The Future of Occupational Safety and Health Protection in a Fissured Economy

See also Rothstein, p. 613, and the *AJPH* OSHA @50 section, pp. 621–647.

There have been innumerable recent conferences, workshops, and convenings on the "future of work." These séances typically focus on issues such as robotics, artificial intelligence, and platform business models like Uber and Lyft. But these topics regarding the future of work affect a relatively small part of the workforce, and speculations on the impacts of technology usually prove wildly off the mark.

A focus on changes that have an impact on the present workplace and that will continue to do so is far more useful. Millions of workers in the United States have jobs that do not pay enough, provide few—if any—benefits, and lack opportunities for economic advancement. Germane to this Special Section, those jobs also expose workers to a wide variety of significant health and safety risks—often falling outside the boundaries of Occupational Safety and Health (OSH) Act protections.

These conditions arise in part because businesses have found myriad ways to maintain control over (and capture economic benefit from) services and products while shedding the messy role of employing workers to others. This change in both the present and future structure of work is what I have termed the "fissured workplace," a phrase that is meant to encompass outsourcing, contracting, and subcontracting; franchising in its many forms; and, most recently, platform business models.[1] The fissured workplace model has allowed businesses to shift risks and responsibilities onto workers and incentivize the misclassification of employees as independent contractors.

CONSEQUENCES OF THE FISSURED WORKPLACE

Having multiple parties with unclear responsibilities for health and safety can create a work environment in which the likelihood of injuries or fatalities increases. This was the case in the mid-2000s as the explosion of cell phone use spurred by the iPhone led to the rapid expansion of cell tower networks. Major companies such as AT&T and Verizon drew on a highly subcontracted system to undertake that work. In that period, the fatality rate among cell tower workers—often those at the bottom of multileveled subcontracting—was three times that facing underground coal miners.[2]

Workers who are hired on a temporary or conditional basis often do not know whom to report safety problems to at the work site or, more often, are reluctant to exercise their right to complain about unsafe conditions because of fear of reprisal. And the prevalence of misclassification of workers as independent contractors in already dangerous work settings like construction, logistics, and transportation can further increase fatality risks. Analysis of the Census of Fatal Occupational Injuries found that, in 2017, about 12% of fatal workplace injuries were experienced by independent workers (defined as workers with short-term jobs that involve a discrete task and have no guarantee of future work). This represents a disproportionally higher propensity of injury or death attributable to a workplace incident than that experienced by their employee counterparts.[3]

Health and safety risks arising from fissured relationships can also spill over to other parties, such as the finding that outsourcing hospital cleaners increases the spread of health care–associated infections.[4] Women and workers of color make up a disproportionate share of the low-wage workforce in industries including temporary help services, security guards and patrol services, home health care, hospitality, and logistics. This means that increased health and safety risks disproportionately affect workers already subject to higher injury and fatality rates.

REALIGNING RESPONSIBILITY AND PROTECTIONS

The OSH Act, like many of our fundamental workplace laws, provides its protections via employment. Erosion of employment therefore undermines protections and requires a new framing for health and safety policy. One way to do so is to make the provision of a safe workplace basic to work itself rather than specifically attached to employment. This would entail broadly extending aspects of the Occupational Safety and Health Administration's (OSHA's) mandate already applied in some sectors.

Congress recognized in passing the OSH Act the importance of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful

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working conditions."[5] The OSH Act creates broad duties for employers both toward their employees and over the general conditions at workplaces operated by them. Because of this, "[c]ourts have frequently ruled that the OSH Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees."[6(p402)]

Thus, in enforcing the OSH Act, OSHA is already able to cite multiple employers at a worksite, even if they do not all have an employment relationship with the worker. This implies that if a worker who is operating in a work setting where the party that has responsibility for providing a safe work environment fails to do so, that party can be held responsible.

This approach is most fully developed in construction. The OSHA multiemployer citation policy includes the concept of a "controlling employer" who "has general supervisory authority of the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by the contract or, in the absence of explicit contractual provisions, by the exercise of control in practice."[7(p829)] In 2009, the Eighth Circuit Court of Appeals affirmed OSHA's unambiguous right to issue citations to employers for violations even where the latter's own employees are not exposed to hazards related to that violation.[7]

Broadening the conception of a "controlling employer" to any organization that exercises similar authority of a worksite akin to a general contractor would operationalize the right to being provided a safe and healthful work environment (i.e., in compliance with OSHA's standards) regardless of employment status. David Michaels, former assistant secretary of OSHA, describes this requirement as a "duty of care" that has precedent in OSHA's treatment of staffing agency workers who are injured or killed while working for a host company. Such a requirement would create incentives for the controlling employer to establish systems, institute training, provide base-level protections, and undertake review and monitoring of all of the entities operating under its umbrella.

CONCLUSIONS

The changes in business organization that underlie the fissured workplace have been transformative. But workplace policies have not adequately factored these profound changes into the rights and protections for workers and the responsibilities placed upon business and other organizational entities. The original drafters of the OSH Act recognized that injuries and fatalities were not the result of inexorable economic or technologic forces, but arose from deliberate choices made by businesses and organizations. In shaping future health and safety policies, we must similarly recognize that the present and the future of work can be shaped by the conscious choices of policy-makers who recognize the continuing need to align private and social outcomes in the workplace. AJPH

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CONFLICTS OF INTEREST

The author reports no financial conflicts of interest.

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7. *Solis v Summit Contractors Inc*, 558 F3d 815, 829 (8th Cir 2009).