated as the working environment in which a worker works or is caused to be placed during the course of employment, and which should include the physical or tangible and intangible space in which the worker finds herself or himself as a result of her or his work duties.

Whether or not OSHA adopts this broader view of a healthy workplace, an effective work hours regulation could still be based on current legal understandings of a workplace and a workplace hazard. Even as a contributing hazard, reducing excessive work

³¹¹ In *Pepperidge Farm*, the Review Commission found clinical and epidemiological evidence as well as the incident rate to be important contributors to its holding that the injuries in question were not only ergonomics hazards that violated the general duty clause but were causally connected to the workplace. 17 O.S.H. Cas. (BNA) 1993, *149 (Apr. 26, 1997).

³¹² See *id.*, at *168 ("We conclude based on the entire record that here, where actual injury is present and substantial causation has been shown, the Secretary may require *Pepperidge* to engage in an abatement process, the goal of which is to determine what action or combination of actions will eliminate or materially reduce the hazard.").

³¹³ Case 84/94, *United Kingdom v. Council*, 3 C.M.L.R. 671, 710 (1996).

hours could be a feasible abatement measure that safety experts could recommend to employers to prevent work-related injuries and illnesses. Moreover, although the threshold at which work hours becomes excessive may vary by industry, occupation, gender, age, and a range of environmental stressors in a particular work setting, research indicates that a cautious threshold of beyond fifty hours per week is reasonable.³¹⁴

As a general rule, excessive work hours should be prohibited because it constitutes an employer-created and employer-controlled condition of employment and policy that operates directly upon workers as they engage in work or work-related activities which can cause serious injury or death. It would therefore be incumbent upon employers to provide employment free of the recognized hazard of excessive work hours. This may even include sending a worker home who shows up to work straight from a second job in which she or he worked a full eight or twelve-hour shift.

In Japan, a part-time employee was found to have died from overwork, which is evidence that there should be no exemptions for non-standard classes of workers, such as temporary, part-time, contingent, contract, casual, or home-based workers.³¹⁵ This expansive coverage is necessary in light of the "feast or famine" predicament in which many U.S. workers find themselves due to the economic insecurity and job instability that characterize today's economy. Therefore, OSHA's mandate must reflect current worker realities of overwork and include underemployed workers who may at certain times in the year work excessive hours in anticipation of unemployment or a worker or additional family member who must increase work hours to maintain current household income levels.

In fact, OSHA's interpretation of the Act already contemplates an expansive definition of employment as it relates to a worker's right to refuse to work under hazardous conditions and protection against retaliation.³¹⁶ Moreover, OSHA requires employers who ex-

³¹⁴ Spurgeon et al., *supra* note 25, at 371.

³¹⁵ *Man's Death Acknowledged as Stemming from Overwork*, *supra* note 95. Significantly, the court in a worker's accident compensation case acknowledged the employee's death was from overwork as a result of accumulated fatigue due to excessive work, even though the decedent had only worked for the employer for 52 days as a part-time employee. *Id.*

³¹⁶ 29 C.F.R. § 1977.5 (2003). The statute in relevant part states:

Persons protected by section 11(c).

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." The Act does not define the term "employ." How-

pose workers to a hazard, even if they do not create the hazard, to disclose the danger to its workers and take reasonable alternative protective measures.³¹⁷ This broad coverage is necessary particularly in light of the growing numbers of non-standard categories of workers in today's new economy. Employers use these new work arrangements to evade liability for labor violations and lower labor costs, both of which tend to exacerbate the problem of long hours. Therefore, it is crucial that no employer who permits or suffers work to be done on its behalf be exempt from OSHA's reach.³¹⁸

ever, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. See *U.S. v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corporation v. McComb*, 331 U.S. 722 (1947).

- (b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See *NLRB v. Lamar Creamery*, 246 F. 2d 8 (5th Cir. 1957). Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

³¹⁷ See U.S. DEPT. OF LABOR, OSHA, Multi-Employer Citation Policy, Effective Date: Dec. 10, 1999, available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024#MULTI (explaining that only exposing employers are citable for a general duty clause violation and define exposing employers as "an employer whose own employees are exposed to the hazard."). The Directive outlines the standard for determining a violation as follows:

If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard. *Id.*

³¹⁸ Inclusion of all workers within OSHA's mandate could be done either through an expansive definition of employment under *Silk* and *Rutherford* or use of the joint employer doctrine. See Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 984 (1999) (arguing that the "suffer or permit to work" definition of employment under the Fair Labor Standards Act and the Agricultural Workers Protection Act is broader than the common law "to employ" definition of employment as connoting direct control over employees because it includes allowing work to take place or to acquiesce in work that is integrated into the employers' production process). Citing *Silk* and *Rutherford* for this broader definition, the authors contend that

In addition, the burden should be on the employer to prove that working more than fifty hours per week does not constitute a workplace hazard. This figure is based on a cautious interpretation of current research. Where the standard employer practice is to mandate or permit over fifty hours of work per week by an employee, an inspector should make a rebuttable presumption that such practice violates the general duty clause. Recognizing that the question of who is an employer should be construed expansively, an inspector should be given authority to cite any employer who could have prevented the violation. This standard is broader than standards limited to all employees within that employer's exclusive control or at that employer's worksite.

As part of the Secretary's authority to order abatement measures, an inspector should have the authority to order, and workers the right to request the inspector to order, the employer to reduce the number of hours worked to fifty for worker(s) at risk of likely serious injury or death. Also, an inspector must have a reasonable basis on which to order such action. Permissible evidence for the inspector's order could include interviews with employers and workers, independent or company medical reports and evaluations, prior successful use in a similar context, expert testimony, and existing scientific research. Indeed, in determining what constituted sufficient evidence of an abatement measure's efficacy, *Pepperidge Farm* confirmed the following as sufficient: "use of a similar approach elsewhere, industry standards and testimony by experts in the industry, and expert testimony that the technology proposed by the Secretary had been on the market for a number of years and would materially reduce the hazard."³¹⁹

The authority to cap overtime for all affected workers places appropriate controls on employers' existing unilateral authority to demand or permit excessive work hours. As discussed, this abatement measure could be ordered even when the threshold level at which the worker is placed in danger is unknown. This authority could extend to all workers in a particular job category or at the workplace as long as the number of work hours per week can be

to "suffer or permit to work" encompasses a wider range of forms of work arrangements including that of the employer who subcontracts some portion of its work. *Id.* For a discussion on the joint employer doctrine, see Lung, *supra* note 55 at 345, 352 (arguing for industry-specific standards under the joint employer doctrine and that primary inquiry with regard to joint liability should focus on manufacturer control of the contract and determinants of profit rather than factors such as exclusivity, permanency, or regularity of ties between manufacturers and contractors).

³¹⁹ *Pepperidge Farm*, 17 O.S.H. Cas. (BNA), at *169.

established. Where overtime hours exceed twenty hours per week, or a sixty-hour workweek, or where the employer cannot produce work hours records, an inspector should be able unilaterally to impose reductions in weekly work hours without substantiating medical evaluations based on affidavits from workers. The inspector's unilateral authority to cap work hours at a level not to exceed ten hours of overtime per week should continue indefinitely until health evaluations can be conducted on all relevant workers.

Moreover, since research indicates that workers are at increased risk for certain illnesses such as cardiovascular disease when workload demands and long hours are accompanied by having no say over working conditions, inspectors should be given authority to order hours reductions as well as other engineering or administrative controls that address job strain.³²⁰ As discussed, a broad interpretation of what constitutes mandatory overtime should therefore be adopted to address situations where lack of worker job control results from economic coercion (an implied condition of employment as well as explicit demands to work those hours). If an employer does not resolve the job strain problems, the inspector should have the authority, and the worker the right to file a claim, to order the employer to reduce hours to no more than forty hours per week and demand changes in work processes and work environment that promote increased decision-making authority and influence over work performance for the worker(s) in question. In designing an abatement process to change work processes and the work environment, an inspector should be required to obtain input from workers and health and safety advocates.

OSHA's authority to prohibit excessive work hours should be formulated in such a way as to address the interplay between productivity and work hours to prevent employers from shifting be-

³²⁰ See Landsbergis, *supra* note 4, at 64. Landsbergis discusses how, rather than promoting worker participation and autonomy, lean production, flexible work arrangements, and the new labor supply regime have combined to create more job strain that is work intensified with less job control. He goes on to explain that research indicates that workers who have less job control suffer a greater risk of cardiovascular disease—one example of less job control is the inability to say no to working long hours. One study found a two-fold increase in the risk of myocardial infarction when weekly hours rose above sixty hours. *Id.* at 67. In describing how new work arrangements lead to less job control, he writes, "[l]ow or decreasing decision authority was also reported in many cases, including a decline in participation in decision-making, and 'influence over the job' over time as new systems were implemented." *Id.*, at 64. He finds that socioeconomic status (being blue-collar) also increases the adverse health effects from job strain. *Id.*

tween a work hours hazard to an ergonomics hazard.³²¹ Therefore, where an employer has been cited for excessive hours and thereafter imposes work speed-ups or break-reductions in order to compensate for the lost work hours, the inspector should also have the authority to order, and the worker the right to file claims for additional abatement measures that require the introduction of engineering or administrative controls to prevent employers from merely substituting an ergonomic hazard with the hazard of excessive work hours.³²² Such practices should be treated as willful violations and reach not only the particular worker or job position that was initially cited but any worker in the workforce adversely affected by the secondary violation. Inspectors could cite to existing research indicating that reducing work hours did not reduce productivity levels to counter employer claims that such speed-ups are economically necessary or that reducing work hours is not economically feasible.³²³

Long work hours not only affect employees adversely but can also have negative effects on a worker's family. The Australian Industrial Relations Commission's policy of prohibiting excessive overtime when it affects workers' family responsibilities is commendable.³²⁴ However, it is probably beyond the plausible scope of the general duty clause to include family disruption or conflict within the realm of serious injury caused by the recognized hazard of long work hours. While health problems caused by overwork can adversely impact other family members by causing them to work additional hours to compensate for an injured wage earner in the family or stirring up family conflicts such as divorce, courts would likely see the connection between excessive hours and family life as a quality of life issue that is too attenuated to satisfy the likely harm

³²¹ This will certainly prove challenging since OSHA has demonstrated an inability to enforce health and safety laws when it infringes upon employer productivity. See Linder, *I Gave My Employer a Chicken*, *supra* note 58, at 34, 116 (noting that the USDA, rather than OSHA, sets the line-speed of the disassembly line for the approximately 200,000 poultry processing production workers and detailing OSHA's inability to slow down production lines in the poultry processing industry which is leading cause of injuries, thus illustrating the difficulty in enforcing health and safety regulations when they interfere with productivity levels).

³²² While opponents will argue that an OSHA mandate that includes the power to reduce work hours to the point of affecting productivity levels gives inspectors and the government too much say over the daily operations of private business, OSHA already has the power to order engineering, administrative, and work practice controls to adjust the PEL to numerous workplace hazards. I would argue that applying this power to the area of overwork is crucial if workers are to have full protection.

³²³ Goldenhar et. al., *supra* note 4, at 223.

³²⁴ See King & Kemp, *supra* note 89, at 19.

requirement. However, family disruption and conflict can and should be used by OSHA inspectors as a symptom of excessive hours in order to look for likely injuries.³²⁵

Since the threshold level at which long hours becomes hazardous varies by industry, occupation, and a host of other workplace and worker variables, research will always be inexact when it comes to finding the point at which the greatest number of hours can be worked while ensuring worker health and safety.³²⁶ Therefore, to build greater consensus for OSHA's expanded mandate and to prevent obstructionist efforts calling for still more and more studies, inspectors should focus primarily on two scenarios, situations where excessive work hours, mandated or permitted by employers (1) constitute a standard practice, or (2) represent employer coercion manifesting as an explicit employer demand, an implied condition of employment to become, remain, or advance in the job, or as necessary in order to supplement low wages. Although one-time instances that were sufficiently severe would not be exempt from inspection or citation, targeting employers whose standard practice has entailed coercing excessive hours from workers would more suitably realize the prophylactic purpose of the Act while pursuing the worst offenders.

Regulating long work hours is not conducive to a promulgated standard because of the variation by industry and occupation. Accordingly, employer standard practices of mandating or permitting excessive hours that rise to the level of a workplace hazard must be determined by OSHA inspectors on a case-by-case basis, factoring in the following: specific job duties; type of work; working conditions during the overtime hours; presence of environmental stressors such as toxic exposure; physical and psychological intensity of the work performed, as well as the number of overtime hours

³²⁵ Goldenhar et al., *supra* note 4, at 223. The authors cite one study that found that "reducing the amount of time people have for social and parenting activities can lead to irritability, which can be detrimental both at home and on the job." *Id.* (citation omitted).

³²⁶ See Spurgeon et al., *supra* note 25, at 372 (noting that current evidence is "undoubtedly sufficient to raise concerns about a possible link between long hours and the risk of significant health outcomes, including cardiovascular disease, particularly when those hours exceed fifty hours a week."). "[C]urrently available data are insufficient to determine exactly how many hours people should be required to work if they are to remain safe and healthy." *Id.* at 374. It is likely that as the threshold level at which work hours becomes hazardous moves closer to forty hours per week, industry challenges to regulation will intensify. These challenges will be targeted at the research supporting a lower threshold level and, if that is unsuccessful, at the direct impact on the ability to run businesses in a way that maximizes competitiveness and profitability.

worked by the employee. OSHA workplace inspectors should look for signs that contribute to *karoshi*.³²⁷

Monetary penalties would obviously increase with the frequency and severity of the violation. Moreover, the Act's threat of imprisonment against willful and repeat violators when the violation results in an employee's death (which has been largely ignored) should be used as leverage where appropriate and relevant.³²⁸ OSHA inspectors should coordinate their inspections with state workers' compensation systems so that compliant employers' workers' compensation premiums reflect that compliance where the reduction in claims can be linked to transparent employer health and safety policies.³²⁹ OSHA inspectors should be authorized to order health evaluations of employees (at the employer's expense) who file claims of injuries or illnesses due to excessive work hours. In the case of an actual injury or illness, the OSHA inspectors, like their Japanese examiner counterparts, should also be authorized to investigate as little as one week and up to six months (and possibly longer) prior to the worker's death or injury to determine whether excessive work hours was a factor in the incident.

Though anti-retaliation and right-to-refuse provisions may be inadequate protections by themselves, ensuring that workers could avail themselves of these protections would further safeguard their right to be free from the recognized hazard of excessive work hours. Workers' existing rights under the Act (including the right

³²⁷ See *supra* Part II.B (discussing the contributory factors to *karoshi* and the AHA study finding that these same factors cause heart disease).

³²⁸ 29 U.S.C. § 666(e) (2002). See also Gross, *supra* note 27, at 362-63 (criticizing the timidity of the provision, which only contemplates imprisonment for violations that cause death, and remarking "[t]he value judgments underlying that provision should be obvious. Ralph Nader has pointed out, for example, that another federal law provides for one year in jail for 'maliciously harassing [not killing] a wild ass.' (internal parentheses omitted)).

³²⁹ See Linder, *I Gave My Employer a Chicken*, *supra* note 58, at 119. In discussing Perdue's decision to implement an ergonomics program, Linder reports that, "[t]he firm's safety and health director has stated that Perdue has been able to finance the costs of the program through reduced costs incurred in workers' compensation claims, which amounted to 70%; reduced turnover and enhanced productivity of healthier employees represent additional savings." Linder goes on to note that, "[o]ne reason why firms may not be impelled to reduce their workers' compensation costs is that they may have intimidated workers . . . so that their fear of reprisal and loss of income induces them not to file or pursue claims. Far from striving to eliminate the conditions that cause repetitive trauma syndrome, some firms appear to focus on frustrating employees' efforts even to secure workers' compensation benefits for injuries already sustained."

to request³³⁰ and accompany an OSHA inspector's inspection of the workplace, access to employer health and safety reports and records, protection against retaliation and the right to refuse to work under hazardous conditions) should all extend to the area of excessive hours. While employers should be required to monitor and maintain reports on the health and safety effects of work hours, workers should also have the right to request a medical evaluation wherever there is a reasonable basis for their claim. In addition, employees should be given the right to access employer records of work hours which inspectors should be required to review. Where such records do not exist or there are indications of falsification, inspectors should have authority to issue a citation based on the testimony of workers themselves.

VI. CONCLUSION

An OSHA mandate that would prohibit excessive work hours represents one concrete way to place the problem of overwork on the national agenda. The primary objective of identifying work hours as a health and safety concern is to shift public consciousness in the direction of calling for a regulatory scheme that puts an end to employers' unilateral authority to set hours. Such power not only creates a downward pressure on wages, but it deprives workers of their health and safety. OSHA is the most appropriate agency to prevent employers from using overtime as a form of hazard pay that boosts productivity and profit on the backs of workers. No longer would workers be forced to choose between their health and job by assuming the costs of employer-created working conditions at the expense of their lives and health. While in theory hazard pay presumes that workers bargain for higher wages based on the hazardous condition, in the case of long hours, workers have lost any bargaining power they may once have had to refuse such conditions. Expanding OSHA's mandate to include prohibiting excessive work hours takes away the employers' unilateral authority to set such work hours and gives working people a new way to fight for control over their lives.

Based on the legislative history and relevant precedent, it is reasonable to conclude that long work hours are a recognized hazard within the scope of the general duty clause. To be sure, the threshold level at which long work hours becomes hazardous will

³³⁰ Courts have held that "an employee complaint may allege violations of the general duty clause when OSHA has not yet promulgated a specific standard addressing the complained of harm." See *Reich v. Kelly-Springfield*, 13 F.3d 1160, 1167 (1994).

vary by industry, occupation, and a host of environmental stressors. Nonetheless, research indicates that working long hours, standing alone, is hazardous and that it exacerbates existing hazards such as ergonomic hazards and toxic exposures. Even if excessive work hours are deemed solely a contributory factor, safety experts and OSHA inspectors could recommend reducing work hours as a feasible abatement measure. Research supports setting a general threshold level of fifty hours after which a rebuttable presumption is made by OSHA that work hours become hazardous. There is still a great need for OSHA, NIOSH, and the academic and legal community to provide more comprehensive research that can assist workers, inspectors, employers, and courts in determining safe levels of work in particular industries and occupations and, in particular, how the hazard will manifest depending upon the specific work being performed. However, the fact that more research across occupation and industry is needed to identify specific industry, occupation, and co-mixed threshold levels should not be used to undermine attempts to prohibit excessive work hours to protect worker health and safety.

With regard to including so-called voluntary overtime within this mandate, in passing the Act, Congress recognized the danger for employees who may be economically coerced into self-exposure to earn a livelihood. In today's lean economy in which working people have become conditioned to accept overwork, much of what is deemed voluntary overtime is in fact compulsory and therefore so-called voluntary overtime must be included within any OSHA actions to prohibit excessive work hours. This will prevent employers from using low wages to economically coerce workers into long hours. However, using the general duty clause as proposed in this article would only limit the work hours of those workers whose health and safety are at risk. Therefore, OSHA's monitoring and enforcement presence in this area would not categorically prohibit all work hours over the fifty-hour workweek threshold. As stated, OSHA's mandate should focus on the worst offenders, identified above as instances in which long hours is a standard practice based on some form of coercion. Moreover, concerns that limiting the work hours and therefore the wages of low-income workers is at cross-purposes with this group's own economic interests disregard the fact that a living wage does not guarantee a safe level of work hours and that widespread use of overtime creates a downward pressure on wages. Such concerns also prioritize wage remuneration of workers over worker health

and fail to acknowledge that paying workers overtime can actually be cheaper than paying for the direct costs of work-related injuries and illnesses.

In sum, the epidemic of overwork characterized by a long work hours crisis must be properly framed as one emerging from the lack of control working people have over their work, health, and lives. Since there is growing awareness of the crisis of long hours, legal practitioners and occupational health and safety advocates should begin to develop a strategy to push the law in the direction of holding OSHA accountable to its mandate to protect worker health and safety as well as employers for the work arrangements that are depriving working people of their health. As an employer-created hazard that operates directly upon workers and which can cause serious injury or death, long work hours must be understood as one of the greatest threats to worker health and safety. Presently, OSHA does not appear willing to expand its mandate to prohibit excessive work hours. Movement on this issue requires a paradigm shift in the national discourse that must be led by working people to push health and safety experts, employers, and various legislatures to recognize the urgency of this issue. A movement for shorter work hours then must be understood as more than simply a call to spread work or enhance working people's quality of life, but as the means by which working people can take control of their time, health, and lives and as the condition precedent to worker health and safety.