

New Mine Safety Bill Includes Dramatic Changes to the Occupational Safety and Health Act of 1970

July 8, 2010

On June 29, House and Senate Democrats released a summary and new discussion draft of the Miner Safety and Health Act of 2010 (MSHA legislation). In addition to expected major mine safety reforms, the discussion draft incorporates provisions from H.R. 2067, the Protecting America's Workers Act (PAWA), which would dramatically amend the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. (OSH Act). If passed, these amendments would represent the first major legislative change to the OSH Act in the 40 years since it was enacted.

While the likelihood of PAWA's passage as part of the MSHA legislation is subject to some debate, employers should be prepared for continued initiatives to expand workplace safety and health initiatives. The current administration has voiced strong support for PAWA, especially in light of highly publicized workplace accidents in recent months.

Background on PAWA

PAWA is not new legislation. Earlier versions were introduced at least as far back as the 109th Congress in 2005–06, and reintroduced on April 23, 2009. PAWA is designed to address a number of perceived weaknesses in the OSH Act. By way of summary, the most recent discussion draft of PAWA, dated March 9, 2010, included provisions that would:

- (1) Increase coverage of the OSH Act to include public employees
- (2) Enhance protections for whistleblowers
- (3) Prohibit any “policies and procedures” (i.e., safety incentive programs) that discourage the reporting of workplace injuries and illnesses
- (4) Prohibit unclassified violations
- (5) Expand victims' rights to participate in enforcement proceedings
- (6) Require immediate abatement of serious, willful, or repeat violations
- (7) Increase civil and criminal penalties
- (8) Expand criminal liability to include felony convictions (rather than misdemeanors), willful violations that result in “serious bodily injury” (not just fatalities), and individual criminal liability for any “responsible corporate officer”

Though PAWA has struggled through Congress since its introduction—and has made little headway toward passage—the Department of Labor (DOL) and the Occupational Health and Safety Administration (OSHA) have nevertheless pledged reform, and have taken several new actions in the areas of civil penalties and enforcement.

On April 22, OSHA announced two important changes to “protect workers” and to create “adequate incentives” for employers to invest in job safety:

- (1) The establishment of the new Severe Violator Enforcement Program (SVEP) for enforcement against certain recalcitrant employers.
- (2) Increases in civil penalties through revising the penalty calculations in OSHA’s Field Operations Manual (FOM).

For more information on the SVEP, please see Morgan Lewis’s April 9, 2010 LawFlash, “Details About OSHA’s Severe Violator Enforcement Program Emerge,” available at http://www.morganlewis.com/pubs/LEPG_OSHAViolatorPrgm_LF_09apr10.pdf.

It is clear that PAWA continues to be a priority not only to its supporters on Capitol Hill but also to the OSHA leadership. Dr. David Michaels, OSHA’s Assistant Secretary, noted in the OSHA April 22 press release that OSHA’s penalties were too low, and that these administrative steps, while important, were “no substitute” for the “meaningful and substantial penalty changes included in PAWA.”

Several significant workplace tragedies, including an explosion and employee fatalities at a Kleen Energy power plant in Connecticut in February, the April lethal explosions at a Gulf of Mexico oil rig, and the deaths of 29 coal miners in West Virginia’s Upper Big Branch mine, brought the issue of workplace safety and health to the forefront in Congress.

These incidents and their significant press coverage brought renewed calls for legislation to address perceived deficiencies in workplace safety and health. Congress held a number of hearings on this topic, including two hearings on PAWA and on general worker safety by the U.S. House of Representatives Education and Labor Committee’s Subcommittee on Workforce Protections. On March 16, Morgan Lewis Labor and Employment partner Jonathan L. Snare presented testimony on behalf of the United States Chamber of Commerce, and on April 28, Morgan Lewis Labor and Employment partner Dennis Morikawa also presented testimony on behalf of the Chamber.

Several OSHA Revisions Have Been Excluded from the MSHA Legislation

The provisions of PAWA included in the MSHA legislation largely track the March 9, 2010 discussion draft of PAWA, with a few notable exceptions:

- They do **not** expand coverage to state and local employees.
- They do **not** prohibit revising willful offenses to unclassified offenses.
- They do **not** prohibit safety incentive programs that “discourage” the reporting of workplace injuries and illnesses.

OSHA Revisions Included in the MSHA Legislation

The OSHA-related provisions of the MSHA legislation largely come from the March 9 discussion draft

of PAWA, along with several new provisions as described below:

- **Expansion of Whistleblower Protections.** The proposed legislation would revise section 11(c) of the OSH Act to provide whistleblower protection to any employee who refuses to perform any job duty if that employee has a “reasonable apprehension” that the performance of the duty would result in serious injury or impairment of health to that employee or other employees. Additionally, if an Administrative Law Judge or the Administrative Review Board fails to meet deadlines for the administration and handling of complaints, whistleblowers will have a civil remedy in the federal court system.

The proposed legislation also prevents employers and employees from waiving whistleblower rights through private employment or collective bargaining agreements. Although the language has undergone some minor modification, the whistleblower protections in the MSHA language are substantially the same to those in the PAWA draft.

- **Victims’ Rights.** The proposed legislation provides additional rights to victims and their families, including receipt of notices and pleadings in proceedings under the OSH Act, and the opportunity to make a statement in U.S. Occupational Safety and Health Review Commission proceedings, including settlement proceedings. Additionally, the proposed MSHA legislation has added the following two new provisions, which were not included in the most recent draft of PAWA:
 - A mandate that the Commission should “provide due consideration to any statement or information provided by a victim” in rendering a decision.
 - Mandatory designation of one employee at each Area Office to serve as a “family liaison” to keep victims informed of the status of matters before the commission and to assist victims in asserting their rights.
- **Abatement of Hazards Pending Contest.** The proposed legislation greatly reduces an employer’s ability to delay abating contested violations. Currently, abatement of contested violations is automatically stayed until such citations are resolved. The proposed legislation will not allow an employer to stay serious, willful, or repeated violations, regardless of whether such violations are contested, unless the employer can, through a new expedited process, affirmatively show that:
 - (1) The employer is likely to prevail in the citation contest.
 - (2) The employer will suffer irreparable harm if a stay is not granted.
 - (3) A stay would adversely impact the health and safety of workers.
- **Enhanced Civil Penalties.** The proposed legislation increases civil penalties as follows:
 - The maximum penalty for willful or repeat violations would be increased from \$70,000 to \$120,000 and the minimum for willful violations would be raised from \$5,000 to \$8,000.
 - The minimum and maximum penalties for willful or repeat violations resulting in death would be \$50,000 and \$250,000, respectively.
 - The Secretary would be required to consider violations under state OSHA plans for the

- purpose of determining whether the violations are repeats (not included in the prior PAWA draft).
- The maximum penalty for serious violations would be increased from \$7,000 to \$12,000 and would be further increased to \$50,000 for violations (except for general duty clause violations) that “caused or contributed” to the death of an employee.
 - The maximum penalty for failure to abate and failure to follow posting requirements violations would be increased from \$7,000 to \$12,000.
 - Civil penalties would be adjusted by the Secretary at least once during each four-year period beginning January 1, 2015 to account for inflation.
- **Enhanced Criminal Penalties, Including Individual Criminal Liability.** Under current law, an employer whose willful violation of any OSHA requirement resulted in the death of an employee, can be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both for the first offense, and by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both for subsequent offenses. The proposed legislation would dramatically increase this liability by:
 - Changing the burden of proof for the mental state requirement from willful to knowing.
 - Increasing the fines as well as the maximum term of imprisonment to a range of 10 to 20 years (compared to six months to one year) for employers who knowingly violate any applicable OSHA requirement that result in the death of an employee.
 - Providing liability for employers who knowingly violate any OSHA requirement that causes “serious bodily harm” to an employee (“serious bodily harm” includes any bodily injury or illness that involves a substantial risk of death, protracted unconsciousness, protracted and obvious physical disfigurement, or protracted loss or impairment, temporary or permanent, of a function of the body, organ, or of mental faculty).
 - Imposing criminal liability to any individual “officer or director” who knowingly violates any OSHA requirement that results in the death of an employee or that causes “serious bodily harm” to an employee.
 - **Prejudgment Interest.** The proposed legislation also includes a provision, not included in the previous draft of PAWA, which provides for pre-final-order interest on penalties. Interest would begin to accrue on the date a party contests a citation until issuance of a final order, and for post-final order interest that would begin to accrue 30 days after the date of a final order.

Next Steps

We understand that the House Committee on Education and Labor will take action on the MSHA-PAWA legislation soon, with a hearing scheduled for Tuesday, July 13, and the potential for a floor vote to be held by the end of July. Even if the bill does move quickly through the House, however, it is unclear as to whether the Senate will have the time and impetus to move the legislation to passage before Congress recesses in August. Even so, there is still the possibility that the Senate could act in September or in any post-election session.

In any event, the inclusion of most of the PAWA provisions in the MSHA legislation signals a continued resolve to pass PAWA, particularly given that mine safety legislation has had an easier time being adopted by Congress (such as the MINER Act, which was supported by bipartisan majorities in both the

House and Senate and signed into law by President Bush in 2006).

Potential Implications of the Legislation

The MSHA legislation is moving on a fast track through the House of Representatives and appears to have significant momentum with committed supporters in both chambers of Congress. Employers should be aware of the significant impact on their workplaces if the PAWA sections included in the MSHA legislation are ultimately included in any final legislation adopted and signed into law.

Employers may want to consider taking steps now to consult with their trade associations, safety professionals, and/or outside counsel to make sure they understand the wide-ranging impact these proposed requirements could have on their operations. They should also raise any questions or concerns with trade associations or other associations involved in the legislative process. Beyond that, employers should be prepared for dramatic changes in the area of workplace safety and health if this bill becomes law, and take appropriate steps to review their current workplace safety and health practices and procedures.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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