Behind Bars and Flames: Protecting the Occupational Health and Safety of California’s Incarcerated Firefighters

Maisie Ide†††

INTRODUCTION
This note analyzes health risks specific to California’s incarcerated firefighters and compares occupational health and safety regulations and workers’ compensation laws as they apply to incarcerated and non-incarcerated firefighters.1 Incarcerated firefighters face a high risk of exploitation by the state and receive less protection under California’s occupational health and safety regulations and workers’ compensation laws.

DOI: https://doi.org/10.15779/Z385D8NF92
†. Maisie Ide is a JD Candidate at UC Berkeley School of Law, Class of 2021.
††. Thank you to Professor Rohini Haar and Professor Eric Stover for their encouragement and guidance.
1. This research on the occupational health and safety of incarcerated laborers is novel, as a 2016 literature review “revealed precisely zero medical and public health articles dealing with inmate occupational health.” Andre Montoya-Barthelemy, The Occupational Health of Prison Inmates: An Ignored Population and an Opportunity, 61 J. OCCUPATIONAL & ENVTL. MED. c74, c75 (2019).
than non-incarcerated firefighters. As climate change increases both the length of California’s fire season and the state’s reliance on prison labor, incarcerated firefighters are vulnerable to exploitation, and their occupational health and safety is at particular risk. Using the United Nations Standard Minimum Rules for the Treatment of Prisoners as a standard, California should protect its incarcerated firefighters with regulations at least as favorable as those that protect non-incarcerated firefighters.

I. CALIFORNIA’S INCARCERATED FIREFIGHTER PROGRAM

Mass incarceration and the American criminal justice system disproportionately harm communities and people of color, and thus discrepancies in occupational health protection and workers’ compensation between incarcerated and non-incarcerated laborers will disproportionately harm communities and people of color. The use of prison labor, commonly likened to slavery, is enabled by a loophole in the Thirteenth Amendment, which outlawed slavery “except as a punishment for crime whereof the party shall have been duly convicted.” Although the California Department of Corrections and Rehabilitation (CDCR) does not publish data on the racial composition of the fire camps, “the racial and ethnic demographics of camps are [estimated to be] roughly similar to the overall state prison population,” in which Black and Latinx individuals are overrepresented. California’s failure to provide incarcerated firefighters with the same occupational health protection and workers’ compensation as non-incarcerated firefighters upholds a system of racial injustice dating back to the era of slavery.

California has used prisoners to fight fires since before World War II, when the workforce was depleted and the state needed more firefighters. Currently, male, female, and youth offenders work in 43 fire camps across the state. Estimates vary, but incarcerated firefighters account for around 30

---


4. In California, white individuals made up 39% of the state’s population but only 21% of the prison population in 2017. VERA INST. OF JUSTICE, INCARCERATION TRENDS IN CALIFORNIA 2 (2019). Conversely, Black individuals made up 6% of the state’s population but 28% of the prison population. Id. Latinx individuals made up 38% of the state’s population but 44% of the prison population. Id.


to 40 percent of California’s firefighting workforce. In order to qualify to work at a fire camp, prisoners cannot have been convicted of sexual offenses or arson, or have a history of forceful or violent escape. Incarcerated firefighters earn between $2.90 and $5.12 a day, with an additional dollar for every hour of an active emergency. In contrast, the average career firefighter in California earns $91,000 annually, with $42,000 in overtime and $13,000 in other pay. California’s use of incarcerated firefighters saves the state an estimated $100 million per year.

Despite earning significantly less than non-incarcerated firefighters, incarcerated firefighters earn more than most incarcerated workers in walled prisons. In addition to higher wages, incarcerated firefighters are entitled to a host of other benefits. They earn two days off of their sentence for every day they are actively fighting fires. Inmate firefighters also receive better food than they would in prison. A former incarcerated firefighter described how “[t]he staff treated you like a human, not a number . . . [and] [t]he boundaries were more relaxed . . . . You were just out there in these beautiful woods.” Despite the dangers of firefighting, he also reflected, “fighting fires, man, that is so much safer than being in prison.” Incarcerated firefighters frequently mention the sense of purpose they feel from fighting fires.


8. Conservation (Fire) Camps, supra note 5.


12. Goodman, supra note 3, at 442 (“For their work fighting fires, prisoners are paid a dollar an hour; for nonfighting work, inmates typically earn less than two dollars a day.”). Throughout this paper I use the term “walled” prison to refer to a typical prison, as opposed to a fire camp.


14. Id.


16. Id.

17. See, e.g., John Raphling, “California’s Prisoner Firefighters Deserve a Chance at a New Life,” HUMAN RIGHTS WATCH (Nov. 5, 2019) (describing how one former incarcerated firefighter “gladly” did the work because it gave him “a purpose, a feeling of self-worth, and allowed him to give back something
II. RISING RISKS OF EXPLOITATION FOR INCARCERATED FIREFIGHTERS

Incarcerated individuals nominally volunteer for the firefighting jobs,18 but “prison is an inherently coercive environment; there’s very little that is truly voluntary.”19 Given the benefits of living in a fire camp as compared to spending time in a walled prison, the decision has the potential to be highly coercive. Aggressive recruitment tactics add further pressure to the decision.20

California’s reliance on incarcerated firefighters, as demonstrated by criminal justice policy and proposals, contributes to the potential exploitation faced by incarcerated firefighters. For example, the number of incarcerated firefighters has decreased since the Supreme Court required California to reduce its incarcerated population in *Brown v. Plata*;21 and since the passage of Proposition 47, which directed individuals convicted of selected nonviolent felonies to county jails through reclassification of the crimes as misdemeanors.22 Though the prison firefighting program had 4,334 incarcerated firefighters in 2008, this number dropped to 3,740 in 2017.23 In response to the decline in incarcerated firefighters, CDCR considered offering eligibility for the firefighting positions to some inmates with violent crime histories.24 Although this proposal was eventually abandoned, Mike Lopez, then-president of the state’s firefighting union, asked, “At what risk is CalFire willing to go to get those inmates?”25 While Lopez’s fear is misguided because there is no systematic evidence that individuals who committed more violent crimes are more likely to cause problems while at a fire camp,26 he correctly identifies the state’s reliance on incarcerated labor and the incentive to distort criminal justice policy to secure that labor.

18. Conservation (Fire) Camps, supra note 5.
20. See, e.g., Goodkind, supra note 9 (describing how a man was asked to join a fire camp immediately after arriving in prison and being processed).
23. Id.
25. Id.
California’s reliance on incarcerated firefighters stacks two competing policy goals against each other: decreasing the incarcerated population and protecting the state from devastating fires. California’s reliance on incarcerated firefighters is so strong that it has also influenced California’s legal arguments on prison policy. For example, in 2014, California’s Office of the Attorney General reportedly argued against offering two-for-one credits to all minimum-custody inmates instead of only those in the firefighting program, because the credits “would severely impact fire-camp participation – a dangerous outcome while California is in the middle of a difficult fire season and severe drought.”

“[T]he incident shows how the temptation to exploit prison labor can distort our criminal justice system.”

Given California’s past attempts to use the incarcerated population for firefighting labor, the declining incarcerated firefighter population, and increased demand for firefighters due to climate change, further exploitation is possible.

The coronavirus pandemic sheds additional light on California’s reliance on incarcerated firefighters. In July 2020, due to coronavirus lockdowns, over 1,000 incarcerated firefighters were quarantined, and only 94 of 192 incarcerated firefighter crews were available. The quarantine reveals the tension between the health of the incarcerated firefighters and the state’s firefighting capacity. In August 2020, after California granted many incarcerated firefighters early release to protect them from the coronavirus, only 1,306 incarcerated firefighters were deployed. After the fact, Mike Hampton, a former corrections officer, stated, “The inmates should have been put on the fire lines, fighting fires . . . How do you justify releasing all these inmates in prime fire season with all these fires going on?” Hampton’s comment echoes the legal argument made by the California Attorney General in 2014 and again shows how California’s reliance on prison labor emerges through officials’ criminal justice policy decisions as well as the justifications behind those decisions. Although the need for firefighters didn’t preclude the early release policy in this instance, incarcerated firefighters need to be

---


28. Fathi, supra note 19.


31. Id.
procedurally safeguarded from the logic espoused by Hampton and the state’s inherent incentive to exploit inexpensive labor.

California’s need for firefighters, and consequently its reliance on incarcerated firefighters, will only increase as climate change continues to intensify the fire season. California’s wildfire season is increasing in severity because of a rise in temperatures, change in seasonal rainfall patterns, and drier soil and vegetation. California’s need for firefighters, and consequently its reliance on incarcerated firefighters, will only increase as climate change continues to intensify the fire season. California’s wildfire season is increasing in severity because of a rise in temperatures, change in seasonal rainfall patterns, and drier soil and vegetation. The area of California burned by wildfires each year increased by 500% between 1972 and 2018 and will continue to increase with climate change. Climate change will not only increase the demand for firefighters, but also impact the health and safety of firefighters. Fatalities and injuries rise with the increase in frequency and intensity of fires, and fire hazards like burnovers, heat exhaustion, and tree hazards are more likely. Climate change therefore may result in increased demand for prison labor as well as an increase in fatalities and injuries for those incarcerated firefighters.

III. HEIGHTENED OCCUPATIONAL HEALTH AND SAFETY RISKS

CalFire may send incarcerated firefighters into more dangerous situations than non-incarcerated firefighters. As a division chief with the state Department of Forestry and Fire Protection put it, incarcerated firefighters “are the Marines of the fire service . . . . When the hose can’t get stretched any more, or the bulldozer can’t go, or even the helicopter can’t reach, these guys have to hike in and physically put a line around the fire to contain it.” One study found that incarcerated firefighters are “routinely assigned the heaviest, dirtiest, least interesting, and most monotonous tasks,” and that non-incarcerated firefighters commonly wait inside the trucks for incarcerated firefighters to unload their hoses and carry heavy equipment through steep terrain. Even if incarcerated firefighters are not currently sent into more dangerous conditions, without proper legislative protection, the risk remains that they may be sent into more dangerous conditions in the future, especially given the likelihood of California’s increased reliance on this workforce.


33. Id.

34. See generally Patrick Withen, Climate Change and Wildland Firefighter Health and Safety, 24 NEW SOLUTIONS: J. ENVTL. & OCCUPATIONAL HEALTH POL’Y 577 (2015) (examining how climate change is impacting wildfires, which are becoming “ever more hazardous,” and wildland firefighters).

35. More information on the comparative danger of firefighting assignments is necessary to understand the extent of exploitation and difference in health risks faced by incarcerated firefighters, compared to their civilian counterparts.


The health risks inherent in firefighting make California’s use of incarcerated firefighters particularly exploitative. Firefighters have significantly elevated risk for melanoma, multiple myeloma, acute myeloid leukemia, and cancers of the esophagus, prostate, brain, and kidney. Firefighters are frequently exposed to “significant concentrations of hazardous materials including carbon monoxide, benzene, sulphur dioxide, hydrogen cyanide, aldehydes, hydrogen chloride, dichlorofluoromethane, and particulates.” Wildfire smoke exposure has also been associated with exacerbated respiratory issues, as well as cardiovascular and cerebrovascular issues.

Incarcerated firefighters face lethal danger while fighting fires: six have died on the job in the past 35 years. Comprehensive data regarding the injury and fatality rates of incarcerated and non-incarcerated firefighters is difficult to access. The lack of public data halts efforts to comprehensively compare health risks faced by incarcerated and non-incarcerated firefighters.

However, a Freedom of Information Act request submitted by TIME reveals some data on comparative health outcomes. TIME found that over 1,000 incarcerated firefighters in California required hospital care between June 2013 and August 2018. More importantly, the data revealed that incarcerated firefighters, as compared to non-incarcerated firefighters working on the same fires, were “four times as likely, per capita, to incur object-induced injuries, such as cuts, bruises, dislocations and fractures” and “eight times as likely to be injured after inhaling smoke and particulates.” The data also showed that non-incarcerated firefighters faced a higher risk of other injuries: they were nine times as likely to suffer burns and twice as likely to suffer heat-related illnesses.

The difference in injury and illness rates may be attributed to the differences in work assignments between incarcerated and non-incarcerated firefighters: non-incarcerated firefighters typically extinguish the flames...
while incarcerated firefighters reduce the likelihood that fires will spread.\textsuperscript{45} Jim Liptrap, the acting superintendent of a fire camp, attributed the differences in injury rates to overreporting because while non-incarcerated firefighters can self-medicate at home with over-the-counter medication, incarcerated firefighters must ask staff members for help with any medical issues and in order to receive medication.\textsuperscript{46} While potentially skewing the statistics, this decreased autonomy over health care could also prove detrimental to the health of the incarcerated firefighters.

In addition to increased risk for certain occupational injuries and illnesses, multiple anecdotes suggest incarcerated firefighters may receive substandard medical care. An incarcerated firefighter from a juvenile fire camp said, “[b]ecause we’re at a prison camp, they don’t necessarily pay attention to our physical needs as much as they do actual firefighters.”\textsuperscript{47} Incarcerated individuals are at risk of substandard medical treatment because doctors have a dual loyalty to both the patients’ health and the correctional officers’ security concerns.\textsuperscript{48} Correctional officers may pressure the doctor to “put aside their primary goal of patient care for the interests of the security mission” instead.\textsuperscript{49} For example, the doctor might be asked to “change prescribing practices or other clinical plans based on security concerns about patients going to off-site specialty care or emergency departments.”\textsuperscript{50} Because dual loyalty is an “omnipresent force in correctional health settings,” there is no reason to assume dual loyalty would be absent in a fire camp.\textsuperscript{51}

Incarcerated laborers are also at risk of substandard medical treatment in the occupational health setting because the doctors have another dual loyalty conflict between the patients’ health and the employer’s profit margin. Occupational medicine as a practice has been criticized because of its “reliance on financing by industry, which has powerful incentives to limit costs and favor physicians who are useful to their employers,” and because “flaws in the incentive structures of workers’ compensation constrain [occupational physicians’] objectivity in their practice.”\textsuperscript{52} This dual loyalty may be present in fire camps, as CalFire may pressure doctors to clear incarcerated firefighters for work earlier than is clinically appropriate in order

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.

\textsuperscript{48} See generally Sarah Glowa-Kollisch et al., Data-Driven Human Rights Using Dual Loyalty Trainings to Promote the Care of Vulnerable Patients in Jail, 17 HEALTH & HUM. RIGHTS J. 1, 1 (2015) (assessing dual loyalty in the New York City jail system and expressing concern over the frequency with which staff are “pressured or asked to put aside their primary goal of patient care”).

\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} See id.

\textsuperscript{52} See, e.g., Joseph LaDou, Occupational Medicine The Case for Reform, 28 AM. J. PREVENTIVE MED. 396, 396 (2005) (arguing that a “fundamental reform of workers’ compensation law and practice is urgently needed to separate occupational physicians from the control of employers”).
to improve CalFire’s bottom line as well as to help CalFire perform its critical land- and life-saving functions. Additional research analyzing the combined effect of doctors’ loyalty to their employer, correctional officers, and patients in incarcerated settings is crucial for evaluating the quality of medical care provided to incarcerated firefighters.

IV. LACK OF EQUAL AND ACTIONABLE OCCUPATIONAL HEALTH AND SAFETY PROTECTIONS FOR INCARCERATED FIREFIGHTERS

A. Unequal CalOSHA Protections for Incarcerated Firefighters

Current California occupational health and safety regulations protect non-incarcerated firefighters to a greater degree than incarcerated firefighters. However, the United Nations Standard Minimum Rules for the Treatment of Prisoners require that “[t]he precautions laid down to protect the safety and health of free workers shall be equally observed in prisons.” California should comply with these rules and protect incarcerated firefighters on the same terms as non-incarcerated firefighters.

The Federal Occupational Safety and Health Administration (OSHA) sets workplace standards to protect workers and conducts inspections of workplaces to ensure compliance. OSHA encourages states to adopt their own workplace safety programs and approves and monitors the programs. These State Plans must be “at least as effective as OSHA in protecting workers and in preventing work-related injuries, illnesses and deaths.” California is one of 22 states or U.S. territories to adopt a State Plan. CalOSHA, California’s State Plan, sets many workplace standards applicable to firefighters. While CalOSHA offers state incarcerated workers less protection than non-incarcerated workers, it offers more protection than

55. See id.
57. See id.
incarcerated workers receive under Federal OSHA in states without a State Plan.  

CalOSHA has jurisdiction over prisoners in the workplace because the California Labor Code declares that “any state prisoner engaged in correctional industry, as defined by the Department of Corrections, shall be deemed to be an ‘employee,’ and the Department of Corrections shall be deemed to be an ‘employer.’” 60 There are at least four ways in which CalOSHA, despite having jurisdiction over prisoners, regulates labor differently for incarcerated and non-incarcerated workers.

First, CalOSHA generally mandates that “[n]o person or employer shall be given advance warning of an inspection or investigation” unless authorized, and “[a]ny person who gives advance notice of any inspection to be conducted, without authority from the chief or his designee, is guilty of a misdemeanor.” 61 Additionally, “[i]n no case, except an imminent danger to the health or safety of an employee or employees, is advance notice to be authorized when the investigation or inspection is to be made as a result of an employee complaint.” 62 In contrast, in a correctional industry, CalOSHA “may give advance notice of an inspection or investigation and may postpone

---


Federal OSHA maintains jurisdiction over federal incarcerated workers. See U.S. DEP’T OF LAB., OSHA INSTRUCTION FAP 01-00-002, FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS WITH THE BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE (Apr. 10, 1995), https://www.osha.gov/enforcement/directives/fap-01-00-002 [https://perma.cc/Y8D2-FAHS]. However, its power has been criticized as “toothless” because OSHA must notify the prison before any inspection. See Beth Schwartzapfel, The Great American Chain-gang, AM. PROSPECT (May 28, 2014), https://prospect.org/justice/great-american-chain-gang/ [https://perma.cc/64ZA-JX7Q]. Additionally, if the prison staff ask OSHA investigators to leave the prison, the OSHA staff must leave, and the prison staff completes the investigation and provides OSHA with a report. See OSHA INSTRUCTION FAP 01-00-002, supra. This internal self-review system is unlikely to promote accountability as it requires the prison staff to evaluate themselves. While CalOSHA similarly allows correctional officers to remove investigators and postpone the investigation, CalOSHA makes no allowance for correctional officers to conduct the investigation themselves. See CAL. LAB. CODE § 6304.3(d) (West 2020). CalOSHA’s implied requirement that CalOSHA investigators complete the reports likely produces more accurate reports than the self-review system produces in prisons under federal OSHA jurisdiction.

60. CAL. LAB. CODE § 6304.2 (West 2020).
61. Id. § 6321.
62. Id.
the same if such action is necessary for the maintenance of security . . . or for ensuring the safety and health” of the CalOSHA investigator.63

Therefore, non-incarcerated workers, as compared to incarcerated workers, have a stronger right to the element of surprise in an investigation, which could help in detecting and deterring workplace violations. When responding to a non-incarcerated employee complaint, CalOSHA can only give advance notice when there is “imminent danger to the health or safety of an employee or employees,” but the standard for giving notice to a correctional industry is much lower, only requiring that notice be “necessary for the maintenance of security” or for “insuring the safety and health” of the investigator.64 The lower standard for providing notice of an inspection in response to an incarcerated employee’s complaint results in less protection for incarcerated workers. Further, the test determining the availability of notice for non-incarcerated workers turns on the health and safety of the employees, while the same test for incarcerated workers turns on the health and safety of the investigator.65 The legislature’s concern for the non-incarcerated workers sits in stark contrast to the legislature’s sole concern for the investigator in a carceral setting. Protection for incarcerated and non-incarcerated workers is not equal: the health and safety of incarcerated workers is irrelevant for administering notice in an incarcerated setting, while the health and safety of the investigator is irrelevant in a non-incarcerated setting. The restrictions prohibiting pre-inspection notifications for non-incarcerated workers should also apply to incarcerated workers to increase the chance of detecting and deterring workplace health and safety violations.

Second, incarcerated workers are also excluded from participating as a party in CalOSHA appeals hearings. The appeals board is required to “provide affected employees or representatives of affected employees an opportunity to participate as parties to a hearing.”66 However, incarcerated workers are not “considered . . . employee[s] for purposes of the provisions relating to appeal proceedings” and therefore cannot participate as a party in appeals hearings.67 More research is needed to determine whether the ability to participate as a party in an appeals hearing affects the outcome in the case. Regardless of outcome, incarcerated workers are denied the opportunity to advocate for their occupational health and safety—an opportunity that is provided to non-incarcerated workers. Incarcerated workers should be able to appear as a party in appeals hearings.

Third, it appears that CalOSHA does not protect incarcerated firefighters in training. In a 2008 appeal before the Occupational Safety and Health

63. Id. § 6304.3(d).
64. See id. §§ 6321, 6304.3(d).
65. See id.
66. Id. § 6603.
67. Id. § 6304.4.
Appeals Board, CalFire argued that it was not responsible for an incarcerated firefighter who suffered heat illness because the accident happened during firefighter training. CalFire argued that CalOSHA lacked jurisdiction because the incarcerated individual “was involved in a training session, and had not yet been accepted into employee status, at which point he would be receiving payment from Employer” and “because the training exercise [the inmate] was involved in when he was injured . . . was a voluntary program.” The appeals board found that it “lack[ed] jurisdiction over Employer in its capacity as [a] trainer of state prisoners.”

When asked whether CalOSHA covers incarcerated firefighters in training, Eric Berg, the Deputy Chief of CalOSHA Research and Standards, wrote, “[i]f an inmate is enrolled in an unpaid volunteer training program and not performing work for an employer (in this case not doing any firefighting), then they would not be considered an employee.” In contrast, non-incarcerated firefighters would receive CalOSHA protection during training if the fire department paid them, as the Los Angeles Fire Department does.

More information is needed regarding payment for firefighter training for both incarcerated and non-incarcerated firefighters to determine whether this policy facilitates another discrepancy in how CalOSHA protects incarcerated firefighters and non-incarcerated firefighters. And the California Legislature should extend CalOSHA protection to incarcerated firefighters in training, given the dangers inherent in firefighting training and the illnesses and deaths that can—and do—occur during training.

Fourth, incarcerated youth firefighters do not qualify for the working hour restrictions that protect other non-incarcerated minors. California Labor Code § 1391 mandates that “an employer shall not employ a minor 16 or 17 years of age for more than eight hours in one day of 24 hours or more than 48 hours in one week, or before 5 a.m., or after 10 p.m. on any day preceding a schoolday.” In 1980, the Attorney General of California wrote an opinion

69. Id.
70. Id. at *5.
71. E-mail from Eric Berg, Deputy Chief, CalOSHA Research and Standards, to Maisie Ide (Nov. 5, 2019, 17:03 PST) (on file with author).
74. CAL. LAB. CODE § 1391 (West 2020).
on the subject, which, while not legally binding, is treated as “authoritative by the officers and agencies who have requested them” and as “persuasive authority by courts.” The opinion states that because “neither the Youth Authority nor its wards has been expressly defined to be included within the provisions of section 1391 . . . the maximum hours restrictions of [that] statute are inapplicable to the use of wards under the age of 18 by the Youth Authority in forestry and conservation work.” Therefore, incarcerated youth firefighters are not protected by working hour restrictions that apply to non-incarcerated youth. Working hour restrictions should apply to incarcerated youth firefighters.

B. Practical Limits on Incarcerated Firefighters’ Ability to Exercise Statutory Rights

Even the statutory rights that incarcerated laborers do receive under CalOSHA may not be actionable because of the power dynamic between incarcerated laborers and their supervisors. One former official of federal OSHA noted that occupational health and safety depends not only on regulations, but also on “political” considerations and on “who has the power in the workplace. If you are intimidated, you won’t raise issues as much as coworkers who are not intimidated. If you don’t feel you have the rights and freedoms to complain, then any rules existing are meaningless if you have no way to enforce them.” Incarcerated firefighters need regulations protecting their health and safety, in addition to a workplace culture where they feel empowered to voice their concerns.

However, prisons are steeped in a culture of retaliation. First-person accounts suggest that this pervasive culture and fear of retaliation extends outside walled prison to fire camps, which could endanger the health and safety of the incarcerated firefighters. For example, the fear of being sent back to walled prison and losing the many benefits of the fire camps could deter incarcerated firefighters from raising health and safety concerns. One former incarcerated firefighter described how, in 2007, a civilian fire captain “put him in a dangerous situation,” in which he became separated from his

77. Telephone Interview with Former Deputy Assistant Secretary, Occupational Safety and Health Administration (Oct. 21, 2019).
78. See, e.g., James E. Robertson, One of the Dirty Secrets of American Corrections Retaliation, Surplus Power, and Whistleblowing Inmates, 42 U. MICH. J.L. REFORM 611, 613-14 (2009) (documenting a study of Ohio inmates, in which 70.1% of inmates indicated that they faced retaliation after voicing grievances, and 87% of prisoners in the study believed staff would retaliate if they used the grievance process).
crew and his backpack melted from the heat.\textsuperscript{79} After his raising the safety concern escalated into a fight with the captain, he was sent back to prison.\textsuperscript{80} Another formerly incarcerated firefighter reflected that while fighting fires, “you have to do what they say, scary as it is, or else you’re going to get sent back to prison. So they throw you into the worst of it.”\textsuperscript{81} Another incarcerated firefighter recalled, “Sometimes they will mistreat you because they know you want to be [there] . . . . You’ve got to bite your tongue and if you don’t [they will send you back to prison].”\textsuperscript{82} This power dynamic could render meaningless any rights incarcerated laborers have under CalOSHA and result in increased exploitation and increased incidence of injury and illness. Incarcerated firefighters can also be sent back to walled prison if they need medical care that is unavailable in the fire camps, such as “for something as mundane as a shot of steroids to treat a poison oak infection.”\textsuperscript{83} This further disincentivizes raising health concerns.

Further, application of CalOSHA standards may be unequal because of bias from regulatory investigators. The Occupational Health and Safety Appeals Board describes CalOSHA as a body that “acts as a public prosecutor when it enforces the Occupational Safety and Health Act by investigating and citing alleged violations of workplace safety and health laws and regulations, and [it] alone decides whether to pursue or settle its cases.”\textsuperscript{84} This discretion allows for potential bias against incarcerated laborers to affect CalOSHA’s decisions to pursue or settle cases. In a 2014 case, Seaworld, an animal-based theme park, accused a CalOSHA investigator of allowing personal bias to affect the investigation. The Occupational Health and Safety Appeals Board found that “more likely than not [the investigator] harbor[ed] some bias against Employer,” but the board upheld the citation despite the bias.\textsuperscript{85} If investigators could harbor bias against Seaworld as an employer, they could similarly harbor bias against incarcerated individuals as employees.\textsuperscript{86} This bias could affect the way CalOSHA investigates and prosecutes cases in which incarcerated firefighters are injured while fighting fires. Additionally, just as federal OSHA enforcement rates can be impacted by the priorities of the presidential

\begin{footnotes}
\item Goodkind, supra note 9.
\item Id.
\item Hager, supra note 15.
\item Goodman, supra note 37, at 367.
\item Id. at *6.
\item Formerly incarcerated individuals have spoken out about the stigma they face because of their criminal record. See, e.g., James Forman Jr., \textit{A Prison Sentence Ends. But the Stigma Doesn’t}, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/opinion/a-jail-sentence-ends-but-the-stigma-doesnt.html [https://perma.cc/FMJ2-UXPE] (discussing how even liberal institutions stigmatize individuals with criminal records).
\end{footnotes}
administration in office,\textsuperscript{87} CalOSHA enforcement may similarly change under different gubernatorial administrations. More data is necessary to determine how CalOSHA employs discretion in investigating and issuing citations for workplace health and safety violations. The lack of procedural protection against regulatory bias further jeopardizes the health and safety of incarcerated firefighters, but equal worker protections for incarcerated and non-incarcerated laborers would begin to close this gap.

V. UNEQUAL WORKERS’ COMPENSATION

California’s incarcerated firefighters are indemnified against occupational injuries and illnesses on less favorable terms than non-incarcerated firefighters.\textsuperscript{88} The United Nations Standard Minimum Rules for the Treatment of Prisoners require that “[p]rovision[s] shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workers.”\textsuperscript{89} Incarcerated firefighters should be indemnified on terms at least as favorable as non-incarcerated firefighters.

California’s incarcerated laborers receive workers’ compensation under California Labor Code § 3370, which provides that “[e]ach inmate of a state penal or correctional institution shall be entitled to the workers’ compensation benefits provided by this division for injury arising out of and in the course of assigned employment and for the death of the inmate if the injury proximately causes death.”\textsuperscript{90} CDCR’s Operations Manual states, “[u]nder the provisions of Chapter 1347 of the Statutes of 1976, inmates are eligible for workers’ compensation benefits for injuries which occur during their incarceration while engaged in assigned work as long as the inmates are not injured as the result of an assault in which they were the initial aggressor

\textsuperscript{87} See, e.g., NAT’L EMP’T LAW PROJECT, OSHA ENFORCEMENT ACTIVITY DECLINES UNDER THE TRUMP ADMINISTRATION (2018) (discussing how, despite an increase in work-related fatalities, OSHA enforcement was declining under the Trump administration).

\textsuperscript{88} California provides more generous workers’ compensation for incarcerated laborers than other states, but California is not alone in failing to offer incarcerated laborers equal benefits. See generally Colleen Doughterry, The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States, 10 U. PA. J. BUS. & EMP. L. 483 (2008). Some states, including Texas and Vermont, explicitly exclude prisoners from receiving workers’ compensation. Id. at 503. Workers’ compensation statutes in other states, including Tennessee and Alabama, fail to mention incarcerated laborers, but have been interpreted by courts to similarly exclude incarcerated laborers. Id. at 503-04. Still other states, including Iowa, Maryland, North Carolina, South Carolina, and Wyoming, allow incarcerated laborers to receive workers’ compensation but implement the same limitation that California does, in not allowing incarcerated laborers to receive benefits while incarcerated. Id. at 507. On the federal level, incarcerated laborers may be able to qualify for workers’ compensation. Id. at 502.

\textsuperscript{89} The United Nations Standard Minimum Rules for the Treatment of Prisoners, supra note 53.

\textsuperscript{90} CAL. LAB. CODE § 3370 (West 2020).
or as the result of intentional acts of the inmates to injure themselves.”

However, there are at least three ways in which incarcerated firefighters receive workers’ compensation on less favorable terms than non-incarcerated firefighters.

First, incarcerated laborers cannot receive temporary disability indemnity benefits while incarcerated, and the benefits cease if reincarcerated. Therefore, if an injured incarcerated firefighter later ended up serving a life without parole sentence, he or she would not receive any workers’ compensation.

Second, incarcerated laborers receive no workers’ compensation for injuries incurred while working for only sentencing reductions, and not cash wages. Therefore, if California were to offer sentence reductions as the sole “compensation” for incarcerated firefighting labor, incarcerated firefighters would not be eligible for workers’ compensation if injured while firefighting. Coercive sentencing reductions in the place of payment could be a strategy the state employs to increase the number of firefighters, while also cutting costs by not paying for their labor. Incarcerated firefighters should be eligible for workers’ compensation regardless of whether they are working for income or sentencing reductions.

Third, incarcerated firefighters receive less in workers’ compensation than non-incarcerated firefighters. California Labor Code § 3370 requires that, “[i]n determining temporary and permanent disability indemnity benefits for the inmate, the average weekly earnings shall be taken at not more than the minimum amount.” Courts have held that, typically, the “earning capacity at the time of injury is the touchstone of average earnings in California.” But that standard does not apply to state prison inmates who have removed themselves from the competitive labor market. The Legislature


92. CAL. LAB. CODE § 3370(a)(2)-(3) (West 2020).


has already determined that they have a minimum earning capacity."96 Because incarcerated laborers can receive only the minimum amount for workers’ compensation, they are indemnified for their injuries on less favorable terms than non-incarcerated laborers who can receive more than the minimum amount.

The California Supreme Court upheld an earlier version of these regulations in 1977 in *Meredith v. Workers’ Compensation Appeals Board*, where the plaintiff was left with paraplegia from injuries suffered as an incarcerated firefighter.97 At the time, non-incarcerated volunteer firefighters received the maximum workers’ compensation amount, while incarcerated firefighters received the minimum.98 The court justified the discrepancy by holding, “the prisoner, having removed himself from the competitive labor market, has neither significant earnings nor earning power, and when measured by salary at time of injury—the basic test—the prisoner ordinarily could not qualify for more than minimum disability compensation. Further, the normal obstacles faced by ex-prisoners in seeking employment upon release make any attempt to use the secondary measure – his earning capacity – speculative.”99 The court also pointed out that, at the time, the California legislature, in “recognizing the importance of prisoner firefighters,” gave incarcerated firefighters workers’ compensation while most other incarcerated laborers were “excluded from the workers’ compensation system.”100 Because the legislature determined that incarcerated laborers can recover only minimum benefits, “prior earnings and post injury employment potential” are irrelevant in determining workers’ compensation benefits for incarcerated laborers.101

However, the restriction limiting incarcerated firefighters to the minimum workers’ compensation amount does not apply to youth incarcerated firefighters. In 1974, the California Supreme Court considered an earlier version of this legislation in a case where a youth incarcerated firefighter contracted coccidiomycosis, “a severe and disabling lung infection more commonly known as ‘valley fever’” while working as a firefighter.102 The court justified a difference in incarcerated adult and incarcerated youth workers’ compensation schemes by reflecting,

In affording full compensation to juveniles injured while participating in firefighting programs, the Legislature recognized its higher obligation to

---

96. See, e.g., *Dep’t of Corrs.*, 109 Cal. App. 4th at 1724 (quoting West v. Indus. Accident Comm’n, 79 Cal. App. 2d 711, 722 (1947), and holding that individual injured while working in prison was not entitled to indemnity because he was working for sentencing credits at the time of injury).
98. *Id.* at 780.
99. *Id.* at 782-83.
100. *Id.* at 782.
youths as contrasted with adult prisoners. It recognized that the state has undertaken the responsibility of wardship for juveniles and realized that if the state assigns juveniles to hazardous duties, it should at least afford them the measure of protection reflected by full compensation in case of injury.  

A 1978 opinion by California’s Attorney General found that “wards of the Youth Authority [we]re entitled to workers’ compensation benefits under the same circumstances as anyone else: that is, if they [could] show the existence of an employment relationship founded on an express or implied agreement for hire.” The opinion also noted that “in recognition of the greater hazards associated with fire suppression activities, workers’ compensation coverage is provided for such activities,” referencing a statute that provides, “[w]henever any ward committed to a camp is engaged in fire prevention work or the suppression of existing fires, he or she shall be subject to worker’s compensation benefits to the same extent as a county employee, and the board of supervisors shall provide and cover any ward committed to a camp while performing that service, with accident, death and compensation insurance as is otherwise regularly provided for employees of the county.” The special exemption allowing youth firefighters to receive workers’ compensation and insurance on equal footing with non-incarcerated firefighters highlights the inequity for adult incarcerated firefighters, who perform similar work and face similar risks in performing that work.

In order to indemnify incarcerated firefighters against occupational injury or illness in the same way as non-incarcerated firefighters, incarcerated firefighters should not be limited to the minimum workers’ compensation amount. The dissent in Meredith—the case involving a firefighting injury that left an incarcerated firefighter with paraplegia—similarly argued for this result:

This petitioner is no longer confined to prison but remains a paraplegic as a result of injuries suffered as a firefighter while in prison. I cannot agree that, merely because his injuries occurred while a prisoner, he is now and for the remainder of his life will be entitled to only a fraction of the benefits afforded to a firefighter who suffered the same disability but who was not a prisoner at the time of injury. Petitioner has paid his debt to society and he is totally disabled; thus there is no rational basis for treating him differently from others who have suffered the same disability while engaged in the same
activity. To do so is to impose punitive treatment upon this petitioner not merely for the penal term provided by law but for life.107 This reasoning remains compelling today. The California Legislature should apply their concern and appreciation for incarcerated youth firefighters to incarcerated adult firefighters. The reasoning “that the state has undertaken the responsibility of wardship for juveniles and . . . [in] assign[ing] juveniles to hazardous duties . . . should at least afford them the measure of protection reflected by full compensation in case of injury” can and should apply equally to incarcerated adult firefighters: the state has similarly undertaken responsibility of incarcerated adults and similarly assigned them hazardous duties.108

CONCLUSION

California fails to protect incarcerated firefighters in the same way it protects non-incarcerated firefighters. Incarcerated firefighters face a high risk of exploitation by the state because of their vulnerability and the state’s increasing need, due to climate change, for inexpensive firefighting labor. This exploitation is particularly dangerous given the health and safety risks of firefighting. Incarcerated firefighters lack equal protection under CalOSHA and lack equal access to workers’ compensation. These discrepancies serve to further entrench systems of racial injustice in the criminal justice system. While the incarcerated firefighting program offers many benefits, incarcerated firefighters must be protected against future exploitation by implementation of CalOSHA standards and workers’ compensation standards that are at least equal to those enjoyed by non-incarcerated firefighters.
