

How Stricter OSHA Legislation Affects You



Eric J. Conn



James A. Lastowka

By ERIC J. CONN & JAMES A. LASTOWKA, McDermott Will & Emery LLP

On March 16, 2010, the Assistant Secretary of Labor for the U.S. Occupational Safety and Health Administration (OSHA), Dr. David Michaels, testified before the U.S. House of Representatives' Subcommittee on Workforce Protections, in support of a major piece of OSHA reform legislation making its way through the U.S. Congress.

Dr. Michaels testified that "because OSHA can visit only a limited number of workplaces each year, we need a stronger OSH Act to leverage our resources to encourage compliance by employers." And a stronger OSH Act is exactly what is before Congress right now. The legislation, the Protecting America's Workers Act (PAWA), proposes a number of major changes to enforcement of the OSH Act, but most significantly, increases criminal and civil penalties and the frequency and

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targets of criminal charges under the Act.

First, PAWA would greatly expand criminal liability against companies and individuals. In the proposed bill before the House, HR 2067, and in a package of modifications to the bill circulated by the House Subcommittee on March 9, 2010, the degree of available criminal charges would increase from misdemeanor to felony. The potential targets of criminal charges would broaden to include “any officer or director.” The maximum prison sentence under the legislation would increase from six months to 10 years for a first offense, and from one year to 20 years for repeat convictions. Significantly, under the modifications to the bill, PAWA also would lower the level of conduct triggering criminal liability. Specifically, the reform legislation would amend the OSH Act to change the burden of proof in a criminal case from “willfully” to “knowingly.”

Dr. Michaels explained: “Section 311 states that any employer who ‘knowingly’ violates any standard, rule, or order and that violation results in the death of an employee is subject to a fine and not more than ten years in prison. . . . This would ease the burden of proof currently required for a criminal violation under the OSH Act because it is easier to prove a knowing violation than to establish willfulness under current cases.” These proposed changes would make OSHA criminal prosecutions much more attractive to local U.S. attorneys.

Second, civil penalties also would increase significantly under PAWA. Dr. Michaels testified that “clearly, OSHA can never put a price on a worker's life and that is not the purpose of penalties — even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost,” and “the current penalties do not provide an adequate deterrent.” Under PAWA, civil penalties for willful and repeated violations would increase from a current maximum of \$70,000 per violation to \$120,000. If a willful or repeated violation results in the death of an employee, PAWA would increase the penalties to a *minimum* of \$50,000 and a maximum of \$250,000 per violation.

There are many other proposed significant changes to the OSHA Act in PAWA of which employers should take note, including the following:

- PAWA would require abatement of *alleged* serious, willful and repeated hazards *during the contest period*. According to Dr. Michaels, “PAWA would enable OSHA to issue failure to abate notices to a workplace with a citation under contest. . . . OSHA believes this protection is critical. Too often hazards remain uncorrected because of lengthy contest proceedings—periods that can last a decade or more. Obtaining speedy abatement is one reason why OSHA settles cases. But we must ensure that neither contests nor lengthy settlement negotiations leave workers exposed to the hazards found during the initial inspection.”
- OSHA, under PAWA, would be *required by law* to investigate all incidents resulting in death or the hospitalization of *two* or more employees.
- PAWA would expand the rights and involvement of workers and victims’ families in the enforcement process. PAWA would allow an injured

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employee or family member to meet with OSHA, to remain informed about the status of citations and challenges to them, and to make statements before settlement agreements are made.

- The reform legislation would prohibit OSHA from modifying the characterization of a citation item to "uncharacterized," a previously available settlement option that, where appropriate in the view of both OSHA and the employer, has proven to be a very useful means of reaching a fair and productive settlement that advances workplace safety and health.
- PAWA proposes to cover the more than 10 million federal, state and local government employees who are currently beyond the jurisdiction of the OSH Act.

The comprehensive reform envisioned under PAWA would dramatically change the regulatory landscape faced by employers. These changes, if enacted, will warrant a careful review and reconsideration of current workplace safety and health programs, practices and policies to ensure compliance, as companies and individuals will be facing stronger enforcement, higher penalties, more litigation and more criminal prosecutions.

James A. Lastowka is a partner in the law firm of McDermott Will & Emery LLP and is based in the Firm's Washington, D.C., office. He is co-head of the Firm's OSHA, MSHA & Catastrophe Response group. Jim has practiced exclusively in the field of occupational safety and health for close to 30 years. He is a recognized authority on OSHA and MSHA law and has a nationwide safety and health practice. Mr. Lastowka can be reached at +1 202 756 8245 or jlastowka@mwe.com [1].

Eric J. Conn is a partner in the law firm of McDermott Will & Emery LLP and is based in the Firms' Washington, DC office. He focuses his practice on occupational safety and health law and complex commercial litigation. Eric's practice includes representing clients in all aspects of OSHA, CSB and MSHA law, including enforcement actions, compliance counseling and litigation. Mr. Conn can be reached at + 1 202 756 8248 or econn@mwe.com [2].

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[1] <mailto:jlastowka@mwe.com>

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