

## OSHA Legislation Gets Boost From Mine Safety Bill

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Legislation introduced last year to amend the Occupational Safety and Health Act of 1970 (“OSH Act”), that has languished since then, has received new life by being incorporated in coal mine safety legislation. Recent coal mine disasters such as the April 5, 2010 Upper Big Branch mine explosion in West Virginia have increased the likelihood of passage for mine safety legislation and, along with it, OSH Act legislation.

On July 1, 2010, Representative George Miller (D- Cal) introduced the Miner Safety and Health Act of 2010 (H.R. 5663), in an effort to improve compliance with mine safety and health and occupational safety and health laws. The bill, which was subsequently renamed the Robert C. Byrd Miner Safety and Health Act of 2010, contains some key provisions of the Protecting America’s Workers Act (H.R. 2067 and S. 1580), which would have extensively amended the OSH Act.[1] It was approved by the House Committee on Education and Labor on July 21, 2010 and is expected to be passed by the entire House.

Shortly thereafter, on July 29, 2010, a companion bill (S. 3671) was introduced in the Senate by Senators Jay Rockefeller (D-WV) and Carte Goodwin (D-WV). Although the bill is less likely to gain approval by the Senate, there is some speculation that it may pass due to the recent coal mine disasters and the public outcry for mine safety reform.

### **I. OSH Act Amendments**

Both the House and Senate bills would amend the OSH Act by incorporating several provisions of the Protecting America’s Workers Act. The Protecting America’s Workers Act was introduced by Rep. Lynn Woolsey (D-Cal.) on April 23, 2009, but remains in committee in both the House and the Senate. The provisions would increase civil penalties up to as much as \$250,000, increase maximum imprisonment terms to 10 years for criminal violations of the Act, enhance whistleblower protections, expand the rights of family members of injured workers to participate in settlement negotiations, and require the abatement of hazardous conditions as soon as an employer is cited for any serious, willful, or repeat OSH Act violation.

The House and Senate bills differ from the Protecting America’s Workers Act in two major respects. First, the bills contain a provision that would allow for the accrual of interest on penalties starting from the date that an

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employer contests a citation, creating a disincentive for cited employers to use the contest period to delay payment. Second, unlike the Protecting America's Workers Act, the bills would not extend the OSH Act to public employees.

Pursuant to an amendment that was proposed by Rep. Dina Titus (D-Nev.) and approved by the Committee, the House bill would also authorize OSHA to identify state plan programs that are not functioning properly and compel remedies, instead of terminating the program. The OSH Act currently only authorizes OSHA to terminate such programs.

### II. Coal Miner Provisions

With respect to mine safety, both bills contains provisions for additional inspection and investigation authority, enhanced enforcement authority, increased penalties, and increased whistleblower protections. Specifically, they would authorize the Mine Safety and Health Administration ("MSHA") to issue subpoenas in order to investigate unsafe mines, require training for miners in unsafe mines, seek court orders to close unsafe mines, and provide for independent investigations of serious mine accidents. Civil penalties for violations of the Federal Mine Safety and Health Act of 1977 ("FMSHA") would increase to up to \$150,000 for each violation and criminal penalties would increase to as much as \$1,000,000 and imprisonment for not more than five years.

The Senate bill contains additional provisions, that are not found in the House bill, that authorize an evaluation of whether MSHA has the experts it needs, require the General Accountability Office to evaluate the new "pattern of violations" criteria to ensure that it is preventing repeated violations, require greater coordination with the Department of Justice in investigating criminal violations of mine safety law, and require MSHA to improve its online database of safety records.

### III. Increased Whistleblower Protections

The bills would enhance the current employee discrimination provisions and add whistleblower protection provisions in the OSH Act and FMSHA. These provisions are very similar to the whistleblower protections that were adopted in the Consumer Product Safety Improvement Act of 2008 ("CPSIA")<sup>[2]</sup> and the recent health care law.<sup>[3]</sup> They are also similar to worker protection provisions in the House bill to amend the Toxic Substances Control Act ("TSCA") introduced July 22, 2010.<sup>[4]</sup>

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These provisions would protect mine employees from being discharged or discriminated against for the refusal to perform a duty that would pose a safety or health hazard. They would also protect employees covered by the OSH Act from being discharged or discriminated against for refusing to perform a duty that would result in serious injury to, or serious impairment of the health of, the employee or other employees. The whistleblower protections in the CPSIA and House TSCA bill similarly prohibit discrimination where an employee refuses to perform duties reasonably believed to be in violation of those Acts.

### IV. Stakeholder Reactions

The bills have generally been met with support from the Department of Labor and labor groups. Secretary of Labor Hilda Solis called the House bill's passage in committee "an important step forward," and OSHA Administrator David Michaels has repeatedly expressed support for the increased whistleblower protections in the House and Senate bills, stating that the current protections are "very, very weak."<sup>[5]</sup> Among labor groups, the bills have been applauded as a smart strategy for advancing OSHA and MSHA reforms by the AFL-CIO, the United Mine Workers of America, and the American Industrial Hygiene Association.<sup>[6]</sup>

Despite the widespread support from labor, there has been some criticism for the failure to extend the OSH Act to public employees. For example, Jonathan Rosen, the director of occupational safety and health for the New York State Public Employees Federation, stated that he was "fairly outraged" that the bill did not address public employees and remarked that "[t]o say that public employees don't deserve the rights and protections that the rest of society has is irrational."<sup>[7]</sup> Similarly, Darryl Alexander, the director of health and safety at the American Federation of Teachers, expressed that the failure to address public employees was "terribly crushing and disappointing" because "[a]ll workers need these protections."<sup>[8]</sup>

In contrast, among industry stakeholders, the bills have been widely criticized for the approach that they take to mine safety reform and for incorporating amendments to the OSH Act. On July 26, 2010, the Coalition for Workplace Safety, a group of industry associations including the U.S. Chamber of Commerce and the National Association of Manufacturers, sent a letter to all House members, criticizing the expansion of whistleblower rights, the bill's mandatory abatement provisions, and the

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increase in civil and criminal penalties.[9] This letter was signed by 240 trade groups and corporations, including the American Trucking Association, National Association of Home Builders, National Grain and Feed Association, National Retail Federation, and Society of Chemical Manufacturers and Affiliates.[10]

In addition, Keith Smith, the director of labor policy for the National Association of Manufacturers, commented that the “proposals are simply not the right approach to assist both employers and employees in maintaining safe workplaces. Instead of promoting a cooperative approach toward workplace safety, the provisions laid out in the Miner Safety and Health Act of 2010 take a punitive approach.”[11] He further stated that “the proposal would actually hinder the safety efforts by manufacturers by promoting an adversarial relationship between the Occupational Safety and Health Administration and employers.”[12] Likewise, Marc Freedman, a director of labor law policy at the U.S. Chamber of Commerce, commented that “[t]acking the OSH Act provisions [to the bills] is just recognizing that this will be [the Democrats’] only opportunity to move a bill dealing with OSHA, and trying to take advantage of the momentum for moving something they think the backdrop of Upper Big Branch will give them.”[13]

### Conclusion

Although the Miner Safety and Health Act is being widely criticized by industry stakeholders, it has a reasonable chance of passage due to recent coal mine disasters. If the OSH Act amendments are passed along with it, stakeholders should expect future OSHA enforcement to be significantly affected.

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[1] For information on the Protecting America’s Workers Act, see Beveridge & Diamond, P.C., “Congress Focuses Attention on OSHA Penalties and Enforcement Process” (June 8, 2009), available at <http://www.bdlaw.com/assets/attachments/BD%20Client%20Alert%20-%20Congress%20Focuses%20on%20OSHA%20Penalties%20Enforcement%20Processes.pdf>.

[2] Pub. L. 110-314, § 219(a).

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[3] Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1558, adding § 18C to the Fair Labor Standards Act.

[4] Toxic Chemicals Safety Act of 2010, H.R. 5820, § 22, amending TSCA § 23.

[5] Stephen Lee, Republicans, Industry Groups Continue to Push Back Against OSHA Reform Bill, 40 OSHR 632 (Jul. 29, 2010).

[6] Stephen Lee, Industry Criticizes OSHA Reform Bill; Groups on Both Sides Expect House Passage, 40 OSHR 571 (Jul. 8, 2010); Stephen Lee, OSHA Reform Provisions to be Part of Bill to Strengthen Mine Safety Act, 40 OSHR 554 (Jul. 1, 2010); Cecil E. Roberts, President, United Mine Workers of America, Testimony before the House Committee on Education and Labor on H.R. 5663 (Jul. 13, 2010).

[7] Stephen Lee, Worker Groups Criticize Mining Bill for Omitting Public Sector Employees, 40 OSHR 572 (Jul. 8, 2010).

[8] *Id.*

[9] Stephen Lee, Republicans, Industry Groups Continue to Push Back Against OSHA Reform Bill, 40 OSHR 632 (Jul. 29, 2010).

[10] *Id.*

[11] Stephen Lee, Industry Criticizes OSHA Reform Bill; Groups on Both Sides Expect House Passage, 40 OSHR 571 (Jul. 8, 2010).

[12] *Id.*

[13] *Id.*