



H.R. 5663 - Miner Safety and Health Act of 2010

Fails to Improve Workplace Safety and Promises to Increase Litigation

While H.R. 5663 primarily seeks to overhaul mine safety laws, Title VII of the bill includes significant changes to the Occupational Safety and Health Act's (OSH Act) enforcement, penalties, abatement and whistleblower provisions. The proposed changes will impose substantial costs on businesses—particularly small businesses—which are struggling to create and retain jobs. Specifically, H.R. 5663 will vastly increase costly litigation under the OSH Act by discouraging settlements, introducing new and vague standards for criminal liability and imposing draconian penalties. The bill also would impose complicated and costly procedures for adjudicating whistleblower cases, which include unlimited damages and a system that seems to favor litigation in federal courts over less costly administrative adjudication. This increase in litigation will stretch and misdirect the resources of OSHA and other federal agencies, all while doing nothing to prevent workplace accidents and injuries.

In fact, the bill contains no provisions that would actually help an employer improve their workplace safety program. In order to work towards our shared goals of healthy and safe workplaces, OSHA must be resource for employers as well as an enforcement agency. Unfortunately, this legislation will create a more adversarial relationship between small business owners and OSHA, as fears of felony prosecution will make employers leery of working with OSHA.

Under H.R. 5663, OSHA Inspectors Unfamiliar with the Workplace May Shut Down Business Operations without Showing Imminent Danger or Providing the Businesses with Proper Due Process. Section 703 would allow OSHA inspectors to immediately enact changes to the workplace without OSHA showing an imminent threat or providing employers with hearing or judicial review of the inspector's allegations. These changes can include shutting down the workplace, or critical processes or machinery. Employers who failed to comply with the work stoppage would face a fine of \$7,000 per day.

- This provision is unnecessary. As OSHA's Director of Enforcement recently informed the House Education & Labor Committee, the Agency is currently able to halt operations within an hour if a serious hazard poses an imminent danger to employees.
- This provision would allow inspectors to require employers to shut down operations or make immediate changes to their workplace designs without having the ability to challenge the accuracy of the inspectors' prescribed abatement measures. This is particularly troubling, given that inspectors are **not** industry experts and lack knowledge or background regarding the industry specific safety practices and operations. Such a system may result in costly and unnecessary changes to workplaces without the ability for employers to seek recourse for their expenses.
- A work stoppage can have a significant negative impact on employers—particularly a small business—and should not be taken lightly. This is especially the case in industries where products are perishable or otherwise destroyed or industries where failing to meet logistics or other deadlines harm the value of the product or service.
- Work stoppages also significantly impact employees, who may lose income, and could face furloughs or layoffs.

The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

H.R. 5663 Creates New, Complicated and Costly Whistleblower Procedures. The OSH Act already provides protections for whistleblowers who believe they have been inappropriately discharged or discriminated against because they reported an injury or unsafe condition or participated in a proceeding related to safety and health. Nonetheless, Section 701 of H.R. 5663 would create new, complicated and costly procedures for adjudicating whistleblower cases under OSH Act, without any evidence that the existing procedures are somehow deficient.

- Section 701 also replaces existing OSH Act procedures for whistleblower claims with a new complicated and costly system, even though the existing procedures have not been shown to be in any manner deficient. The new system includes a complex and protracted appeal process—which promises to prolong litigation. It also gives an employee explicit rights to bring an action against their employers in federal court based merely on an Administrative Law Judge or review board missing a very difficult 60 to 90 day deadlines to issue an order. This Section also includes many other provisions that will encourage litigation, such as unlimited damages and a prohibition on the use of pre-dispute arbitration agreements, even though arbitration often provides a less expensive alternative to costly litigation. While these provisions may benefit trial lawyers, they do nothing to improve workplace safety.
- These changes are particularly troubling as litigation costs already impose a significant drag on the economy. The 2009 edition of an annual study by Towers Perrin shows that our nation’s tort system cost \$254.7 billion annually, or more than \$800 per person.

Vague New Standards for Criminal Conduct and New Penalties Will Trigger More Litigation, Costing Businesses and Stretching and Misdirecting OSHA’s Resources. Sections 705 and 706 of the bill make significant changes to the penalty provisions in the OSH Act. Section 706 would impose felony criminal sanctions against “any company officer or director” for “knowing” violations of the Act. The bill, however, provides no definition of “knowing,” nor does it provide any limitation or guidance on which “officers or directors” could face criminal charges. At the same time, the bill dramatically increases civil and criminal monetary penalties.

- The specter of increased liability—and the lack of clarity of who could be liable—will lead businesses to litigate rather than settle a claim especially if it could later be used as evidence in a “knowing” violation.
- The increased litigation will lead to a backlog of cases and pull many OSHA compliance officers away from inspecting workplaces for safety and health hazards as they are forced to defend their citations in court.
- Since the MINER Act regulations took effect in 2007, the backlog at the Mine Safety and Health Administration (MSHA) is 16,000 cases (worth \$195 million), and expected to rise further as the current policy at MSHA is to not engage in settlements. This backlog has impacted safety in the mining industry by absorbing an unprecedented amount of MSHA resources which would otherwise be devoted to field and other activities.

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