

OSHA and Small Business: Improving the Relationship for Workers

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Testimony

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify today about the need to improve safety and health protections for the millions of workers employed by small businesses. My testimony will address several legislative proposals (H.R. 739, 740, 741, and 742) that have been advanced and promoted on grounds that they will assist small businesses in their efforts to comply with the requirements of the Occupational Safety and Health Act. This testimony is submitted on behalf of the 13 million working men and women represented by the 57 national and international unions that comprise the AFL-CIO. The Occupational Safety and Health Act (OSH Act), as written and as administered by the Occupational Safety and Health Administration (OSHA), already includes numerous measures to assist small businesses in complying with the law. In our view, the pending legislative proposals are either unnecessary or counterproductive. The bills will drain resources away from an agency that is chronically underfunded and struggling to fulfill its statutory mandate. And the bills will do nothing to address the serious job safety hazards faced by American workers.

Two weeks ago, on Workers Memorial Day (April 28), the AFL-CIO released a report, entitled, "Death on the Job: The Toll of Neglect," that details the astounding number of deaths and injuries occurring in workplaces across the United States, and the numerous shortcomings in our nation's efforts to deal with this serious problem. Each year, millions of workers are injured or made ill by job hazards. According to the Bureau of Labor Statistics, each day, fifteen workers die on the job. The number would be far higher if deaths from occupational diseases such as cancer and black lung disease were included. At its current budget levels, OSHA's enforcement reach is severely limited. There are at most 2,138 federal and state OSHA inspectors responsible for enforcing the law at approximately 8 million workplaces. In FY 2004, 861 federal OSHA inspectors conducted 39,246 inspections, and the inspectors in state OSHA agencies conducted 58,675 inspections. At its current staffing and inspection levels, it would take OSHA 108 years to inspect each jobsite in America just once.

The penalties assessed by OSHA for violations of the law are exceedingly modest. In FY 2004, OSHA assessed a total of \$82.6 million in penalties against employers for 86,475 violations of the law, for an average penalty of just \$955. The average penalty for a serious violation of the Occupational Safety and Health Act – defined as a hazard posing a "substantial probability that death or serious physical harm could result," 29 U.S.C. § 666(k) -- is just \$872.

Serious safety and health hazards exist at workplaces across the United States, in businesses large and small. Just because a business is small does not mean it is safer. To

the contrary, small firms, particularly in high hazard industries like construction, are very dangerous.

The Bureau of Labor Statistics' fatality data – which, unlike injury data, is based upon a government census, and not employer self-reports – shows that in high risk industries such as construction, small firms account for a disproportionately high percentage of fatal injuries. For example, according to BLS, firms with fewer than 20 employees employed 38.2 percent of the construction workforce, but accounted for 55.5 percent of all construction fatalities. (BLS, 2002 Census of Fatal Occupational Injuries).

Similarly, a study of Hispanic construction workers in Texas found that 40 percent of fatalities among these workers occurred in establishments of less than 10 employees. (Fabrega and Starkey, Fatal Occupational Injuries among Hispanic Construction Workers of Texas, 1997 to 1999, Human and Ecological Risk Assessment, 2001; 7:1869-1883). And a study of fatalities among teenage construction workers found a similar result. Sixty three percent of the teenage construction fatalities investigated by OSHA from 1984-1998 occurred at firms with fewer than 11 employees. (Suruda et al., Fatal Injuries to Teenage Construction Workers in the U.S., American Journal of Industrial Medicine, 2003, 44:510-514).

Clearly, small businesses have their share of workplace hazards, particularly in high risk industries. Workers employed at these firms need the full protection of the job safety law. It is important to point out that OSHA, and the OSH Act, already include special provisions designed to assist small employers and provide them special relief in enforcement proceedings. First, for more than 25 years, through a rider in the annual OSHA appropriations bill, employers with 10 or fewer employees in “safer” industries have been exempt from OSHA general schedule inspections. This exemption covers the majority of small businesses in this country. These firms are only subject to inspections in the event of a fatality or complaint from employees alleging serious hazards.

Second, the OSH Act itself directs that the size of the employer must be taken into account in setting penalties, along with the seriousness of the violation, the employer's compliance history, and the employer's good faith. 29 U.S.C. § 666(j). OSHA has established specific enforcement policies taking these statutory mandates into account. Under OSHA's policy, the smallest employers – those with 25 or fewer employees – are entitled to an automatic 60 percent reduction in the amount of the assessed penalty. The percentage reduction decreases as the size of the employer increases. (Field Inspection Reference Manual, Ch. IV.C.2.c.) Penalties may be further reduced in any post-citation settlement, and they also may be reduced by the Occupational Safety and Health Review Commission (OSHRC), which considers the size of the employer when establishing a final penalty amount.

Third, for decades OSHA has had a small business compliance assistance program. This program, administered through grants to the states, is currently funded at more than \$53 million in the FY 2005 budget – more than 10 percent of OSHA's entire budget. This is nearly four times more than the agency spends developing workplace safety standards. According to OSHA, in FY 2004, there were 31,334 consultation assistance visits conducted under this program, all of which, pursuant to OSHA's policies, were conducted at business establishments with fewer than 250 employees.

The AFL-CIO believes that these measures appropriately address the particular issues and needs of small employers, and they should be continued. We do not support the

additional measures contained in H.R. 739, 740, 741, and 742. It is important to point out that only one of these bills – H.R. 742 – specifically applies only to employers with less than 100 employees. The other bills apply to all employers covered by the OSH Act. These bills would chill enforcement of the law and divert much-needed resources from enforcement and standard-setting, at a time when the injury, fatality, and enforcement statistics all show that more, not less, enforcement of the job safety law is needed to protect American workers.

Our views on each of the bills are set forth below.

H.R. 742, The Occupational Safety and Health Small Employer Access to Justice Act. H.R. 742 would require taxpayers to pay the attorneys' fees and legal costs for "small" employers (defined as employers with 100 or fewer employees and up to \$7 million net worth) who prevail in any administrative or judicial proceeding brought by OSHA or any challenge to an OSHA standard, regardless of whether OSHA's action was substantially justified. This bill would drain resources away from OSHA and further weaken OSHA enforcement at a time when it needs to be strengthened, not curtailed.

Under the age-old American Rule, each party to litigation pays its own expenses. This is true not only in private litigation but also in cases in which the government acts as public prosecutor to enforce consumer protection laws, environmental laws, safety and health laws, and labor laws.

The Equal Access to Justice Act (EAJA) provides a limited exception to the American Rule. Under EAJA, organizations with no more than 500 employees and a net worth of no more than \$7 million, can recover their fees and costs if they prevail in administrative or judicial proceedings against the federal government, but only if they meet two conditions. First, an award is proper under EAJA only if the agency's position was not substantially justified. Second, an award can only be made if there are no special circumstances that would make the award unjust. 5 U.S.C. § 504.

H.R. 742 would create a special exception from the American Rule, and from EAJA, for legal proceedings under the OSH Act. Employers that prevailed in administrative or judicial proceedings under the OSH Act would be entitled to fees and costs from OSHA without having to show that the government's position lacked substantial justification and that there are no special circumstances that would make an award unjust.

There is no credible reason for carving out this exception either to the American Rule or to EAJA. By subjecting OSHA to the payment of attorney's fees and costs every time the agency loses a case to an employer falling within the bill's definition, the bill would seriously weaken OSHA's effectiveness.

When Congress enacted EAJA, it considered and rejected automatic awards to prevailing parties precisely because such an "approach did not account for the reasonable and legitimate exercise of government functions and, therefore, might have a chilling effect on proper government enforcement efforts." GAO, "Equal Access to Justice Act: Its Use in Selected Agencies," Jan. 14, 1998, at 9. Instead, Congress crafted EAJA's limited exceptions "to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 11.

H.R. 742's reach is broad. Notwithstanding the label "small employer" in the title, the bill would apply to all employers with not more than 100 employees and a net worth of not more than \$7 million. Data from the Census Bureau show that establishments with fewer

than 100 employees make up 98 percent of all private sector establishments. (U.S. Census Bureau, Statistics about Business Size, 2001). Excluding businesses with no employees (i.e., self-employed individuals), establishments with fewer than 100 employees still comprise 86 percent of all private sector business establishments. Id. These firms employ fully 36 percent of all employees, or nearly 41 million workers. Id.

In contrast, Congress traditionally defines “small business” for the purpose of establishing coverage under a range of other employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have twenty or more employees. 29 U.S.C. § 630(b). Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), covers employers with fifteen or more employees. But the vast majority of private sector establishments would fall within the employee threshold for coverage established by H.R. 742.

H.R. 742 would provide a monetary incentive for more employers to challenge OSHA citations, to spare no expense, and to drag out litigation of the case, because at the end of the day they could recover their attorneys fees and costs if they prevailed.

The bill would allow even the worst employers -- ones with repeated and egregious violations -- to recover fees if they prevailed on a particular violation. Take for example Eric Ho, who was cited for 11 willful violations of OSHA’s respirator and training standards after he exposed his immigrant workforce to asbestos by requiring them to perform building renovation work behind locked gates at night without any respirators or training. Eric Ho was criminally convicted of violating the Clean Air Act. But he succeeded in persuading the Occupational Safety and Health Commission to throw out 10 of the 11 willful OSHA violations, on grounds that OSHA was not allowed to cite Ho for each employee exposed to asbestos hazards, but could only issue one citation. *Secretary of Labor v. Ho*, Nos. 98-1645 & 98-1646 (OSHRC, Sept. 29, 2003). H.R. 742 would require taxpayers to pay the attorneys fees and costs of rogue employers like Eric Ho. EAJA currently provides for fee awards if the government’s position is not “substantially justified.” EAJA thus penalizes – and deters – the filing of insubstantial complaints. No rational public policy would be furthered by discouraging OSHA from issuing citations that are substantially justified but as to which the government ultimately is unable to carry its burden of proof. Rather, the inevitable result of such a rule, which would penalize the government every time it loses, would be to chill the issuance of meritorious citations in close cases on behalf of employees exposed to unsafe working conditions. It is important to point out that H.R. 742 is not limited to enforcement proceedings initiated by OSHA. By its terms, H.R. 742 applies to any administrative or judicial proceeding, meaning that qualifying employers could recover their attorneys fees and costs for successfully challenging an OSHA standard or regulation in court. While OSHA has been quite successful in defending its rules and standards, this provision will create a huge financial incentive for businesses to fight OSHA’s rules even more routinely and aggressively, given the possibility of recovering their attorneys fees and costs at the end. As a result, OSHA will be even more reluctant to issue much-needed workplace safety rules to protect workers.

H.R. 742 will drain resources away from an agency that has perpetually struggled to do its job with the limited resources available to it. As estimated by the Congressional Budget Office, this bill would cost \$7 million in FY 2005 and \$44 million total for FY 2005-2009, which must come out of OSHA’s budget. This would require Congress to

appropriate additional money to OSHA's budget to cover the cost of the bill or to cut OSHA's enforcement budget or reduce compliance assistance to small business. Passage of this bill would further reduce the resources available for implementing and enforcing the OSH Act, to the detriment of working men and women who depend on OSHA to protect their safety and health on the job.

H.R. 741, The Occupational Safety and Health Independent Review of OSHA Citations Act. H.R. 741 is a misdirected piece of legislation that would undermine the Secretary of Labor's authority to interpret and enforce the job safety law. The bill flies in the face of Supreme Court precedent and longstanding administrative law principles. The bill should be rejected.

H.R. 741 would overturn the Supreme Court's unanimous decision in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991). *Martin v. OSHRC* dealt with the question of which agency's interpretation of an OSHA rule should be given deference – the Secretary of Labor's, or OSHRC's. After reviewing the language, structure, and legislative history of the OSH Act, the Court unanimously ruled that the Secretary of Labor, and not OSHRC, should be given deference.

The Court's decision in *Martin v. OSHRC* was in keeping with well-established precedent giving deference to administrative agencies that are given authority by Congress to adopt and implement regulations. 499 U.S. at 150-151 (citing precedent). In *Martin v. OSHRC*, the Court elaborated on the important reasons for this rule.

First, the Court pointed out that the Secretary of Labor "enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question." 499 U.S. at 152. By contrast, OSHRC does not promulgate occupational safety and health standards and has no such expertise.

Second, the Court pointed out that "by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations." 499 U.S. at 152. This experience makes it "more likely [that the Secretary will] develop the expertise relevant to assessing the effect of a particular regulatory interpretation." *Id.* By contrast, OSHRC sees only a small slice of the enforcement cases brought by the Secretary. Employers seek review of less than 10 percent of all cases before the Commission, and only a fraction of these cases are heard by the full Commission. As a consequence, the Commission does not have the same breadth and depth of knowledge and experience as the Secretary of Labor.

It is also important to note that under *Martin v. OSHRC* and related cases, the Secretary of Labor still has the burden of showing that her interpretation is reasonable. Where the Commission or a reviewing court believes the Secretary's interpretation is not reasonable – for example, where the Secretary has advanced conflicting or inconsistent interpretations – no deference is given to the Secretary's view. Thus, the Secretary does not have unbridled discretion; there is a very real and substantial check on her authority built into the system.

H.R. 741 would turn this well-established system upside down and say that the Review Commission, not the Secretary, should get the final say on the meaning of the Secretary's regulations. This defies longstanding precedent and common sense. As the Court in

Martin recognized, the Secretary of Labor, as the policymaking entity that promulgates and enforces workplace safety standards, is in a far superior position to interpret the meaning of her own regulations, and to have those interpretations respected so long as reasonable. Policy decisions like the interpretation of workplace safety standards should be left with the policymaking body, not given to an adjudicative body that lacks comparable knowledge, experience, and expertise.

H.R. 739, The Occupational Safety and Health Small Business Day in Court Act. Under the OSH Act, an employer has 15 days in which to challenge an OSHA citation. 29 U.S.C. § 659(a). If the employer does not file a notice of contest with OSHRC by that deadline, the OSHA citation becomes a final order of the Commission, enforceable against the employer. *Id.*

H.R. 739 would excuse employers from the OSH Act's fifteen-day deadline if the employer can show that its failure to meet the deadline was caused by "mistake, inadvertence, surprise, or excusable neglect."

The intent of the bill, according to its proponents, is to incorporate into the OSH Act provisions for obtaining relief from a final judgment similar to those provided by Rule 60(b) of the Federal Rules of Civil Procedure (FRCP).

The bill is unnecessary. The Commission has always taken the position that Rule 60(b) applies to Commission proceedings and that the Commission has the authority to provide relief from a final judgment when the employer has made the requisite showing under Rule 60(b). See, e.g., *Secretary of Labor v. Branciforte Builders, Inc.*, 9 OSHC 2113 (1981). The courts of appeals have generally agreed that Rule 60(b) applies to Commission proceedings and that OSHRC has authority to provide relief from a final judgment where appropriate under that rule. See, e.g., *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156 (6th Cir. 1980); *J.I. Hass Company v. Marshall*, 9 OSHC 1712 (3d Cir. 1981); *Avon Contractors*, 372 F.3d 171 (3d Cir. 2004).

Proponents of the legislation argue that the bill is needed because of a contrary court ruling in *Chao v. Russell P. LeFrois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002). But that decision is both an anomaly and irrelevant, given that the Solicitor of Labor has now issued a memorandum stating that the Department of Labor will no longer seek to prohibit employers from making a claim for relief under Rule 60(b). See Memorandum to Regional Solicitors, et al., from the Solicitor of Labor (Dec. 13, 2004).

The bill is also inappropriately one-sided. It excuses employers from missing their 15-day deadline but does not provide the same relief to employees or their representatives who seek to exercise their statutory rights to challenge the period for abatement in a citation. Fairness and reason dictate that both employers and employees should be afforded the same relief if Congress were to adopt this measure.

Finally, it is important to point out that the legislation, while purporting to incorporate the provisions of FRCP 60(b), does not actually track the language of that rule. Rule 60(b) includes important safeguards and limitations, including that the motion for relief under Rule 60(b) must be made within a reasonable time, and in any event not more than one year after the judgment was entered. Rule 60(b) also specifies that a motion made under the section does not affect the finality of a judgment or suspend its operations.

Particularly in a circumstance where, as here, the judgment at issue is one that requires employers to address workplace safety hazards, Rule 60(b)'s safeguards and limitations should apply. Parties should be required to make their motion for relief within one year,

and the motion should not affect the employer's obligation to abate the hazard while the employer is seeking relief from the judgment.

H.R. 740, The Occupational Safety and Health Review Commission Efficiency Act. H.R. 740 expands the number of members on the Occupational Safety and Health Review Commission (OSHRC) from three to five, and mandates that all members have legal training.

In our view, the bill is unnecessary and inappropriate in a time of severe budgetary constraints. The Commission's modest caseload does not warrant a 40 percent expansion in the number of Commissioners. Moreover, the fact is that the Commission's perpetual case backlog has persisted regardless of whether the Commission is fully staffed or lacks a quorum. It would appear that factors other than the size of the Commission or the lack of a quorum affect the Commission's ability to issue decisions.

And it is no coincidence that Republican Members of Congress are pushing to expand the number of seats on the Commission at a time when a Republican president would fill the seats.

Proponents cite to the Federal Mine Safety and Health Review Commission as an analogous agency with five commissioners, not three. However, it is also the case that the FMSHRC has more responsibilities, and hears more cases, than OSHRC. For example, miners and their representatives are permitted to bring cases before the FMSHRC alleging retaliation for exercising their rights under the mine safety law, and the FMSHRC hears and decides these cases. The OSH Act has no comparable provision, and OSHRC has no comparable role.

Expansion of the Commission, and restricting the eligibility of individuals to serve as commissioners, are unnecessary and unwarranted proposals that should be rejected.

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In sum, the AFL-CIO urges the Subcommittee to explore ways of strengthening the OSH Act and its enforcement in order to address the high injury and fatality levels that persist in American workplaces today. Passage of H.R. 739, 740, 741, and 742 will do nothing to advance this goal; to the contrary, they will deprive OSHA of the resources and authority they need to do the job.