



Assembly Labor and Employment Committee
Worksafe's Testimony: Solutions for Workplace Health and Safety
Issues Impacting Latino Workers

November 19, 2015

Nicole Marquez, Worksafe Staff Attorney

Thank you, members of the committee, for the opportunity to speak with you today. I am Nicole Marquez, Staff Attorney with Worksafe, an Oakland-based statewide organization that focuses on advocating on behalf of workers' rights with respect to health and safety in the workplace. As a legal services support center, we train legal aid advocates on how to support and advocate for injured workers rights, workers who are trying to improve their workplace conditions or workers who experience retaliation for exercising their health and safety rights. We also advocate for protective worker health and safety laws and effective remedies for injured workers, and engage in campaigns in coalition with unions, worker centers, community, environmental and legal organizations, and scientists to eliminate hazards and toxic chemicals from the workplace.

I'd like to begin with a couple important introductory stories to support the need and urgency in coming together to find legislative solutions to address the workplace health and safety issues impacting the Latino community.

Eduardo Lopez, a 29-years old construction worker in San Diego, was crushed to death by falling rebar on May 20, 2014.

Elias Vera, a 54-years old construction worker in San Mateo, was killed in an industrial fall on May 21, 2014.

Victorino Campos-Tovar, a 48 years old construction worker, was killed in an industrial fall on May 21, 2014.

These were all Latino workers whose deaths occurred within a span of two days: May 20th and May 21st of 2014. They are representative of an alarming number of Latino workers that are killed at work every day.

It's important to remember that all three of these men were much more than simply workers who were killed at work. They were someone's parent, child, sibling, spouse...and what they left behind was so much more than just their occupation. They left behind people that loved and cared for them and people whom they, in turn, loved and supported.

These tragedies remind us of the importance of the on-going struggle to prevent deaths such as these. In approaching this work, we have to first recognize that these deaths are representative of an epidemic that is disproportionately impacting the Latino community. Only then can we create solutions that not only address the problem, but that also empower Latino workers to address these issues.

What is to be done?

Two things: First, Latino workers need to have a stronger voice to enforce their health and safety rights on the job. This alone, however, will not solve the problem. Thus, a necessary secondary component is that we need to ensure that state enforcement agencies have the requisite resources, capacity, and legislative support to engage in successful

enforcement of workers' rights. Without enforcement mechanisms that actually work to deter retaliation, employers will continue to feel empowered to violate workers' rights.

STRENGTHEN WORKERS' VOICES

While there are many attributes to strengthening workers' voices, I will focus on four key areas. Latino workers need to be able to:

- (1) Speak up about hazards and get them fixed without the fear of retaliation or experiencing retaliation;
- (2) Receive basic health and safety information about their job in a language that they understand – a critical time to do this is when they have just been hired for a job;
- (3) Exercise their rights even if they are not in a union. This requires expansion of current Cal/OSHA health and safety rights so that non-unionized Latino workers can better protect themselves;
- (4) Access strong and capable worker centers and unions who work with Latino workers. This requires a conscious effort by the state to help build the capacity of worker advocates at unions and worker centers to help Latinos and other vulnerable workers navigate the health and safety process.

1.) End Retaliation:

Speaking up for safe and healthy working conditions and being a whistleblower is a difficult task. These difficulties increase exponentially for minorities and disenfranchised populations such as Latino workers – particularly if they are undocumented workers.

It is well known that one barrier to reporting health and safety hazards is a fear of employer threats regarding immigration issues. For example, some years ago, Worksafe had to assist a group of primarily undocumented workers who were arrested by their employer for “trespassing” shortly after requesting OSHA Log 300s, which they are entitled to receive under the law. Similarly, workers and worker advocates have shared stories with Worksafe of employers incorrectly informing workers that they were not covered by workers' compensation because they were undocumented or of employers threatening to contact ICE if the worker reports their workplace injuries.

Despite the recent enactment of a new state immigration reform law and thus, the clear illegality of these threats, many low-wage, undocumented workers either still feel too afraid or are uninformed about the new laws to take action against their employers. Thus, more work is necessary to ensure that workers understand their new rights and that there are sufficient resources for worker advocates to assist workers.

Moreover, as it is still unclear to what extent the recent reforms encompass health and safety rights, Worksafe believes the Legislature should conduct more exploration around the new laws, in in the regulations that will be enacted that provide clarity on their applicability to worker health and safety rights.

Another barrier to reporting health and safety-based retaliation is confusion that is experienced among workers who experience retaliation for reporting a workplace injury. Specifically, when a worker is retaliated against for reporting an injury it is unclear in California as to whom a worker would report this claim: DWC or DLSE. Both of these agencies refer such cases back and forth to each other with the ultimate effect of the case never being fired.

At the heart of this discrepancy is the DLSE's failure to accept Occupational Health and Safety retaliation complaints based solely upon a worker experiencing retaliation for reporting a workplace injury. This is a fundamental right that has been protected under federal OSHA since its inception.

Rather, the DLSE claims that in such a situation, the worker needs to file a Labor Code 132a complaint with the DWC. The DWC, however, unlike the DLSE, *does not investigate* claims of retaliation like the DLSE. Moreover, the DWC tends to not accept Labor Code 132a claims unless a worker has also filed a claim for workers' compensation. In many of these cases, there is no such claim for workers' compensation because the worker has been retaliated (usually terminated) for just reporting the injury itself (let alone request medical benefits for it).

Under the current workers compensation law, if a worker attempts to request workers compensation *after* they have been terminated, it is considered a "Post-termination" workers' compensation claim, which has a different set of requirements. Such claims are often dismissed unless they fit very narrow exceptions. The ultimate result is that currently, in California, workers who are retaliated against (fired, demoted, etc.) for reporting an injury have *no* remedy.

There needs to be clarity about the protected right of a worker to be protected from discrimination for reporting an injury. The DLSE claims that the law is not clear on this issue despite decades of federal policy. **If the solution requires fixing the law, then the Legislature should be poised to address this discrepancy by introducing a bill as soon as possible. The DIR administration should fully support and sponsor this bill to ensure its prompt passage and enactment.**

Finally, the current penalties available to the DLSE to enforce workers' rights leave much to be desired, resulting in little deterrence to employers. Unscrupulous employers will retaliate against an employee because they know the worse that can happen to them is that they have to reinstate the worker with back wages – and those who are undocumented get nothing. Thus, as hundreds of advocates acknowledged recently at Worksafe's Occupational Safety and Health Anti-Retaliation State-wide Summit, California needs stronger penalties that actually serve to deter employers for violating health and safety rights.

The recent Legislative changes that allow for a \$10,000 penalty to an employee for violation of whistleblower rights and engaging in egregious retaliation based upon

immigration is a good start. We believe that more can be done. We have seen such improvements to the penalty structure for wage theft.

The Legislature should support a bill which creates a stronger set of financial disincentives so employers will be deterred from engaging in retaliation when a worker reports health and safety issues. Federal OSHA, for example, has a mechanism that allows for the awarding of punitive damages in egregious OSH whistleblower cases. We have seen successful cases come out of California for workers under federal jurisdiction. The Legislature should update our state law to enable the DLSE to take similar action in health and safety based retaliation cases.

2.) Basic health and safety information to all new hires:

We know that Latino workers are dying at an alarmingly disproportionate rate. We know that contributing to these unfortunate statistics is the over-representation of Latino workers in some of the more high-hazard and dangerous industries. But we also know that these deaths could have been prevented with adequate on-the-job health and safety training designed to assist workers in safely performing their job. This is especially true for new or temporary workers.

Studies show that new or temporary workers are more likely to be injured or killed because they were not provided with the health and safety training that is required by law or basic training on how to perform their job.¹ Frequent and adequate training is extremely important to all workers especially those with unique employee-employer relationships such as temp workers who often labor in dual and multi-employer sites.

Therefore, the Legislature should consider introducing a bill similar to the Massachusetts' temp bill that would require all new employees to get a set of basic information on their first day of a new job. This information could include basic wage and hour information as well as basic health and safety information. The training must be in the language and at the literacy level appropriate for the target group of workers. This law should apply to all workers: those hired into traditional employee-employer relationships, temporary and contract workers who start work at a new location, or day laborers who change job sites frequently.

3.) Expansion of health and safety rights to non-unionized Latino workers to increase their capacity to advocate for themselves:

¹ Grabell, Michael, Olga Pierce, and Jeff Larson, "Temporary Work, Lasting Harm." *Pro Publica*, December 18, 2013, <http://www.propublica.org/article/temporary-work-lasting-harm> (found that in California, temporary workers had about a 50 percent greater risk of being injured on the job than traditional direct-hire employees. Also found that over the past five years, the injury claim rates of temporary workers have increased in California, while those of direct hire workers has held steady or fallen).

When Cal/OSHA was enacted in 1973, it gave unions specific rights to engage and participate in the walk-around and post inspection activities. However, with the decline of union representation, and more non-unionized Latino workers being exposed to serious hazards and dying at work, Cal/OSHA should be amended to expand the right to file formal complaints and participate in walk-arounds during inspections to non-unionized workers and their advocates.

Limiting those rights to only those in unions no longer makes sense in a world where close to 90% in the private sector are non-unionized. Federal OSHA has broader policies on this issue than California has currently – but we think California, with its large immigrant and Latino population, needs an even more expansive view of worker’s OSH rights.

The Legislature should also amend the law to define more broadly who can file a formal complaint,² who can participate as a “walk-around”³ representative, and who can participate in the negotiations that take place after the inspection.

This should include worker representatives such as those from worker centers where many non-unionized Latino workers congregate for assistance and non-legal service providers that primarily focus on serving low-wage and immigrant workers.

Lastly, the Legislature should consider expanding the health and safety rights of other non-union Latino workers, such as domestic workers who are excluded from Cal/OSHA⁴ and workers’ compensation protection, and day laborer, whose enforcement of workers’ compensation rights are difficult.⁵

4.) Strengthen the capacity of worker advocates at unions and worker centers to help Latino workers navigate the health and safety process:

Employers are required to meet all of their legal obligations with respect to providing training to workers. We all know, however, that not all employers comply with the law. Even when they do comply, Worksafe has regularly received complaints of insufficient trainings that fail to provide important jobsite and health and safety information to workers. What training employers do provide is typically focused exclusively on hazards and work practices, with almost no attention given to informing workers of their rights under Cal/OSHA. In fact, inaccurate information is often provided, such as the employer’s duty to pay for all necessary PPE or fit-test respirators or provide fall protection. That is why there needs to be an independent source of information and training to supplement employer-based training.

² Lab Code §6309; See also P & P C-7, page 5 which also needs to be amended to coincide with any legislative changes.

³ Lab. Code §6314, subd. (d)

⁴ Lab. Code § 6303, subd. (b)

⁵ Lab. Code § 3352 , subd.(h)

Thus, we believe that, in order to best empower marginalized communities, basic training on workers' OSH rights and how to use these rights is oftentimes best provided by worker advocates from within the community rather than the employer. Of course, site-specific hazard training will still need to be done by the on-site employer.

For example, however, if worker advocates train vulnerable Latino workers to understand and be aware of the training responsibilities and duties of employers in dual or multi-employer settings, workers will be fortified with knowledge, power and support from the center to understand their right to receive training, whom they should receive this training from, and thus, whom they should demand such a training from. This, in turn, leads to their ability to hopefully also tackle a workplace hazard that they may encounter.

The Legislature could support advocate-centered training by adding and funding a new program within the Commission on Health and Safety and Workers' Compensation (CHSWC), which currently funds a number of worker training and education activities.⁶ Since this requires new funds, it may be appropriate to initiate a regional pilot program in an area with a high concentration of Latino workers. A pilot project such as this will be similar to the national OSHA Harwood worker training and capacity building grants which funds health and safety training throughout the country for vulnerable workers.

STRENGTHEN STATE ENFORCEMENT AGENCIES

Years of experience and countless state and national assessments have confirmed, however, that workers' voices alone, without strong state agencies support, is insufficient to improve workplace conditions. Thus, unless workers have strong, well-funded, and culturally and linguistically competent state agencies such as Cal/OSHA and the DLSE who can enforce their rights, they might as well have no rights.

Worksafe believe the Legislature can adopt three key policies to strengthen state agencies:

(1) Increase Numbers and Competency of Cal/OSHA Staff: The Legislature should support a budget that enables Cal/OSHA to do its job. California ranks near the bottom of all states regarding the number of inspectors per worker. DOSH is currently working to add several new positions over the next two years. But even when these positions are filled, it will still leave California ranked near the bottom of all states regarding number of inspectors per worker. (As of September 2015, there were 240 authorized inspector positions: 190 were filled and 50 were vacant. This puts us at about the number of inspectors we had 20 years ago, when our workforce was much smaller).

Cal/OSHA has more standards to enforce compared to other states or federal OSHA. Example include the heat illness prevention standard, the Injury and Illness and Prevention Plan standard, and construction permits for hazardous operations such as entering confined spaces – all standards critical to protecting Latino workers. This means

⁶ Lab. Code § 6354.7, subd. (e)

California needs more inspectors per capita to enforce these laws so as to ensure the protection of Latino workers.

The Legislature also needs to support a budget that not only adds more inspectors, but also provides Cal/OSHA with support to build an administrative agency that is culturally and linguistically competent. Cal/OSHA inspectors must understand cultural and language issues relevant to serving the Latino workforce. This could be done through inviting members of the community to participate in inspectors' education.

Another way to improve Cal/OSHA's cultural and language capacity is to enable Cal/OSHA to include bilingual capacity as a preferable job requirement and give it considerable weight in the hiring process of inspectors. We understand that this would require DOSH working with the state personnel board to overcome a particular hurdle that now exists – and they may need the help of this assembly committee to do this. Currently the job title “safety engineer” is used by several state agencies and many of these jobs don’t require speaking a second language, so it may not be deemed relevant in the initial screening of applications before they are sent over to DOSH. But DOSH clearly needs to increase its language capability among inspectors. So we need to bring together the decision-makers in the agencies to work to modify the job description of the DOSH safety engineers to include "bilingual" capacity as a factor to be considered for these inspectors. Similarly, we need more inspectors qualified to do health inspections.

(2) Increase Number of Positions within the DLSE to help with Health and Safety Based Retaliation Cases: The Legislature should support a budget that creates more positions within the DLSE to help the agency with health and safety based retaliation cases. We know there is widespread fear among low-wage Latino workers to report injuries and many are fired when they do report. The DLSE needs more support to help address its backlog of cases, noted by OSHA in its annual FAME audit.

(3) Create a Targeted Enforcement Program: The Legislature should consider a bill that directs DOSH to create a Special Emphasis Program (SEP) within Cal/OSHA This SEP would run targeted enforcement of health and safety laws focusing on industries with a high concentration of low-wage immigrant workers – or within certain sectors, like janitorial, food processing, warehousing, waste recycling, car wash, etc.

There are many more ways to help support Latino workers. But the Legislature could make huge strides by starting with enfranchising Latino workers with a stronger voice to enforce their health and safety rights on the job and building up Cal/OSHA and DLSEs' resources, staffing and cultural and language capacity.

Thank you for your consideration.

Sincerely,

Nicole Marquez
Staff Attorney, Worksafe