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OSHA Penalties: Proposed Reforms of Appeal Procedures

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Summary

Several bills sponsored by the chairman of the House Subcommittee on Workforce Protections (Mr. Norwood) are aimed at augmenting the ability of employers to defend themselves against penalties proposed by the Occupational Safety and Health Administration (OSHA), as well as improving the functioning of the commission that hears appeals of those penalties. H.R. 742 would provide new opportunities for small businesses to recoup their legal defense costs. H.R. 739 would provide flexibility in the time deadline for making appeals. H.R. 740 would expand the review commission from three to five seats. H.R. 741 would instruct the courts to give due deference to the commission's specialized expertise. The bills were approved by the Committee on Education and the Workforce in April 2005. This report will be updated to reflect legislative actions.

Several bills (H.R. 739, H.R. 740, H.R. 741, and H.R. 742) have been introduced, according to their sponsor (Representative Norwood of Georgia), in order to provide small employers with "fundamental fairness [and] equitable results in their efforts to defend themselves against citations issued by the OSHA." This is to be achieved in two ways: (a) by augmenting employers' opportunities to make appeals, and (b) by adjusting the structure and functioning of the Occupational Safety and Health Review Commission, a body established alongside OSHA as an independent, quasi-judicial forum for reviewing contested OSHA penalties. The bills were approved by the House Committee on Education and the Workforce in April 2005.

Although rather technical on their face, these bills echo emotional controversies that have surrounded OSHA ever since the debates that led to its creation. Among the themes underlying the measures are whether OSHA's first priority is safety or simply issuing citations; whether small employers can cope with complex regulations and the power of the federal government; and which institution — OSHA, the review commission, or the courts — has the most expertise and fairness for judging compliance with safety regulations. In what follows, we review first the appeal rights bills, then the review commission bills, indicating the significance of each specific provision.

Reimbursement of Legal Costs (H.R. 742)

H.R. 742 (H.Rept. 109-61, Parts I and II)¹ would ease the requirements for small businesses to recover their legal defense costs when they prevail in a case brought by OSHA. Currently, the Equal Access to Justice Act (504 U.S.C. Title 5 and 2412 U.S.C. Title 28) authorizes courts and adjudicative officers to order the government (i.e. the agency involved) to reimburse defendants in various proceedings if they win their case and the government's position was "not substantially justified." H.R. 742 would authorize payment without meeting the substantially-justified criterion in the case of small businesses, defined here as those with fewer than 100 employees and net worth less than \$7 million.

Proponents of the bill argue that small businesses often cannot afford to defend themselves against OSHA citations, and hence often pay penalties that they believe are unjustified. Opponents of the bill note that the "not substantially justified" criterion provides sufficient protection against agency over-zealousness.

Time Limit for Objections (H.R. 739)

Under current law, businesses have 15 working days after notification of a citation or penalty to inform OSHA of their desire to contest same. H.R. 739 would provide flexibility for the review commission (which hears the contests) to excuse late notices in cases of "mistake, inadvertence, surprise or excusable neglect."

H.R. 739 would help to resolve a split between Federal Circuit Courts. The review commission's practice has been to go by Federal Rule of Civil Procedure 60(b), which allows such flexibility to consider late notices of contest. Recent cases, however, have led to a circuit court split on the matter.² More fundamentally, the issue is the reasonableness of the 15 day limit. Proponents of the bill argue that small business owners can be overwhelmed by a proliferation of regulatory requirements, let alone the normal press of business, so that fairness requires some flexibility on deadlines. Opponents of the bill caution that some less scrupulous businesses could take advantage of these provisions to delay their cases (and remedial action). Also, this bill's scope is not explicitly limited to small business.

Commission Structure (H.R. 740)

H.R. 740 would expand the review commission from three to five members and extend the term of a member, if necessary, until his/her successor is confirmed.

¹ Reported by the Judiciary Committee as well as the Committee on Education and the Workforce.

² Full Panel at OSHRC Provides Opening to Address Complex Cases, *Occupational Safety and Health Reporter*, Jan. 9, 2003, p. S-14.

This bill responds to a situation where the commission has had less than its full complement of three members during much if not most of the time during the last decade or more. There have even been periods when there was only one member, and no final decisions could be made. Presumably a larger body would less often be in such a situation, and even if there were delays in seating a new member, the outgoing member could continue serving.

There have been chronic delays in seating commissioners because of differences between the President and members of the Senate. Although H.R. 740 could not be expected to resolve those differences, its intent is at least to keep the commission functioning without undue disruptions. This might be achieved through retaining a sitting commissioner indefinitely instead of having a vacancy.

Commission Authority (H.R. 741)

H.R. 741 would mandate that “The conclusions of the Commission with respect to all questions of law that are subject to agency deference under governing court precedent shall be given deference if reasonable.” This means that the U.S. Courts of Appeals (which hear appeals from decisions of the commission) are to treat the commission as the recognized, specialized authority in interpreting the OSHA law (29 U.S.C. 651 et seq.), and whose judgments in such matters would be overruled only in special circumstances, e.g., if a conclusion were “unreasonable.” H.R. 741 would preclude arguing that OSHA, rather than the commission, should be given deference as the recognized authority when the two entities differ.

This measure reflects a difference of opinion that has persisted through the entire history of the OSHA law, and indeed shaped the debates that preceded it. Generally speaking, proponents of vigorous enforcement wanted a cohesive, single institution, an OSHA that would write, interpret and enforce its standards. Opponents of that approach argued that it was problematic to have one agency be, as it were, “judge, jury and executioner.” The act of 1970 thus yielded a tripartite system: An agency within the Department of Health and Human Services (i.e., NIOSH) to recommend standards, OSHA to write the precise language of the standards and manage compliance, and the review commission to act as independent arbiter.

H.R. 741 would tend to increase the authority of the commission vis-a-vis both OSHA and the Courts of Appeals. H.R. 1583 (Norwood) in the 108th Congress, the bill from which the current package was derived, was more explicit in augmenting the commission’s authority. It contained a provision directing the commission to give “due and *de novo*” consideration to the appropriateness of OSHA’s proposed penalties. This would have further strengthened the commission’s authority by making clear that it was not to defer to OSHA’s presumed expertise.