

Rural Migration News

Blog 301

OCTOBER 2022

Food Safety and Farm Labor Compliance

There was little government or industry concern with the safety of fresh produce until the 1990s. The death of several children in 1993 who ate undercooked Jack in the Box hamburgers contaminated with E Coli prompted efforts to prevent the contamination of food rather than simply investigating the source food that made people sick. Hazard Analysis and Critical Control Point (HACCP) plans became routine in meat processing, and spread to fresh produce as the FDA traced more food illnesses to green onions and other fresh produce that is eaten raw.

Lytton's book *Outbreak* traces the evolution of the FDA's Produce Safety Rule (<https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-produce-safety>), which aims to develop science-based standards to ensure the safety of fresh produce. Lytton outlines the evolution of industry self-policing efforts, which accelerated after contaminated spinach led to widespread illness and a recall of all bagged spinach on September 15, 2006. The demand for spinach and other bagged salads collapsed, prompting the growers, handlers,

and buyers of leafy greens to develop water, fertilizer, and worker hygiene standards to prevent contamination.

Systems

Three interacting systems aim to ensure that fresh produce is safe, government regulation, market pressure or private supply chain management as with buyer standards enforced via audits, and civil litigation that involves consumers who sue the growers of the food that sickened them and the retailers who sold the food. These regulatory, market/audit, and litigation systems interact. Research and experience informs the development of government and private standards, such as how much bacteria is allowable in irrigation water, and underwriters of liability insurance set premiums that reflect their risks and claims experience by commodity and grower.

Could a similar system of government regulation, market pressures and audits, and litigation improve compliance with labor laws? The major labor compliance tool is government investigators, supple-

mented by market pressure/audits and litigation.

Market interdependence is different in food safety and labor. In food safety, growers and buyers have a shared incentive to ensure that their produce is safe. The costs of contaminated food include reduced sales of the contaminated commodity as well as significant payouts to consumers who get sick or die, giving growers, buyers, and insurers incentives to prevent contamination. The major role of government in food safety is more often to locate the source of the contamination rather than to levy fines.

Compliance with labor laws is different. Labor violations are usually employer-specific rather than commodity wide, with exceptions such as Thai seafood or Bangladeshi garments, and thus do not affect consumer demand for the commodity. Employers and buyers emphasize that labor violations are episodic rather than systemic, and that governments should do more to detect and punish individual employers who violate labor laws. Aggrieved workers can normally recover only the wages and benefits they should have received, a sharp contrast to food safety litigation that can produce large payments if consumers die.

The goals of producing safe food and protecting farm workers are best achieved by creating cultures of safety and compliance, as when farms implement systems to prevent contamination by monitoring water and fertilizer and worker hygiene, and ensure labor compliance with systems to record worker hours accurately and avoid side payments to or harassment by supervisors.

Labor compliance systems are more difficult to implement because it is hard to create top-down sys-

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<https://rocky-ford-growers-association.mandccommunications.com/>





tems that provide a motion picture view of wages and working conditions in the same way that testing irrigation water creates a record of water quality. Audits provide a snapshot of labor conditions, but they are often check lists asking whether an employer has a policy on a particular item, not whether the policy is adhered to continuously. Rectifying individual worker complaints is often seen as a cost of doing business rather than a reason for systemic change.

Within a year, the Jensens filed for bankruptcy and in 2013 they pled guilty to selling contaminated food and were sentenced to six months probation.

Bill Marler of Marler Clark litigated 46 of the 66 suits filed in the Jensen case that sought more than \$50 million; Marler argued that the Jensens were strictly liable for selling contaminated food even if they were not negligent. The Jensens had only

\$2 million in liability insurance, so Marler sued the handlers and retailers of Jensen cantaloupes such as Kroger and Walmart as well as auditor Primus Labs, founded in 1987 by Robert Stovicek in Salinas to check produce for chemical residues and adding food safety audits in 1998.

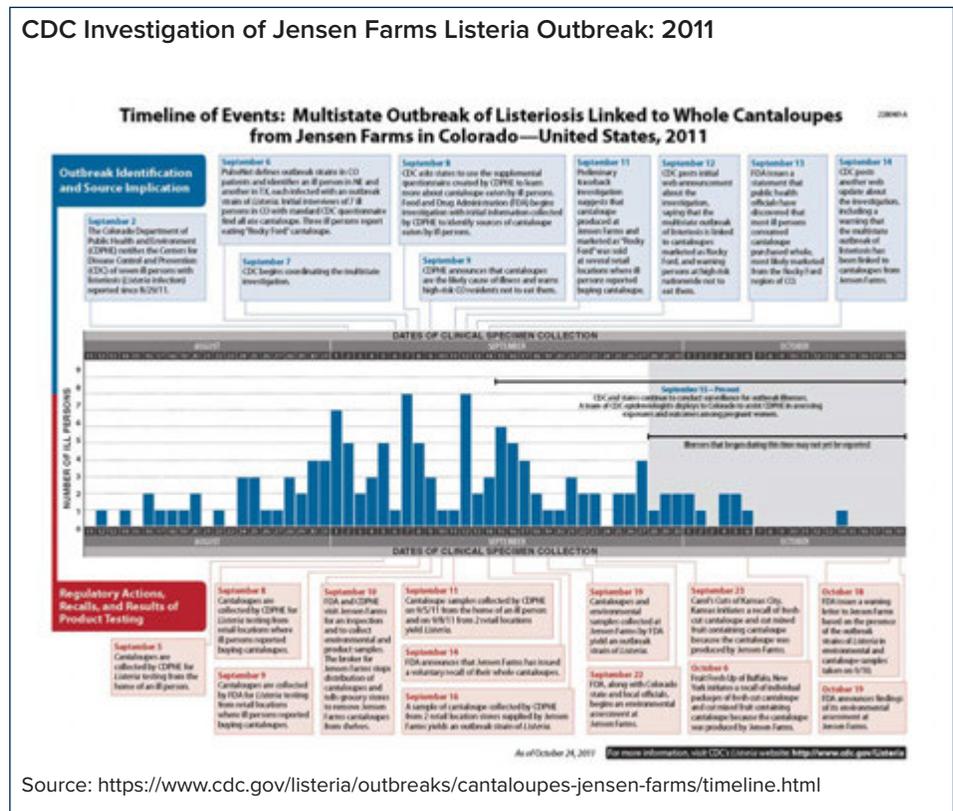
Primus used a subcontractor to conduct the audit at Jensens, which lasted four hours. Primus defended itself by arguing that it provided the audit that Jensen requested and paid for, viz, an announced audit to ensure compliance with FDA food safety standards, not best-practice standards. Primus emphasized that its audits are snapshots of conditions on the day of the audit, not motion pictures to determine if safety practices are followed every day. Primus considers scores of 95 and higher to be “superior,” the rating given to Jensens.

Many industry associations defended Primus, arguing that the audit provided what Jensens requested. They emphasized that deficiencies to make the melons

Jensen

Lytton’s nine chapter book begins with the story of the Jensen brothers, whose Sweet Rocky Ford cantaloupes led to at least 33 deaths from Listeria in 2011. The brothers had a 6,000 acre farm that dunked harvested melons in chlorinated water, earning them a 95 superior rating in a food safety audit in 2010. Following the advice of the auditor, the brothers replaced the dunk tank with spray-washing equipment in 2011, which earned them a 96 superior rating despite their failure to add anti-microbial solution to the spray water.

The spray wash machine spread Listeria from one melon to the next, and a Listeria outbreak was soon traced to the Jensen farm.



Source: <https://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/timeline.html>

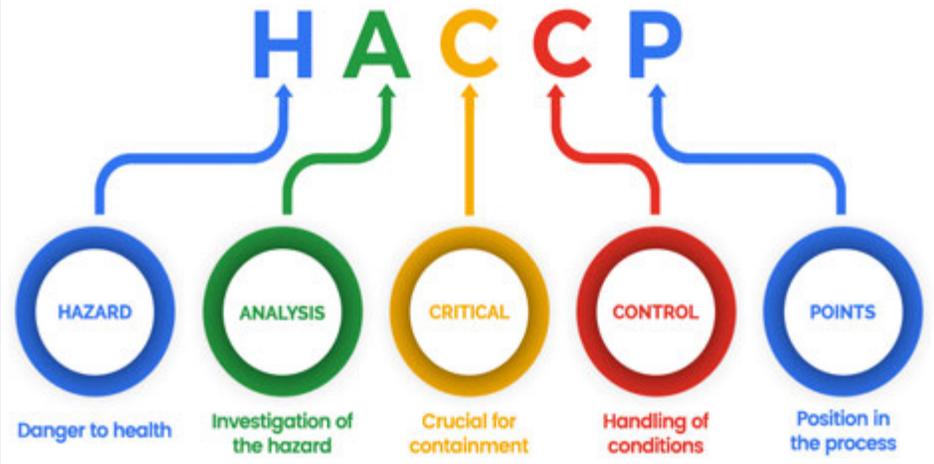
safer, such as adding anti-microbial solution to the wash water, were not required by FDA. Primus owed confidentiality to the client, so Primus did not report the lack of anti-microbials to any government agency.

Primus defended itself from consumer lawsuits by arguing that it was liable only for the losses suffered by client Jensens, not to consumers who ate Jensen melons. Nine of the 12 courts that considered consumer suits against Jensens disagreed, finding that consumers could reasonably rely on Primus certification to assume the melons were safe. After judges ruled that juries could decide if Primus was liable to consumers, Primus settled the consumer suits to avoid trials.

The Jensen case illustrates the three interacting systems that aim to keep food safe, government regulation, market pressure via supply chain management such as the audits demanded by buyers or requested by farmers, and litigation for damages. Lytton concludes that the best ways to improve food safety include (1) improving investigations after outbreaks so that the causes of foodborne illnesses can be detected and corrected quickly, and (2) having government inspectors conduct more buyer-funded audits and make private auditors liable for negligence if there are outbreaks.

Lytton emphasizes the need for more science to understand what improves food safety and more liability and product recall insurance so that private underwriters can develop experience analogous to workers compensation, where employer-paid premiums reflect the risks that workers will be injured on a particular farm. Lytton emphasizes that most motion-picture food safety actions must be taken on a day-to-day basis by farmers who have embraced a culture of food safety.

HACCP Plans Aim to Prevent Food Contamination



From Milk to Meat

Lytton's book begins with the fight to end swill milk between the 1820s and 1860s, which involved feeding cows the mashed and fermented grains left over from beer and whiskey production and adding chalk and plaster of Paris to make the milk appear creamy and molasses to give it a yellow color. Reformers continued to demand better milk for children throughout the 1800s, leading to certified and eventually pasteurized milk by the early 1900s. The handling and distribution of fluid milk was standardized, and the US by the 1920s had a public and private system aimed at ensuring that children drank safe milk.

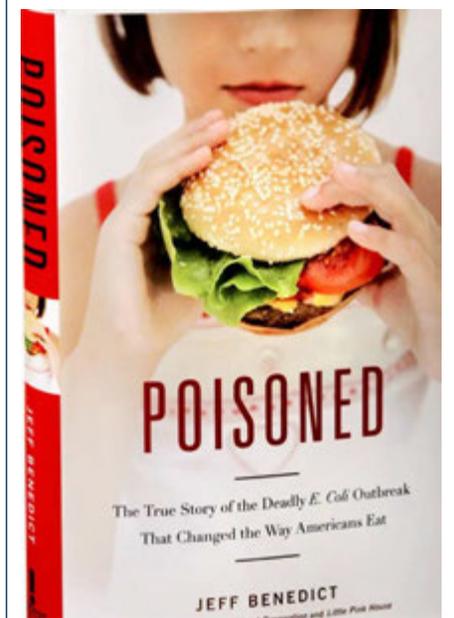
The next challenge involved preventing microbial contamination of canned food, which led to NASA's approach of examining each step of the production process to identify and eliminate hazards in the 1970s. Hazard Analysis Critical Control Points programs use benchmarks, metrics, and routines to ensure that contamination does not creep into canned food. The recall of Bon Vivant canned vichyssoise soup contaminated with *C. botulinum* bacteria in 1971 highlighted the inability of FDA inspectors to visit food production facilities frequently. Bon Vivant traced the contamination

to one crate of 460 cans, and the 40-employee firm filed for bankruptcy.

The National Canners Association, whose six hundred members packed 90 percent of US canned food, proposed HACCP food safety guidelines that were quickly adopted by all canners.

The fourth chapter deals with the Jack in the Box *E. Coli* outbreak in 1993 that left four children who had consumed undercooked burgers dead. The meat industry had argued that bacteria in meat were

The Jack in the Box *E. Coli* Outbreak Changed how Burgers are Cooked



inevitable, and that the burden was on consumers to cook meat properly. Jack in the Box cooked its burgers to 144F rather than the recommended 155F, and Bill Marler won a \$15 million settlement for a nine-year old in 1995, prompting Jack in the Box to settle other suits in 1997. Jack in the Box changed beef suppliers, developed a HAACP program, and led an industry-wide effort to reduce E Coli in meat that was eventually incorporated into USDA regulations.

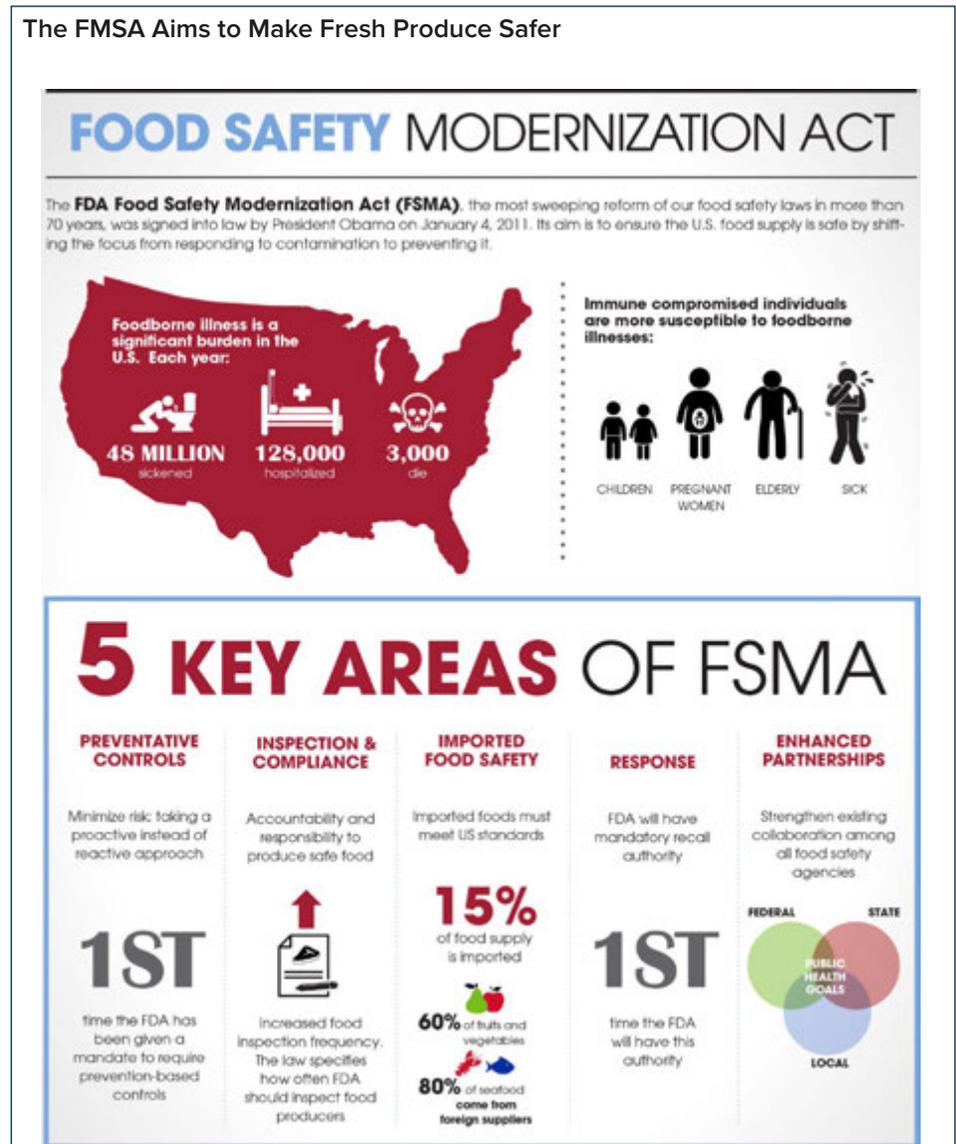
Produce

Chapter five turns to the 9/15/06 spinach outbreak that led to a recall of all bagged spinach and reduced the demand for bagged salads. The likely source was cattle ranch land leased to a spinach grower, and spinach's 9/15 moment led to the development of good agricultural practices or GAPs to reduce the risk of contamination in leafy green vegetables.

Many produce buyers required their suppliers of fresh produce to pay for audits that certified the farm had GAPs and monitored irrigation water, fertilizer, and worker hygiene. However, the GAPs provided general rather than specific advice, advising a buffer zone between crops and livestock but not specifying the distance. For the highest risk crops, including leafy greens, cantaloupes, green onions, and tomatoes, buyers often set specific standards, so that a grower selling to different supermarket chains could be audited several times and against different checklists.

Leafy greens growers, who are often large and year-round suppliers of lettuce, broccoli, and other vegetables, led the drive to standardize food safety protocols by having the government set the standards. The result was the Food Safety Modernization Act (FSMA) of

The FSMA Aims to Make Fresh Produce Safer



2011, which led to the development of Produce Safety Rules that are being implemented a decade later. Private auditors often check farms to ensure that they are complying with the PSR. Lytton emphasizes that the long march to safer food reflects growing industry and consumer awareness of a problem, reformers who propose solutions, and nonlinearity or an event such as the outbreaks of 1993 and 2006 that opens a window to change policy. To ensure that food is safe, Lytton argues that government regulators need industry expertise to identify risk factors and to develop tools that actually reduce risks. Lytton concludes that it is very hard to determine whether and which

GAPs have done the most to reduce foodborne illnesses traceable to fresh produce.

Perspective

There is considerable uncertainty about the sources of foodborne illnesses and the steps needed to reduce them. For example, a 2008 wave of illnesses thought to be from tomatoes was eventually traced to jalapeno peppers, with no compensation for the tomato growers who lost their crop. A top priority is improving investigations after outbreaks so that the causes of foodborne illnesses can be detected and corrected quickly, which means identifying the source and the practices that led to contamination.

Major FSMA Provisions

Title I: Preventing outbreaks	<ul style="list-style-type: none">• extends registration requirements for food facilities• enhances agency authority to inspect company production records• mandates that food processors implement HACCP-type programs• calls for updating guidance and regulations related to manufacturing practices, produce safety, food allergies, and intentional adulteration• encourages closer cooperation among federal, state, and local authorities
Title II: Detecting and responding to outbreaks	<ul style="list-style-type: none">• prioritizes inspection of high-risk food facilities• recommends using only accredited laboratories for pathogen testing• promotes information sharing among laboratories• mandates pilot projects and record-keeping requirements to improve traceability• supports additional investment in and coordination of public health surveillance, incident reporting, and outbreak investigations at all levels of government• arms the FDA with enhanced enforcement powers, including mandatory recall authority• invests in training programs for state and local food safety officials and educational programming for food producers• authorizes five regional centers to serve as models and coordinate capacity building necessary to carry out reforms
Title III: Regulating imported food	<ul style="list-style-type: none">• requires importers to verify that their foreign suppliers satisfy US food safety standards• approves reliance on third-party regulatory compliance audits for food production facilities abroad• mandates the opening of FDA offices in other countries
Title IV: Funding and whistle-blowers	<ul style="list-style-type: none">• authorizes spending to hire additional FDA personnel• provides legal protections for corporate whistle-blowers

Several innovations are making it easier to trace the source of contaminated food back through the supply chain, including the digitization of records and the insertion of temperature and other sensors into packed produce. The availability of data makes it easier to determine where particular items were grown, how they were shipped, and where problems may have arisen.

Second, industry and government must cooperate to develop realistic food safety standards that are implemented and audited. Lytton advocates having government inspectors conduct more buyer-funded audits against government- and industry-developed standards, and believes private auditors should be made liable for negligence to ensure that they take their jobs seriously; he quotes

experts who disparage the reliability of private audits that are paid for by the farm being audited (p207-08).

Third, Lytton encourages insurance companies to provide liability insurance to growers and handlers for selling contaminated food, arguing that the that insurers would develop data and experience when paying claims and create market incentives to improve food safety. The cost of premiums would be lower for farms with good practices.

Chapter nine asks the benefit-cost question and concludes that “no one knows just how much illness food safety efforts prevent or whether these health benefits have been worth the costs.” (p234). There is far more information and data on what growers do to avoid contamination, and what these food safety

measures cost, than on whether they reduce outbreaks of food-borne illness.

What lessons does the quest for safer food hold for labor law compliance? First is the need for more continuous data, such as electronic recordkeeping of hours and units of work. New technologies make electronic record keeping possible even in farm fields, and could be encouraged for all farm employers and required for those found to have violated labor laws.

Second is the need for more government investigations and private audits. Federal WHD investigators visit about 1,000 US farms a year and find labor law violations on two-thirds. However, the five percent of the farms with the most violations account for 50 to 75 percent of all of the labor law violations found on apple, orange, grape, and other farms. Private organizations including CIW, EFI, and Fairtrade have certified perhaps 500 US farms as in compliance with their labor standards, but there are over 100,000 US farm employers registered with UI, and 500,000 that report labor expenses to the COA, indicating that WHD investigations and private certifications affect a very small share of the farm labor market.

Third would be liability insurance for labor law violations. Many larger farms have HR departments and a general counsel to manage their employees and deal with problems that arise. Many farms belong to associations that provide education on labor law compliance and offer discounts on legal services in the event of suits, and there are many university extension services and NGOs that aim to educate employers and workers about their rights. Insurance for violations of labor laws would be a new frontier.

Next Steps

The quest for food safety proceeded slowly until a trigger event such as 1993 or 2006 opened the window for policy action. The fact that scientists, government agencies, and growers and buyers had been developing proposals for reforms allowed Congress to enact legislation, albeit with lags for enactment and more lags for implementation. Lytton emphasizes the need to continue to conduct research and develop policy proposals to have them ready for implementation when policy windows open.

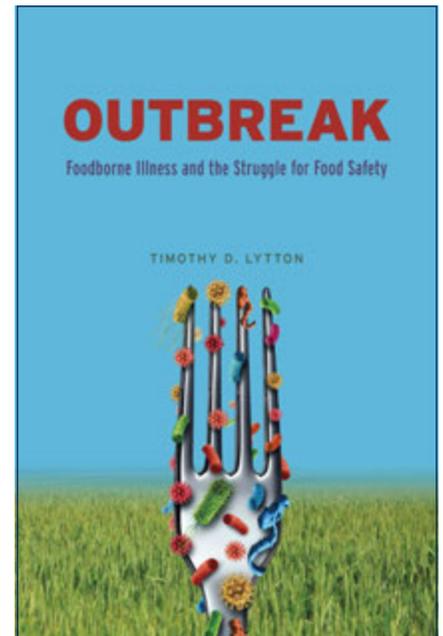
Food safety may be less “political” than labor law compliance. Lytton notes that food safety professionals who move between industry and government may benefit as science and practical knowledge on implementation are exchanged, while farm labor specialists tend to be tagged as pro-employer or pro-worker. Instead of meeting jointly as with food safety specialists, many farm labor meetings involve only employer or worker advocates.

What does this mean for farm labor? On September 17, 1963, the worst vehicle accident in the US occurred near Chualar in the Salinas Valley when a converted truck with

benches carrying 53 Braceros was struck by a train, killing 32 workers, many of whom could not easily be identified because the practice was to identify them by number rather than name. Farm labor reformers had been urging an end to the Bracero program, arguing that the presence of Braceros depressed farm wages and that the US government was not protecting Bracero workers.

What pending farm labor reforms could be implemented if a policy window opened today? The Farm Workforce Modernization Act was approved by the House in 2019 and 2021 to legalize unauthorized farm workers, modify H-2A regulations, and require farmers to use E-Verify to check the status of new hires. Many states enacted or have pending laws that require farmers to pay overtime wages to farm workers and to protect them from heat stress.

The US farm labor market is diverse, involving 100,000 to 500,000 employers and up to 2.5 million workers. One strategy for considering 21st century farm labor reforms would be to reward farm employers who comply with labor laws while imposing new requirements on those found to have violated labor



laws. For example, creating a rating system analogous to TSA-precheck could allow A-rated employers to self-certify their need for H-2A workers and their housing, while requiring C-rated violators to submit hours worked, wage, and units of work data electronically to more easily detect new violations.

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