

Expanding Coverage of the U.S. Occupational Safety and Health Act to Protect Workers from Severe Psychological Harm

David C. Yamada*

I. INTRODUCTION

In October 2022, Dr. Vivek Murthy, Surgeon General of the United States, released a major report, *The U.S. Surgeon General's Framework for Workplace Mental Health & Well-Being (Surgeon General's Framework)*, highlighting the public health costs of toxic workplaces and calling for a new commitment to support the mental health of the nation's workers.¹ "Workplace mental health and well-being is a critical priority for public health," notes the opening of the *Surgeon General's Framework*, adding that "[i]t has numerous and cascading impacts for the health of individual workers and their families, organizational productivity, the bottom-line for businesses, and the U.S. economy."² In addition to examining the psychological experience of work in the U.S. generally, the *Surgeon General's Framework* recognizes the unique and challenging workplace circumstances generated by the COVID pandemic.³

This central focus on the importance of psychological health at work contrasts noticeably with the original purpose of America's primary workplace safety and health law. The U.S. Occupational Safety and Health Act of 1970 (OSH Act)⁴ was designed to safeguard workers from hazardous working conditions that can cause serious *physical* harm and death.⁵ Enactment of the statute represented the culmination of many years of worker advocacy and employer opposition towards

* Professor of Law and Director, New Workplace Institute, Suffolk University Law School, Boston, MA. J.D., New York University. For many years, I have been involved as a scholar, educator, and advocate in efforts to create stronger legal protections against workplace bullying, mobbing, and related mistreatment. Although the opinions stated here are solely my own, my relevant *pro bono* service affiliations include the Workplace Bullying Institute (affiliated scholar), International Society for Therapeutic Jurisprudence (board member), and Massachusetts Coalition for Occupational Safety and Health (board member).

1. See generally OFFICE OF THE SURGEON GENERAL, THE U.S. SURGEON GENERAL'S FRAMEWORK FOR WORKPLACE MENTAL HEALTH & WELL-BEING (2022) [hereinafter, SURGEON GENERAL'S FRAMEWORK].

2. *Id.* at 6.

3. See *id.* at 7 (citing survey data suggesting mental health impacts of COVID pandemic).

4. Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (2004).

5. See Judson MacLaury, *The Job Safety Law of 1970: Its Passage was Perilous*, 104(3) MONTHLY LAB. REV. 18, 18, 22 (1981) (describing studies of late 18th and early 20th century industrial injuries and diseases and state-level factory safety laws and worker's compensation laws); David Rosner & Gerald Markowitz, *A Short History of Occupational Safety and Health in the United States*, 110(5) AM. J. PUB. HEALTH 622, 626 (2020) (detailing industrial working conditions in early 20th century U.S.).

various attempts at the federal level to regulate aspects of workplace safety and health.⁶ Since becoming law, the OSH Act and its administrative enforcement agency, the Occupational Safety and Health Administration (OSHA), have continued to generate strong partisan differences, being criticized alternately by industry for regulatory overreach and by labor for inadequate enforcement and sanctions.⁷ Meanwhile, the ongoing toll of physical injuries and fatalities at work reminds us of the compelling need for the OSH Act and its many state equivalents to protect workers.⁸

In addition, the *Surgeon General's Framework* and various research and public education initiatives are now spotlighting workplace hazards that severely threaten the *psychological* health of today's employees. Toxic work environments generally,⁹ the extraordinary workplace stressors prompted by the COVID pandemic,¹⁰ and workplace bullying and abuse,¹¹ among other concerns, have underscored the human costs of trauma, fear, anxiety, and stress. As will be explained below, many of these working conditions, especially those not

6. See MacLaury, *supra* note 5, at 20-24 (detailing path to eventual enactment of OSH Act); Rosner & Markowitz, *supra* note 5, at 625-26 (summarizing events leading to enactment of OSH Act).

7. See generally, e.g., Michael Blanding, *OSHA Inspections: Protecting Employees or Killing Jobs?*, HARVARD BUS. SCH. (May 21, 2012), <https://hbswk.hbs.edu/item/osha-inspections-protecting-employees-or-killing-jobs> [<https://perma.cc/7XDQ-QE9G>]; David Weil, *OSHA: Beyond the Politics*, FRONTLINE (Jan. 3, 2003), <https://www.pbs.org/wgbh/pages/frontline/shows/workplace/osha/weil.html> [<https://perma.cc/53T5-8UAH>].

8. See generally JONATHAN D. KARMEI, DYING TO WORK: DEATH AND INJURY IN THE AMERICAN WORKPLACE (2017) (containing accounts of workplace injuries and fatalities from dangerous conditions in many industries); Emily A. Spieler, *The Pandemic and Essential Frontline Workers* 56 SUFFOLK U. L. REV. [pin to be added at end] (2023) (discussing pandemic's impact on health and safety workers). Each year, the Massachusetts Coalition For Occupational Safety and Health issues a report, *Dying to Work*, that details workplace fatalities within the state. See *Reports*, MASS. COAL. FOR OCCUPATIONAL SAFETY & HEALTH (last accessed Mar. 30, 2023), <http://www.masscosh.org/publications/reports> [<https://perma.cc/V9Y3-NPNY>].

9. See SURGEON GENERAL'S FRAMEWORK, *supra* note 1, at 6 (noting research indicating workers regard disrespect, non-inclusivity, unethical behavior, cutthroat competition, and abusive behaviors as being indicative of toxic workplace). See generally JEFFREY PFEFFER, DYING FOR A PAYCHECK: HOW MODERN MANAGEMENT HARMS EMPLOYEE HEALTH AND COMPANY PERFORMANCE – AND WHAT WE CAN DO ABOUT IT 36-64 (2018) (examining the human costs of toxic work environments); Donald Sull et al., *Toxic Culture Is Driving the Great Resignation*, MIT SLOAN MGMT. REV. (Jan. 11, 2022), <https://sloanreview.mit.edu/article/toxic-culture-is-driving-the-great-resignation/> [<https://perma.cc/XYX8-MB6T>] (examining how toxic workplaces fuel resignations).

10. See SURGEON GENERAL'S FRAMEWORK, *supra* note 1 at 7 (describing how pandemic has "brought the relationship between work and well-being into clearer focus"). See generally Ashley Abramson, *Burnout and Stress are Everywhere*, 53 MONITOR ON PSYCH. 72 (2022) (examining impact of the pandemic on workers); Susan E. Peters, et al., *Work and Worker Health in the Post-Pandemic World: A Public Health Perspective*, 7 LANCET PUB. HEALTH e188 (2022) (examining "implications of the COVID-19 pandemic for the future of work, worker health, and wellbeing").

11. See SURGEON GENERAL'S FRAMEWORK, *supra* note 1 at 12 (listing bullying among psychological harms related to occupational hazards). See generally GARY NAMIE & RUTH NAMIE, THE BULLY AT WORK (2009) (exploring workplace bullying, its impacts on targeted employees, and potential responses); WORKPLACE BULLYING AND MOBBING IN THE UNITED STATES (Maureen Duffy & David C. Yamada eds., 2018) [hereinafter DUFFY & YAMADA, WORKPLACE BULLYING AND MOBBING] (exploring all dimensions of workplace bullying in two volume, multi-contributor book).

implicating protected class status under employment discrimination laws, generally evade legal or regulatory accountability.

In a welcomed 2022 development, OSHA began sharing public educational resources on workplace mental health issues.¹² Also, its federal research counterpart, the National Institute for Occupational Safety and Health (NIOSH), has been engaging in research and public education on these matters for some time.¹³ As will be discussed below, many other nations and international bodies have already recognized psychological harms at work via their workplace safety and health laws and directives.

For these reasons and others, this essay aspires to contribute to a needed conversation about policy options for extending the regulatory reach of the OSH Act to cover severe psychological harms at work and to anticipate expanded enforcement responsibilities for OSHA in this realm. It will start with a short examination of the OSH Act's origins and main provisions. It will then examine how understanding severe psychological harms at work enables a fuller comprehension of modern risks to worker safety and health. Next, it will examine two potential policy responses pertinent to this discussion: first, applying the current OSH Act to one of the most serious psychosocial hazards to worker psychological health, namely, workplace bullying; and second, amending the OSH Act to expressly cover workplace hazards that may cause severe psychological harm.

II. OSH ACT'S ORIGINS AND MAIN PROVISIONS

A. Origins

It may be argued that modern public recognition of significant workplace hazards in America's burgeoning industrial economy started in 1911, with the tragic Triangle Shirtwaist Company fire in New York City. On the 100th anniversary of the fire, OSHA paid tribute to the victims and noted the legacy of the tragedy:

One hundred years ago on March 25, fire spread through the cramped Triangle Waist Company garment factory on the 8th, 9th and 10th floors of the Asch Building in lower Manhattan. Workers in the factory, many of whom were

12. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, *Workplace Stress*, <https://www.osha.gov/workplace-stress> [<https://perma.cc/TXD6-9CZS>]; OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, SUPPORTING MENTAL HEALTH IN THE WORKPLACE: GETTING STARTED GUIDE FOR SENIOR MANAGERS, https://www.osha.gov/sites/default/files/Getting_Started-Senior_Manager_508.pdf [<https://perma.cc/2AAE-RVYB>].

13. See generally, e.g., Anthony D. LaMontagne et al., *Developing an Integrated Approach to Workplace Mental Health*, in TOTAL WORKER HEALTH 211-27 (Heidi L. Hudson, et al. eds., 2019) (incorporating worker mental health into NIOSH's Total Worker Health framework); Paula L. Grubb et al., *Workplace Bullying: What Organizations Are Saying*, 8 EMP. RTS. & EMP. POL'Y J. 407 (2004) (NIOSH researchers reporting on their study of workplace bullying in U.S.); NIOSH, STRESS...AT WORK (1999), <https://www.cdc.gov/niosh/docs/99-101/> [<https://perma.cc/PQJ8-4M55>].

young women recently arrived from Europe, had little time or opportunity to escape. The rapidly spreading fire killed 146 workers.

The building had only one fire escape, which collapsed during the rescue effort. Long tables and bulky machines trapped many of the victims. Panicked workers were crushed as they struggled with doors that were locked by managers to prevent theft, or doors that opened the wrong way. Only a few buckets of water were on hand to douse the flames. Outside, firefighters' ladders were too short to reach the top floors and ineffective safety nets ripped like paper.

The catastrophe sent shockwaves through the city, beginning in the communities of immigrant workers on Manhattan's Lower East Side, where families struggled to identify their lost in makeshift morgues. Family grief turned to citizen anger as the causes of the fire – including the abhorrent working conditions at the time – were exposed.

The public outcry over what was clearly a preventable tragedy brought a renewed sense of urgency to the labor movement and to other groups working to improve women's and immigrants' rights in the workplace.¹⁴

The public response to the Triangle Shirtwaist Co. fire would eventually result in policy reforms in New York State. It did not, however, lead to any national legislation concerning worker health and safety. Two decades later, President Franklin Roosevelt's New Deal legislative initiatives would include minimum wage and hour laws, safeguards against exploitation of child labor, and the creation of the modern Social Security system, but they did not include occupational safety and health protections.

Subsequent years would bear witness to federal regulatory efforts in specific occupational areas, such as maritime safety and mine safety.¹⁵ But not until the late 1960s would a coalition of labor and environmental advocates finally prompt consideration of a comprehensive federal workplace safety and health statute.¹⁶ In 1968, President Lyndon Johnson supported such a bill, but it never reached his desk before he left office.¹⁷ Two years later, with strong labor support and strong business opposition, the OSH Act passed through Congress and was signed into law by President Richard Nixon.¹⁸ As stated in its Preamble, this new law was enacted:

14. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, "*The worst day I ever saw*", <https://www.osha.gov/aboutosha/40-years/trianglefactoryfireaccount> [<https://perma.cc/SA2F-BB7U>]. David Von Drehle and Leon Stein provide more detailed accounts of the Triangle Shirtwaist Co. fire and its aftermath. *See generally* DAVID VON DREHLE, TRIANGLE: THE FIRE THAT CHANGED AMERICA (2004); LEON STEIN, THE TRIANGLE FIRE (1962).

15. *See* MacLaury, *supra* note 5, at 20-21; Rosner & Markowitz, *supra* note 5, at 625-26.

16. *See* MacLaury, *supra* note 5, at 21-22; Rosner & Markowitz, *supra* note 5, at 626.

17. *See* MacLaury, *supra* note 5, at 22.

18. *See id.* at 23-24.

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.¹⁹

B. OSH Act Basics

Especially for those unfamiliar with the OSH Act, this brief summary is intended to provide a context for the policy-related discussions in Parts III and IV below.²⁰

The OSH Act covers private employers in the U.S., including non-profit organizations.²¹ Federal and state public employers are generally not covered, although the legislation directs federal agencies²² and authorizes states²³ to create their own equivalent standards. Section 5 of the statute imposes duties upon employers and employees:

(a) 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;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.²⁴

Section 5(a)(1) is known as the General Duty Clause and can be cited as an independent violation of the statute. OSHA defines the elements of a General Duty Clause violations as follows:

In general, Review Commission and court precedent have established that the following elements are necessary to prove a violation of the general duty clause:

19. Occupational Safety and Health Act, PUB. L. 91-596, 84 STAT. 1590, 1590(1970).

20. See *infra* Sections III, IV. A more detailed overview can be found by James D. Schoeny and Andrew R. Kaake. See James D. Schoeny & Andrew R. Kaake, *Health and Safety in the Workplace: Overview*, WESTLAW, <https://us.practicallaw.thomsonreuters.com/9-500-9859>.

21. See 29 U.S.C. § 652(4) (explaining covered workplaces).

22. *Id.* § 668.

23. *Id.* § 652(5).

24. *Id.* § 654.

The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

The hazard was recognized;

The hazard was causing or was likely to cause death or serious physical harm; and,

There was a feasible and useful method to correct the hazard.

A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's own employees.²⁵

OSHA further explains that "(r)ecognition of a hazard can be established on the basis of employer recognition, industry recognition, or 'common-sense' recognition."²⁶

Section 5(a)(1) authorizes the Secretary of Labor to promulgate specific regulations designed to prevent recognized hazards that cause or are likely to cause death or serious physical harm.²⁷ Regulations filling several hundred pages of the Code of Federal Regulations have been concentrated in four broad categories: General industry,²⁸ Agriculture,²⁹ Construction,³⁰ and Maritime.³¹

Fines are the primary source of penalty for violations of the General Duty Clause and individual regulations. For example, OSHA has established that during 2023, fines for each serious violation range from \$1,116 to \$15,625, and for each willful or repeated violation range from \$11,622 to \$156,259.³² Criminal sanctions are available for willful violations that cause the death of a worker, punishable by up to one year in prison.³³

Although it is beyond the scope of this essay to delve deeply into the history of the OSH Act and OSHA, suffice it to say that both the statute and its enforcement agency have faced consistent criticisms from both the political left³⁴ and

25. U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, FIELD OPERATIONS MANUAL, Ch. 4, Sec. III A (2020), <https://www.osha.gov/enforcement/directives/cpl-02-00-164/chapter-4> [<https://perma.cc/S5F5-8UXZ>].

26. *Id.* at Ch. 4, Sec. III B(6).

27. 29 U.S.C. §654(a)(1).

28. 29 C.F.R. §1910 (2023).

29. 29 C.F.R. §1928 (2023).

30. 29 C.F.R. §1926 (2023).

31. 29 C.F.R. §§1915, 1917, 1918 (2023).

32. Memorandum from Kimberly A. Stille & Scott C. Ketcham to Regional Administrators, 2023 Annual Adjustments to OSHA Civil Penalties (Dec. 20, 2022), <https://www.osha.gov/memos/2022-12-20/2023-annual-adjustments-osha-civil-penalties> [<https://perma.cc/U9KT-BDP8>].

33. 29 U.S.C. §666(e).

34. See Brooke E. Lierman, "To Assure Safe and Healthful Working Conditions": Taking Lessons From Labor Unions to Fulfill OSHA's Promises, 12 LOY. J. PUB. INT. L. 1, 6-12 (2010) (criticizing OSH Act's inadequate enforcement); James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351, 355 (1998) (criticizing inadequacies in federal collective bargaining and workplace safety and health laws).

right.³⁵ Labor economist David Weil captures how that debate has focused on OSHA as an enforcement agency:

From its inception in 1971, few government agencies have been as maligned as the Occupational Safety and Health Administration (OSHA). Critics on the political right have regarded it as the embodiment of onerous government, the promulgator and enforcer of expensive and ineffective standards, an agency with a deep reach that mercilessly wields a penalty bludgeon needlessly sending many small businesses to bankruptcy court. At the same time, critics on the political left have often chastised OSHA for failing to fulfill its mission. They argue that the agency is stymied by too few inspectors and too small a budget to carry the weight of its legislative mandate: “[to] assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” They claim that OSHA is either the victim of Democratic administrations too timid, or Republican administrations too ideologically opposed, to exercise its authority to reduce workplace injuries and fatalities.³⁶

The forthcoming arguments for extending the OSH Act’s reach to safeguard workers from psychological harms at work operate within the statute’s perceived strengths and limitations as a regulatory framework. In addition, the specific proposals are offered with an understanding of the current political realities concerning the likelihood of adoption and the institutional realities of OSHA absorbing any significant new regulatory responsibilities. Nevertheless, change starts by proposing it and fostering a conversation. Thus, Part III discusses workplace hazards that pose significant risks of serious psychological harm, and Part IV examines two policy options for pertinently expanding the OSH Act’s coverage.

III. HAZARDS POTENTIALLY CAUSING SEVERE PSYCHOLOGICAL HARM AT WORK

This Part examines the underlying rationale for considering an expansion of the OSH Act’s coverage, starting with the relevant state of work overall, and then looking at a specific psychosocial work hazard in workplace bullying.

35. See Thomas J. Kniesner & John D. Leth, *Abolishing OSHA*, 4 REGUL. 46, 46 (1995) (calling for abolishing the agency because of regulatory overreach). *But see* Thomas O. McGarity & Sidney A. Shapiro, *OSHA’s Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 588, 590 (1996) (examining business criticisms of OSH Act and rejecting calls for abolishing statute).

36. David Weil, *supra* note 7.

A. Toxic Work Environments, the Pandemic, and Psychosocial Work Hazards

The *Surgeon General's Framework* begins by affirming the fundamental importance of “Protection from Harm,” built upon the core human needs of “safety and security.”³⁷ It states:

Workplace safety means all workers are in a safe and healthful work environment, protected from physical harm, injury, illness, and death . . . This is done through continued efforts to minimize occupational hazards and physical workplace violence, *as well as psychological harm such as bias, discrimination, emotional hostility, bullying, and harassment* . . . Security builds on safety to include financial, and job security, given the negative effects that layoffs and job loss can have on the workers and their families.³⁸

The 2022 release of the *Surgeon General's Framework* coincided with an outpouring of references to toxic work environments in the popular and business media, apparently associated with a return to work during the pandemic.³⁹ In examining the phenomenon tagged as the “Great Resignation,” a study published in the *MIT Sloan Management Review* that year found that a toxic work culture was the most significant factor in motivating people to leave their jobs:⁴⁰

A toxic corporate culture is by far the strongest predictor of industry-adjusted attrition and is 10 times more important than compensation in predicting turnover. Our analysis found that the leading elements contributing to toxic cultures include failure to promote diversity, equity, and inclusion; workers feeling disrespected; and unethical behavior. . . . For now, the important point is that a toxic culture is the biggest factor pushing employees out the door during the Great Resignation.⁴¹

The wide specter of toxic work environments can be framed through the lens of psychosocial work hazards, which attorney and researcher Ellen Pinkos Cobb defines as properties of the social and organizational contexts of work that have

37. SURGEON GENERAL'S FRAMEWORK, *supra* note 1, at 12.

38. *Id.* at 12 (emphasis added and footnotes omitted).

39. See, e.g., Melody Wilding, *How to Recover from a Toxic Job*, HARVARD BUS. REV. (Oct. 17, 2022), <https://hbr.org/2022/10/how-to-recover-from-a-toxic-job> [<https://perma.cc/CYY2-C5AE>]; 8 *Warning Signs That Your Workplace Is Becoming Toxic*, FORBES (Nov. 21, 2022), <https://www.forbes.com/sites/allbusiness/2022/11-21/8-warning-signs-that-your-workplace-is-becoming-toxic/?sh=b4a760f46be1> [<https://perma.cc/7TKU-V57-R>]; Sarah Molano, *These Are the Signs that You're in a Toxic Work Environment*, CNN HEALTH (July 20, 2022), <https://www.cnn.com/2022/07/20/health/toxic-workplace-signs-solutions-wellness/index.html> [<https://perma.cc/c38FL-TCCV>].

40. Sull et al., *supra* note 9.

41. *Id.*

“the potential for causing psychological and physical harm.”⁴² She further explains:

Today’s world of work is more complex than ever before. The consequences of the change from an industrial to a service economy, as well as green and demographic transitions, have increased the psychosocial hazards...and work-related stress that exist in the modern world of work. COVID-19 has presented a further challenge to the workplace.⁴³

Indeed, the COVID-19 pandemic has had a profound impact on the experience of work. The hazards and fears of working on site, the stressors of adapting to remote work, the uncertainties about job security, and the everyday realities of life amid a life-threatening virus have made this an extraordinarily difficult time.⁴⁴ The *Surgeon General’s Framework* observes that in a “2021 survey of 1,500 U.S. adult workers across for-profit, nonprofit and government sectors, 76% or respondents reported at least one symptom of a mental health condition, an increase of 17 percentage points in just two years.”⁴⁵

Perhaps no other vocational category has experienced pandemic-related psychosocial hazards like workers in the healthcare fields, especially those treating COVID patients. As a 2022 report by the U.S. Department of Health and Human Services on the impact of the pandemic on the healthcare workforce summed up:

The COVID-19 pandemic has put extreme stress on the health care workforce in the United States, leading to workforce shortages as well as increased health care worker burnout, exhaustion, and trauma. These pandemic-related challenges have taken place in a context of significant pre-existing workforce shortages and maldistribution, as well as in a workforce where burnout, stress, and mental health problems (including an ongoing risk of post-traumatic stress disorder) were already significant problems.⁴⁶

42. ELLEN PINKOS COBB, *MANAGING PSYCHOSOCIAL HAZARDS AND WORK-RELATED STRESS IN TODAY’S WORK ENVIRONMENT: INTERNATIONAL INSIGHTS FOR U.S. ORGANIZATIONS* 6-7 (2022).

43. *Id.* at 2.

44. See generally Abramson, *supra* note 10 (noting “(b)urnout and stress are at all-time highs across professions, and among already strained health care workers, they are exacerbated by the politicization of mask-wearing and other unrelenting stressors”); Peters et al., *supra* note 10 (examining how “pandemic has highlighted and accelerated trends in the social, political, and economic environments that affect employment and labour patterns”).

45. SURGEON GENERAL’S FRAMEWORK, *supra* note 1, at 7.

46. OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., *IMPACT OF THE COVID-19 PANDEMIC ON THE HOSPITAL AND OUTPATIENT CLINICIAN WORKFORCE: CHALLENGES AND POLICY RESPONSES 1* (Issue Brief No. HP-2022-13) (May 2022), <https://aspoe.hhs.gov/sites/default/files/documents/9cc72124abd9ea25d58a22c7692dccb6/aspoe-covid-workforce-report.pdf> [<https://perma.cc/UMH2-3DQL>].

In short, ongoing, broad changes in the U.S. economy and associated effects on employment and work have combined with the pandemic to highlight significant psychosocial hazards at work that may cause serious psychological harm. This is an opportune time to explore the possibility of the OSH Act entering a new regulatory realm in response to these hazards.

B. A Specific Psychosocial Hazard: Workplace Bullying

Drs. Gary and Ruth Namie, leading North American authorities and co-founders of the Workplace Bullying Institute, define workplace bullying as the “repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviors that are threatening, intimidating, or humiliating; sabotage that prevents work from getting done; or some combination of the three.”⁴⁷ The serious physical and mental health harms of workplace bullying can be significant. Surveying the pertinent research, subject-matter experts and therapists Maureen Duffy and Jessi Eden Brown have noted that workplace bullying and related workplace misconduct have been associated with clinical depression, anxiety, post-traumatic stress disorder (or symptoms), substance abuse, sleep disruption, and generally elevated rates of serious mental illness.⁴⁸

Suicidal ideation also has been linked to workplace bullying.⁴⁹ Perhaps the most significant example came out of a criminal prosecution under France’s workplace bullying law pursued against France Télécom, a large telecommunications company.⁵⁰ The case alleged that a management campaign of severe, sustained bullying designed to prompt widespread resignations of thousands of employees contributed to the suicides of some 35 workers.⁵¹ At trial, a guilty verdict resulted in fines and short prison terms for several high-ranking executives.⁵²

Andrea Adams, the British journalist who popularized the term workplace bullying during in the late 1980s, knew very well how terrifying and harmful this form of abuse could be.⁵³ Speaking before a British trade union in 1994, she

47. NAMIE & NAMIE, *THE BULLY AT WORK*, *supra* note 11, at 1.

48. Maureen Duffy & Jessi Eden Brown, *Best Practices in Psychotherapy for Targets of Workplace Bullying and Mobbing*, in DUFFY & YAMADA, *WORKPLACE BULLYING AND MOBBING*, *supra* note 11, at vol. 2, 292.

49. See Morten Birkeland Nielsen et al., *Workplace Bullying and Suicidal Ideation: A 3-Wave Longitudinal Norwegian Study*, 105 AM. J. PUB. HEALTH e23, e26 (2015) (finding workplace bullying “may be a precursor to suicidal ideation”).

50. Adam Nossiter, *3 French Executives Convicted in Suicides of 35 Workers*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/world/europe/france-telecom-suicides.html> [<https://perma.cc/3BDA-K7-4M>].

51. *Id.*

52. *Id.*

53. See generally ANDREA ADAMS, *BULLYING AT WORK: HOW TO CONFRONT AND OVERCOME IT* (1992) (examining dynamics of workplace bullying).

characterized bullying as “vindictive, cruel, malicious or humiliating attempts to undermine an individual or groups of employees.”⁵⁴ She further explained:

This abuse of power or position can cause such chronic stress and anxiety that the employees gradually lose belief in themselves, suffering physical ill-health and mental distress as a result.

Over the past five years, people have described this experience as everything from psychological terrorisation, to emotional rape, to entering a war zone. Their accounts are all so similar that I can now predict when somebody contacts me, what they are actually going to say and the way in which they identify bullying, and their physical and emotional responses to it. It establishes a clear trend and fear in the workplace.⁵⁵

In sum, workplace bullying is one of the most severe psychosocial work hazards.⁵⁶ And yet, as Part IV(A) below will explain, despite the significant physical and mental health impacts of workplace bullying, most U.S. workers have few, if any, legal protections against this form of targeted abuse.

IV. POLICY CHOICES FOR EXTENDING THE OSH ACT’S REACH

The foregoing discussion raises the possibility of at least two policy changes for the OSH Act. The first involves interpreting the current General Duty Clause to cover workplace bullying. The second involves an amendment to the OSH Act that covers workplace hazards that may cause serious psychological harm.

A. Using the Current OSH Act to Address Workplace Bullying

A more cautious, yet very significant step towards expanding the OSH Act’s coverage to reach workplace hazards that may cause serious psychological harm is to interpret the statute’s General Duty Clause to include severe workplace bullying. The analytical reasoning behind this possibility, and the challenges of implementation, are explored immediately below.

1. The Analytical Case

In 2009, law professor Susan Harthill authored a thorough analysis positing that workplace bullying fits within the protections of the OSH Act’s existing

54. Andrea Adams, Conference Address sponsored by the British Trade Union in Manufacturing, Science and Finance (May 24, 1994), <http://workplacebullying.org/multi/pdf/adams.pdf> [<https://perma.cc/9UY4-6GQZ>].

55. *Id.*

56. COBB, *supra* note 42, at 18 (stating “impossible to discuss psychosocial hazards without specifically mentioning bullying”); WORLD HEALTH ORG., WHO GUIDELINES ON MENTAL HEALTH AT WORK 3 (2022), <https://www.who.int/publications/i/item/9789240053052> [<https://perma.cc/KK4L-4E85>] (listing bullying, harassment, and mobbing among psychosocial work hazards).

General Duty Clause and could (and should) lead to a newly promulgated regulation specifically addressing these behaviors at work.⁵⁷ Harthill observed that OSHA has deemed workplace violence to be covered by the General Duty Clause and urged that workplace bullying falls within that rubric.⁵⁸ In support, she noted that OSHA has favorably drawn from NIOSH's definition of workplace violence, which includes "verbal abuse occurring in the work setting" and "psychological traumas such as threats, . . . an intimidating presence, and harassment of any nature such as being . . . sworn at or shouted at."⁵⁹ She also observed that the Federal Bureau of Investigation's definition of workplace violence extends beyond physical assaults as well, including "stalking, threats, harassment, bullying, emotional abuse, intimidation, and other forms of conduct that create anxiety, fear, and a climate of distrust in the workplace."⁶⁰ Harthill stated that "(a)lthough workplace bullying can take the form of physical violence, it is more likely to take the form of psychological assault, and can be labeled 'psychological violence.'"⁶¹

Although Harthill's argument has not yet borne fruit, it remains worthy of consideration. Among the psychological harms listed in the Surgeon General's Framework—"bias, discrimination, emotional hostility, bullying, and harassment"⁶²—only those related to legally protected class membership such as race, sex, disability, and other categories constitute unlawful employment practices through U.S. discrimination laws. Workplace bullying, by comparison, remains the most common and severe form of workplace mistreatment that largely evades legal accountability in the United States.⁶³ In an attempt to close that gap, I have drafted model anti-bullying legislation dubbed the Healthy Workplace Bill⁶⁴ (HWB) and worked closely with the Workplace Bullying Institute and advocates across the country to bring it to state legislatures.⁶⁵ The HWB creates a civil claim for damages for bullying that causes physical or psychological harm, while

57. See Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1251-53 (2009) (outlining argument for existing OSH Act to cover workplace bullying).

58. *Id.* at 1283-84.

59. *Id.* at 1283 (drawing from NIOSH definition).

60. *Id.* at 1256-57 (quoting from FBI definition).

61. Harthill, *supra* note 57, at 1257.

62. SURGEON GENERAL'S FRAMEWORK, *supra* note 1, at 12.

63. See generally David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L. J. 475 (2000) (documenting lack of legal protections against workplace bullying in U.S. employment law); David C. Yamada, *The American Legal Landscape: Potential Redress and Liability for Workplace Bullying and Mobbing*, in DUFFY & YAMADA, WORKPLACE BULLYING AND MOBBING, *supra* note 11, at vol. 2, 413-33 (detailing more recent U.S. legal developments).

64. See generally David C. Yamada, *The Healthy Workplace Bill, An Act Addressing Workplace Bullying, Mobbing, and Harassment, Without Regard to Protected Class Status* (2023) [hereinafter Yamada, *Healthy Workplace Bill*].

65. *WBI Healthy Workplace Bill to Prevent & Correct Abuse at Work*, WORKPLACE BULLYING INST., <https://healthyworkplacebill.org> [<https://perma.cc/4LWQ-LZUZ>].

adding liability-reducing incentives for employers to prevent and respond to bullying behaviors.⁶⁶ Although the HWB has been introduced in many state legislatures, as of this writing (Spring 2023) it has yet to be enacted in its full form.

While efforts to enact workplace bullying laws continue, an expansion of occupational safety and health laws that covers workplace bullying would add meaningfully to the now-limited legal toolkit available to address this form of interpersonal abuse. If OSHA is open to considering a form of “psychological violence” as qualifying for coverage under OSH Act, then it makes sense that workplace bullying – as the most common and destructive form of workplace mistreatment generally not covered by existing protective employment laws – should be the top candidate. Accordingly, Susan Harthill’s well-reasoned argument for covering workplace bullying under the current OSH Act merits OSHA’s serious attention.

2. Implementation

Implementation of this change would require additional resources and training within OSHA. Among other things, it would require funding for more workplace inspectors to investigate reports of workplace bullying. This would constitute a tangible challenge for an agency well-known to be short-staffed on inspectors, both currently and historically.⁶⁷ Furthermore, OSHA investigators, hearing officers, and other professionals involved in investigating and resolving reports of bullying would have to be trained on how to distinguish situations that may violate the General Duty Clause from milder instances of bullying and from behaviors classified as lesser workplace incivilities.⁶⁸ Also, OSHA would be expected to produce an accompanying body of public education materials designed to inform employees and employers of its expanded reach into workplace bullying and the practical implications for investigation and enforcement protocols. In the event the Secretary of Labor promulgates regulations concerning workplace

66. See Yamada, *Healthy Workplace Bill*, *supra* note 64.

67. Louise Esola, *Decline in Number of Inspectors Hampers OSHA Operations*, BUS. INSURANCE (Dec. 21, 2022), <https://www.businessinsurance.com/article/20221221/NEWS08/912354445/Decline-in-number-of-inspectors-hampers-OSHA-operations> [<https://perma.cc/7ACS-PHST>] (reporting how pandemic-related “workplace safety duties coupled with a steady drop in the number of [OSHA] inspectors since 2014 have challenged the agency”); Bruce Rolfsen, *Federal Workplace Safety Inspector Numbers Fall Under Biden*, BLOOMBERG L. (Nov. 16, 2021), <https://news.bloomberglaw.com/safety/federal-workplace-safety-inspector-numbers-tumble-under-biden> [<https://perma.cc/8ULP-RQN6>] (reporting the “number of federal workplace safety inspectors at OSHA fell to a record low by the close of fiscal year 2021”); Peter Lurie et al., *Report Detailing OSHA Enforcement Actions from 1972 Through 1998*, PUB. CITIZEN, <https://www.citizen.org/article/report-detailing-osh-a-enforcement-actions-from-1972-through-1998/> [<https://perma.cc/6F9H-59QT>] (reporting sharp decline in OSHA work-site inspections since mid-1970s).

68. See David C. Yamada et al., *Workplace Bullying and Mobbing: Definitions, Terms, and When They Matter*, in DUFFY & YAMADA, *WORKPLACE BULLYING AND MOBBING*, *supra* note 11, at vol. 1, 5-14 (discussing definitions of workplace bullying, workplace incivility, *inter alia*).

bullying, then all of the foregoing activities would have to incorporate the new, specific standards.

Adding these tasks to the work of an already overburdened administrative agency would be no small matter and would raise the need for significantly more funding and resources. This proposed expansion of coverage under the existing statute, however, would serve as a valuable “test run” to assess OSHA’s capacity to assume a broader regulatory role covering serious psychological harms generally, in the event of a statutory amendment. This latter possibility is discussed in section B, immediately following.

B. Amending the OSH Act to Cover Psychological Harms

A more dramatic step in expanding the OSH Act’s coverage would be to amend the statute to expressly cover recognized hazards that are causing or likely to cause serious psychological harm. The following proposes an amendment and examines the potential effects of such a significant change.

1. A Proposed Amendment

From a drafting standpoint, the easiest way to amend the OSH Act in a manner consistent with this commentary is to add two words (as italicized below) to the General Duty Clause, Section 5(a)(1), requiring an employer to furnish to its 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 *or psychological* harm to his employees. . .

This small change in wording, however, would create a significant new dimension of regulatory oversight and raising critically important definitional questions, especially in identifying which recognized hazards and serious psychological harms will be covered under the statute.

The proposed amendment to the OSH Act would presumably alter the boilerplate test for determining whether working conditions violate the General Duty Clause, per the italicized words:

The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

The hazard was recognized;

The hazard was causing or was likely to cause death or serious physical *or psychological* harm; and,

There was a feasible and useful method to correct the hazard.

The amendment would also implicitly authorize, pursuant to section 5(a)(2) of the statute, the promulgation of specific regulations concerning serious psychological harm at work.

2. Implementation

The potential ramifications of this amendment cannot be taken lightly. In addition to significantly expanding the regulatory compliance obligations facing covered employers, it would have a momentous impact on OSHA's everyday operations. In essence, it would be the mega-version of the "simple" addition of workplace bullying to the agency's charge, as described in the preceding section. For a public agency historically focused on physical hazards that cause serious physical harms, an expansion of statutory coverage to include hazards that cause serious psychological harms would trigger the development of a large body of regulatory and judicial rulings, new regulations, and public education initiatives. Although the expertise to do all this would be within the agency's grasp – such as accessing expertise and research from NIOSH – the application steps would be substantial.

That said, an expansion of the General Duty Clause as proposed here would not be a panacea to those who wish to legislatively eliminate everyday conflict, incivilities, and work demands. Even in the face of expanded statutory coverage, the essential work of some vocations would inevitably retain some inherent stressors, and people would continue to have bad days at work and get into arguments with co-workers. In some cases, there may not be a recognized hazard present. In many other instances, there may not be a "feasible and useful method" for correcting a hazard.

Among other things, the everyday frustrations and unpleasantness of work would remain outside of the expanded statutory reach. After all, hospital nurses will still have to care for extra patients when someone calls in sick for a shift, actors in a professional theatre company may have to cope with an exacting director or producer and face even tougher audiences, and restaurant workers may periodically have to deal with an upset or rude customer. While addressing these respective concerns at the organizational level may be appropriate, these normal experiences of work should and would not be the stuff of regulatory intervention even under an expanded General Duty Clause.

Let us, however, tweak a bit the scenarios above. What if a hospital is chronically understaffed on nursing shifts, at the cost of continually burning out its nurses and compromising the quality of patient care?⁶⁹ At this point, serious psychological harm and potential abatement measures enter the picture. One

69. See Karen B. Lasater et al., *Chronic Hospital Nurse Understaffing Meets COVID-19: An Observational Study*, 30 *BMJ QUALITY & SAFETY* 639, 643 (2021) (noting nursing staffs in two locations studied were already suffering burnout due to high patient-to-nurse ratios and poor management before COVID arrived, which would reduce quality of care during pandemic); Georgios Tsolakidis et al., *Nursing Staff Burnout: A Critical Review of the Risk Factors*, 15(1) *INT'L J. CARING SCIS.* 668, 671 (2022) (noting "(i)n studies relating to the staffing of nurses, the greater number showed that in cases of understaffing, or in cases of staff/patient disproportion, nurses were more likely to develop burnout").

possibility, for example, is to institute minimum nurse-patient ratios, consistent with proposals that have been advanced by some nurses' unions.⁷⁰

In the second work setting, what if a theatre company's director or producer is not exacting, but rather is a savage and manipulative bully, to a point where many are experiencing fear and extreme stress, and some have even left the company because of the toxic work environment?⁷¹ Here, too, the expanded statutory coverage would become relevant, raising the possibility of a cease-and-desist order (which may include a personnel change) as a feasible abatement.

And in the third work setting, what if restaurant servers are routinely subjected to harassment (sexual and general), threats, and unwanted physical contact by customers, causing significant anxiety and fear and prompting some to quit?⁷² At this point, an expanded General Duty Clause becomes relevant, inquiring about the psychological harm wrought by these behaviors and the possibility of requiring abatement measures.

In other words, adding serious psychological harm to the General Duty Clause would require a fair amount of sorting out what aspects of toxic work environments and what types of psychosocial hazards would fall under an expanded regulatory rubric. In an August 2022 blog commentary, I identified a cluster of situations and topics now being associated with toxic workplaces:

- The MeToo movement;
- The pandemic and overwork of workers in essential job categories;
- The Great Resignation;
- Diversity, equity, and inclusion;
- Political and social discord;
- Bullying and incivility;

70. See Lasater et al., *supra* note 69, at 643-45 (discussing status of legislative efforts to mandate minimum patient-to-nurse staffing ratios).

71. See generally, e.g., Michael Paulson, *After Bullying Reports, Scott Rudin Says He'll Step Back From Broadway*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/04/17/theater/scott-rudin-bullying-broadway.html> [<https://perma.cc/D8P3-UK7Q>] (reporting prominent Broadway and Hollywood producer "had continued to thrive in an entertainment industry with a long history of tolerating poor behavior by people who produce acclaimed art"); Alison Pollard-Mansergh, *Bullying in Theatre: Our Stories*, INTERACTIVE THEATRE INT'L BLOG (Nov. 16, 2018), <https://blog.interactivetheatre.com.au/index.php/2018/11/16/bullying-in-theatre-our-stories/> [<https://perma.cc/92VN-DGCQ>] (observing "(i)t's no secret that bullying and harassment are rife in our industry"); Lyn Gardner, *Bullying in the Arts: Let's Raise the Curtain on Theatre's Thugs*, GUARDIAN (May 15, 2013), <https://www.theguardian.com/stage/theatreblog/2013/may/15/bullying-in-the-arts-theatre> [<https://perma.cc/BU3C-PUWT>] (observing "(f)or many people working in theatre, bullying is a fact of life," including "directors who treat theatre buildings as personal fiefdoms").

72. See e.g., Becky Sullivan, *Tips And "Service With A Smile" Rules Fuel Sex Harassment In Restaurants, Study Says*, NPR (July 22, 2021), <https://www.npr.org/2021/07/22/1019017172/tips-and-service-with-a-smile-drive-sexual-harassment-in-restaurants-study-finds> [<https://perma.cc/K6P9-2NYL>] (reporting on study linking tipped employment and prevalence of sexual harassment); Neil Vigdor, *Restaurant Shuts Down for a "Day of Kindness" After Customers Make Its Staff Cry*, N.Y. TIMES (July 14, 2021) <https://www.nytimes.com/2021/07/14/us/apt-cape-cod-restaurant-workers-covid.html> (detailing abusive treatment of restaurant staff by customers after pandemic re-opening).

Attention to bad bosses;
Wage stagnation and benefit cuts;
The recent dramatic uptick in union organizing.⁷³

In considering this list, I further suggested the necessity of digging “beneath the generic tag of toxicity” to understand specific situations:

The results may yield different problem areas and different fixes. Some bad behaviors may be intentional. Others will fall under the categories of negligence or dysfunction. Some may implicate employment and labor law violations. Certain concerns may be organizational in nature; others may be limited to a department or working group.

It’s also true that, on occasion, frequent complainers will invoke the language of toxicity to avoid supplying specific allegations that won’t hold up. Some will do so as attempted shields against accountability for their own inadequate work performances.⁷⁴

These distinctions would be even more important when distinguishing among work settings and behaviors for purposes of determining a potential violation under an expanded General Duty Clause.

C. *International Perspectives*

This call for the U.S. to expand the scope of its workplace safety and health laws is wholly consistent with global trends in workplace legislation, directives, and advisories. In fact, these international developments leave the United States distinctly behind the curve in adopting legal responses to severe psychological harms at work.

For example, in 2019, the International Labour Organization (ILO), an agency of the United Nations, adopted a Violence and Harassment Convention,⁷⁵ the first international treaty to require member nations who ratify it “to put in place the necessary laws and policy measures to prevent and address violence and harassment in the world of work.”⁷⁶ In 2022, the World Health Organization, another U.N. agency, jointly issued a Policy Brief with the ILO, calling upon workplace stakeholders to proactively address mental health concerns related to work.⁷⁷ Among its many recommendations, the Policy Brief urges governments

73. David Yamada, *We Need to Dig Beneath Generic References to “Toxic Workplaces”*, MINDING THE WORKPLACE (Aug. 27, 2022), <https://newworkplace.wordpress.com/2022/08/27/we-need-to-dig-beneath-generic-references-to-toxic-workplaces/> [<https://perma.cc/S6ZZ-JCSJ>].

74. *Id.*

75. Violence and Harassment Convention, June 21, 2019, 190 INT’L LABOUR ORG.

76. INT’L LABOUR ORGANIZATION, *Eliminating Violence and Harassment in the World of Work*, <https://www.ilo.org/global/topics/violence-harassment/lang—en/index.htm> [<https://perma.cc/UAN3-GKUJ>].

77. WORLD HEALTH ORG. & INT’L LABOUR ORG., MENTAL HEALTH AT WORK: POLICY BRIEF (2022), <https://www.who.int/publications/m/item/mental-health-at-work-policy-brief-2022>.

to integrate workplace mental health concerns into their public policies and to safeguard workers against discrimination and stigmatization based on mental health.⁷⁸

Many national governments are using their employment codes to address workplace mistreatment that can cause psychological harm. For example, in 2015 Sweden revised a previously pioneering workplace healthy and safety ordinance law covering workplace bullying to include a broad-ranging array of behaviors classified as victimization, *i.e.*, abusive behaviors directed at workers that “could lead to ill health or their being placed outside the community of the workplace.”⁷⁹ In 2019, Canada expanded the scope of its national workplace safety and health laws to impose a duty upon federally-regulated employers to proactively address violence, harassment, and bullying.⁸⁰ The same year, Japan expanded coverage of its workplace harassment codes to require employers to engage in prevention of “power harassment,” the phrase commonly used to cover bullying behaviors.⁸¹

V. CONCLUSION

This essay is offered to encourage a needed discussion about using our workplace safety and health laws to protect employees from severe psychological harms generated by their work environments. It does not pretend to be an exhaustive examination of the topic, but rather it attempts to state the initial case by introducing relevant subject matter, raising important questions, and offering policy proposals that focus our attention on the significant implementation challenges posed by potential changes in the OSH Act’s statutory coverage. While some might consider this essay to be supporting dramatic proposals for change, it simply invites the United States to recognize a fuller array of serious hazards to worker safety and health in the modern workplace and to catch up with nations around the world that already have done so.

[://www.who.int/publications/i/item/9789240057944](https://www.who.int/publications/i/item/9789240057944) [https://perma.cc/BG2D-HXY7].

78. *Id.* at 16.

79. ORGANIZATIONAL AND SOCIAL WORK ENVIRONMENT (AFS 2015:4) (Swed.), https://www.ires.uu.se/digitalAssets/617/c_617288-1_1-k_organisational-and-social-work-environment-afs2015-4.pdf [https://perma.cc/-24DV-C5CF].

80. BILL C-65, AN ACT TO AMEND THE CANADA LABOUR CODE (HARASSMENT AND VIOLENCE), THE PARLIAMENTARY EMPLOYMENT AND STAFF RELATIONS ACT, AND THE BUDGET IMPLEMENTATION ACT, No. 1 (Can.); WORK PLACE HARASSMENT AND VIOLENCE PREVENTION REGULATIONS, SOR/2020-130 (Can.).

81. David C. Yamada, *Bullying and the Law: Gradual Progress on a Global Scale*, in BULLYING AND HARASSMENT IN THE WORKPLACE: THEORY, RESEARCH AND PRACTICE, 3d ed. 636-37 (Stale Valvante Einarsen et al., eds., 2020).