

Testimony of Peg Seminario, Director, Safety and Health, AFL-CIO
Before the House Subcommittee on Labor, Health and Human Services, Education and
Related Agencies on the FY 2011 Budget for Worker Protection Programs
March 17, 2010

Chairman Obey, Ranking Member Tiahrt and members of the committee, I appreciate the opportunity to testify today to present the views of the AFL-CIO on funding for the nation's job safety and worker protection programs. I would like to thank you Chairman Obey and other members of the committee for your strong, continuing support for the programs to protect workers from injuries, illnesses and death. I am happy to report that after years of neglect and erosion under the previous administration, that under the Obama Administration the job safety and health agencies have returned to their mission of protecting workers and ensuring their basic rights.

President Obama signaled that there would change at the Department of Labor when he appointed Hilda Solis, a strong voice for workers, as Secretary of Labor. He reinforced his intentions with the appointment of experienced, committed worker safety advocates to lead the job safety agencies – Joe Main at the Mine Safety and Health Administration (MSHA) and Dr. David Michaels at the Occupational Safety and Health Administration (OSHA).

Under their leadership, the agencies have moved to strengthen enforcement programs, resuscitate moribund regulatory agendas and advance needed regulations.

The President's budget request last year reflected the administration's commitment to strengthening the job safety agencies with a proposed increase in funding to return these and the other DOL worker protection agencies to their FY 2001 operating levels. The FY 2011 budget proposal continues this commitment, with a focus on strengthening job safety enforcement and regulatory programs.

For the Occupational Safety and Health Administration, the FY 2011 budget proposes to increase funding to \$573.1 million and staffing to 2,360 positions – an increase of \$14.4 million and 25 FTEs over the FY 2010 levels. This proposal would undo the erosion experienced under the Bush Administration, and return the agency to FY 2001 levels. These increases are needed and most welcome. But it should be pointed out that the erosion in the OSHA program has been taking place for decades. Staffing for the agency reached a high point in FY 1980 with 2,951 positions – nearly 600 more than today. Since that time the nation's workforce has increased by nearly 40 percent, and the types of hazards that must be addressed have become more varied and complex. The rebuilding of the agency will take a multi-year commitment to increase funding and staffing.

For FY 2011, the Administration has made enforcement and standard setting a priority at OSHA. The budget provides for 25 additional inspectors and redirects 35 FTEs from compliance assistance to enforcement activities. This will bring the number of federal OSHA compliance positions (CSHOs, IH's and supervisors) to approximately 1,300, still less than the 1,469 compliance staff the agency had at its high point in FY 1980.

OSHA's capacity to oversee workplaces is woefully inadequate. In FY 2009, federal OSHA conducted 30,057 workplace inspections and had the capacity to inspect workplaces under its jurisdiction approximately once every 137 years. This means that OSHA must target and leverage its enforcement resources to have the maximum effect. The AFL-CIO is pleased that OSHA is revamping its enhanced enforcement program to strengthen enforcement and follow-up for severe violators, and is overhauling its penalty policy to provide more meaningful penalties. In FY 2009, the average federal OSHA penalty for a serious violation of the law – was just \$965. And for serious violations that are related to a worker's death, the average penalty was only \$2,425. OSHA's new enforcement initiatives will help but are not sufficient. The penalty provisions of the OSH Act are far weaker than most other safety and environmental laws and fail to provide an adequate deterrence. We are hopeful that legislation to strengthen the OSH Act, including its civil and criminal penalty provisions, now being considered by the Committee on Education and Labor will be adopted.

In response to concerns about the underreporting of injuries and illnesses, in FY 2009 and FY 2010 Congress directed OSHA to enhance its oversight and enforcement of employer injury and illnesses recordkeeping, and in response OSHA has initiated a national emphasis program. This enhanced enforcement program should continue, and the agency directed to investigate the reasons for underreporting so these problems can be addressed.

In 21 states, state OSHA plans are responsible for oversight of private sector workplaces. Federal funding for these programs was largely frozen during the Bush Administration, with states picking up an increasing share of the costs or cutting back their programs. The FY 2010 appropriations provided an \$11.8 million increase in state plan funding, and the FY 2011 budget provides an additional \$1.5 million. The AFL-CIO supports this increase in funding. However, it is our view that a number of state plans are deficient and are not meeting the requirement to provide protection that is "as effective as" federal OSHA, and that in recent years federal OSHA has been delinquent in its oversight of state plans. In the wake of significant deficiencies found in the Nevada State plan after a series of deaths among construction workers on the Las Vegas Strip, federal OSHA has initiated a comprehensive review of each of the state OSHA plans. The AFL-CIO asks this committee to urge OSHA to complete this review expeditiously and to act promptly to address any deficiencies that are found.

The budget proposes a much needed \$4 million increase in OSHA's standard setting budget, increasing funding to \$23.8 million in FY 2011 from \$19.6 million in FY 2010. This increased funding will be used to support the scientific and economic analyses needed to develop and issue new standards. After eight years of neglect and inaction by the Bush Administration, there is a huge backlog of hazards that need to be addressed. The Obama administration is moving forward with an ambitious regulatory agenda to develop new rules on silica, diacetyl, combustible dust, airborne infectious diseases and other priority hazards. OSHA has issued proposed rules to update the Hazard Communication Standard to conform with international standards and to reinstate a column on the OSHA injury and illness log to identify musculoskeletal disorders. The agency is also considering the development of a safety and health program rule and a new approach to updating permissible exposure limits for toxic chemicals which are woefully out of date. Both of these initiatives are important to build a stronger foundation for worker safety and health.

The AFL-CIO supports this stepped up regulatory activity. But we remain concerned about the slow speed of the regulatory process and rules actually getting put in place so that workers are protected.

Over the years more and more requirements and analyses have been added to the regulatory process by the Congress, the courts and OMB, all of which OSHA must follow. Moreover, OSHA is one of only two government agencies (the other being EPA), that must provide for a special small business panel review of draft rules before it can even propose a regulation. All of these requirements have been added without any additional resources, and have greatly slowed down the development and issuance of needed standards. It now routinely takes OSHA 6 or more years to issue major rules. The AFL-CIO has urged both OSHA and OMB to evaluate the current OSHA rulemaking requirements and process to determine how the process can be expedited. The AFL-CIO urges the committee to request from OSHA the estimated time frames and resource needs for issuing priority rules on its agenda and to provide the agency the necessary funds to ensure that these rules are issued expeditiously.

Another important program area that needs and deserves additional resources is OSHA's worker safety and health training program, which provides training about job hazards and worker rights and is targeted to high risk groups. For FY 2011, a small increase is proposed for this program, bringing the funding level to \$11 million – somewhat less than the funding level in FY 2001. This compares to FY 2011 proposed funding of \$126 million for the federal and state employer compliance assistance programs combined. It should be pointed out that when the OSHA compliance assistance program and worker training program were initiated in the 1970's, they were funded at similar levels. In FY 1980, the worker training program received \$18 million in funding, with half contributed by the National Cancer Institute to train workers on occupational cancer risks. Over the years funding for employer compliance assistance has grown dramatically, while funding to train workers has been cut. We urge the committee to enhance OSHA's worker safety and health training program starting with an additional \$5 million in funding in FY 2011.

Like OSHA, the Mine Safety and Health Administration has an ambitious agenda to strengthen protections for workers. The agency has made the reduction of mine fatalities a top priority and

is launching a comprehensive strategy to protect miners from debilitating lung diseases which are on the rise. New standards to limit exposure to coal dust and silica are at the top of MSHA's regulatory agenda.

MSHA has moved to fully implement the MINER Act, legislation passed in 2006 in the wake of the tragedies at Sago, Darby and other mines. Enforcement has been stepped up and penalties increased with \$141.2 million in penalties assessed in CY 2009 compared to \$35 million in CY 2006, before the penalty provisions of the MINER Act went into effect. In 2009, this enhanced attention to mine safety resulted in the lowest number of mine fatalities ever recorded - 18 deaths among coal miners and 17 deaths among miners in metal-non-metal mining.

Unfortunately, many coal operators have tried to undermine and blunt the enhanced penalty provisions of the MINER Act by contesting violations, in an effort to have penalties reduced and to avoid violations that could lead to establishing a pattern of significant and substantial violations that carry more serious consequences. In CY 2009 operators contested 27 percent of all violations representing 66 percent of proposed penalties, compared a contest rate of 7 percent of all violations representing 35 percent of proposed penalties in CY 2006. This increased contest rate has led to a huge backlog of 16,000 cases at the Federal Mine Safety and Health Review Commission (FMSHRC) and is overwhelming MSHA, DOL and FMSHRC.

For FY 2011, the President's budget proposes \$360.8 million in funding for MSHA. This funding would maintain MSHA's ability to conduct mandatory inspections and provide an increase in funding and staffing for the metal-non-metal enforcement program. The budget also provides for an increase in MSHA's standard's budget to develop priority rules, including those on coal dust and silica.

The FY 2011 budget request, however, does not include sufficient resources to address the backlog of contested MSHA enforcement cases, which continues to grow and threatens to undermine MSHA's enforcement program. The AFL-CIO urges the committee to provide MSHA, the DOL Solicitors' Office and FMSHRC the necessary funding and staff to address this critical problem, and recommends consideration of a supplemental appropriation for FY 2010 to prevent the situation from deteriorating further.

While OSHA and MSHA are the DOL agencies with primary responsibility for workplace safety and health programs, the Solicitor of Labor (SOL) plays an important role in implementing these programs. SOL provides legal support in the development of regulations and enforcement policy and represents DOL in litigation on standards and enforcement cases.

During the Bush Administration, the staff and resources of SOL were greatly diminished, undermining OSHA's and MSHA's regulatory and enforcement programs. The FY 2010 appropriations provided a much needed increase in funding and staff for SOL – an additional \$20 million in funding and 39 additional FTEs over FY 2009. This year's budget proposes further a further increase of \$5.2 million and an additional 22 FTEs. Some of this increase is to address the growing MSHA case backlog. These increases are welcome and needed if OSHA, MSHA

and the other DOL agencies are to be effective. But as noted earlier, still more funding is needed to address the MSHA backlog.

I would like to briefly address three other agencies with responsibilities for implementing provisions of the Occupational Safety and Health Act – the Occupational Safety and Health Review Commission (OSHRC), the Bureau of Labor Statistics (BLS) and the National Institute for Occupational Safety and Health (NIOSH).

Under the OSH Act, OSHRC is responsible for the adjudication of contested OSHA citations. For years there were vacancies on the three member board, and with the lack of an active OSHA enforcement program, the commission's caseload declined. Now with three confirmed commissioners in place and a stepped up OSHA enforcement program, we expect that the activity and caseload at OSHRC will also increase. If legislation is enacted to increase OSHA penalties and strengthen enforcement, some increase in contested cases may also occur. For FY 2011, \$12 million and 67 FTEs are requested, levels that maintain current program activity. These levels may be sufficient, but the AFL-CIO urges the committee to monitor activity at OSHRC to determine if additional resources are required to ensure timely consideration and resolution of cases.

The Bureau of Labor Statistics conducts two major occupational safety and health data collection initiatives – the Survey of Occupational Injuries and Illnesses (SOII) and the Census of Fatal Occupational Injuries (CFOI). Both of these programs are carried out in collaboration with the states. In recent years there have been growing concerns about the completeness and accuracy of the injury and illness data collected by BLS, which is based upon employer-reported information. Some studies have indicated that 33-66% of all injuries and illnesses may not be captured by the survey. In FY 2009 and FY 2010, the Congress provided additional funds for BLS to conduct further research on the injury underreporting problem, which BLS has been undertaking. Continued funding is needed for this research and pilot studies to look at the feasibility of utilizing non-employer based data to ascertain the extent of work-related injuries and illnesses.

The National Institute for Occupational Safety and Health (NIOSH), part of the Department of Health and Human Services was established under the OSH Act with responsibility to conduct research and surveillance and to develop recommendations for safety and health standards. The Mine Safety and Health Act of 1977 assigned NIOSH similar responsibilities for mine safety. In the last decade NIOSH's responsibilities have expanded to include new program areas including causation determinations and dose reconstruction under the Energy Employees Occupational Illness Compensation Program Act, and administration of the World Trade Center Health Program to provide medical monitoring and treatment to responders and community members exposed to toxins at ground zero.

NIOSH has always had a small budget, particularly compared to other federal health research agencies. In FY 2010, NIOSH received \$302.4 million in funding for its core safety and health programs, compared to \$690 million appropriated for the National Institute for Environmental Health Sciences. For FY 2011 \$305.9 million is requested for NIOSH's core program which

includes \$124.5 for the National Occupational Research Agenda (NORA). The AFL-CIO urges the committee to increase the funding for NORA by \$25 million to support an increase in funding for NIOSH's construction safety initiative and enhanced funding for research on the protection of healthcare workers from pandemic influenza and other infectious diseases, nanotechnology, and other priority areas.

In FY 2009 and FY 2010, NIOSH was provided funding to conduct research on the underreporting of injuries and illnesses in collaboration with BLS. This work needs to continue. In addition NIOSH should expand its surveillance activities to identify work-related injuries and illnesses through non-employer data sources to get more complete and accurate information on these occurrences.

With the enhanced regulatory activity at OSHA and MSHA, there will be an increased demand for NIOSH's involvement in and support for the development of rules. This is particularly true for standards on toxic chemicals and respiratory diseases, where NIOSH has great expertise. The AFL-CIO is concerned that NIOSH's capacity to provide such scientific and technical support has been greatly diminished. In the last decade there have been few OSHA standards developed and NIOSH has produced few recommendations for new or revised rules. We urge the committee to get a detailed assessment from NIOSH of the agency's resources available for the development and support of standards and to provide the necessary funding for NIOSH to meet its responsibilities in this area.

The FY 2011 NIOSH budget request includes \$150 million for the World Trade Center Health program to provide medical monitoring and treatment to responders, clean-up workers and community members exposed to toxins in the aftermath of the 9/11 terrorist attacks. According to NIOSH, to date more than 55,000 responders and 4,100 community members have enrolled in the program with more than 15,000 receiving medical treatment for 9/11 illnesses last year. The FY 2011 request is an increase over FY 2010 funding when carryover funds from previous years reduced the amount of needed funds. The present request will allow the program to continue at its present level of operation. It should be noted that the Congress is considering legislation to establish the 9/11 health program on a permanent basis, which if enacted, may impact the funding requirements of this important program.

Turning to another important worker protection program, I would like to express the AFL-CIO's strong support for the Labor Department's initiative to enforce federal laws governing the misclassification of employees as independent contractors, which involves OSHA as well as the Wage and Hour Division, the Solicitor's Office, and the Employment and Training Administration.

The administration's budget reflects its understanding that many employee benefits and worker protections are available only for workers classified as employees, and the incorrect classification of employees as independent contractors may lead to their not receiving benefits for unemployment (unemployment insurance) or on-the-job injuries (workers' compensation), not being paid minimum wage or overtime, or not benefiting from various on-the-job health and safety protections.

In addition, when employers misclassify their employees to avoid paying state and federal payroll taxes, they gain a competitive advantage over firms that do properly classify their employees. The IRS reports that 15 percent of employers misclassify their workers, avoiding their obligation to pay state and federal payroll taxes on about 3.5 million workers.

The administration's FY 2011 budget proposes a joint Labor Department/Treasury Department initiative to strengthen and coordinate federal and state efforts to enforce statutory prohibitions and deter misclassification. This strategic approach is modeled on the growing number of state initiatives that have successfully raised millions of dollars in federal and state revenues.

The administration's budget proposes a total of \$25 million and over 100 FTEs dedicated to addressing misclassification, including \$12 million and 90 FTEs for the Wage and Hour Division to focus on misclassification during targeted investigations; \$11.25 million and 2 FTEs for the ETA to award competitive grants to reward states that are most successful in addressing misclassification; \$1.6 million and 10 FTEs for the Solicitor of Labor to pursue misclassification litigation; and \$150,000 for OSHA to modify training curriculum and investigation guidelines to allow inspectors to identify potential misclassification and share information with Wage and Hour.

We believe this misclassification initiative is long overdue, and is critical to meeting the Department's goal of "good jobs for everyone." We are gratified that, with the administration's proposed increases for the Wage and Hour Division, staffing will be restored to FY 2001 levels, after years of decline.

In conclusion, the job safety and health agencies and other worker protection agencies are returning to their mission to protect workers and have the opportunity to make real progress. The AFL-CIO urges the committee to provide these programs the necessary support and funding to effectively do their jobs, to reduce the toll of injury, illness and death and to ensure that workers' receive the pay and benefits they are lawfully owed.