



Protecting America's Workers Act of 2009: A Plan to Give OSHA a Lot More Teeth

BY ERIC J. CONN & ROBERT C. GOMBAR • MCDERMOTT WILL & EMERY LLP

Just weeks before his death, the late Sen. Ted Kennedy (D-MA), with the help of Senate Majority Leader Harry Reid (D-NV), introduced legislation to amend the Occupational Safety and Health Act of 1970 (OSH Act), which has not been significantly altered since its inception. The proposed legislation, S. 1580, is known as the Protecting America's Workers Act of 2009 (PAWA). A companion bill, H.R. 2067, has been introduced in the House of Representatives by Representative Lynn Woolsey (D-CA).

Similar legislation had been introduced in both the House and the Senate in recent sessions of Congress. PAWA is sponsored by 18 members of the Senate (it was 19 until the death of Sen. Kennedy) and has been referred to the Senate Committee on Health, Education, Labor, and Pensions. Previous versions of PAWA, introduced in 2004, 2007, and 2008, gained increasing support, including co-sponsorship by then-Senators Barack Obama and Joe Biden. What makes this legislation different is that it actually may make it out of committee and, with the blessing of the current administration, be passed by Congress in some form.

PAWA would make a number of major changes to enforcement of the OSH Act. This On the Subject, however, focuses on the very significant changes to criminal and civil penalties under the OSH Act proposed in this legislation.

More "Meaningful" OSHA Penalties

Penalty amounts under the current OSH Act regime have been criticized as too small to effectively promote worker safety. Congressman George Miller (D-CA), chairman of the House Committee on Education and Labor, recently wrote on the Hill's Congress blog: "Penalties are the key enforcement mechanism under the OSH Act. They must be real. They must be meaningful. They must function to deter violations. They must get people's attention. And, these enforcement mechanisms must not be a mere cost of doing business." PAWA increases the size and application of penalties in several important ways. The penalty increases contained in this bill, in conjunction with OSHA's new "per employee" penalty rule issued in December 2008 (the final rule subjects employers

to "per employee" penalties for violating a large number of existing standards and permits OSHA to propose a separate penalty with respect to each employee not trained or not equipped with personal protective equipment) would dramatically increase the penalty amounts that may be assessed against employers. Under the OSH Act, OSHA has the authority only to propose penalties. Penalties are assessed by the Occupational Safety and Health Review Commission, an independent agency that is not part of OSHA. See 29 U.S.C. § 666(j).

Criminal Penalties

PAWA would greatly expand the availability of criminal penalties against employers. The bill proposes to change the criminal charge for willful violations that result in an employee death from a misdemeanor to a felony. This change would make the prosecution of such charges much more attractive to local U.S. attorneys and give them an incentive, at OSHA's urging, to bring more criminal charges. Furthermore, for the purposes of felony OSHA prosecutions only, the legislation expands the definition of "employer" to include "any responsible corporate officer."

The maximum prison sentence for a willful violation that results in the death of an employee would increase under the bill from six months to 10 years for the first offense and from one year to 20 years for repeat convictions. The maximum prison term for knowingly making a false statement, representation or certification to OSHA also would be increased by the legislation from six months to two years.

PAWA would also expand potential criminal liability for willful violations to include circumstances that do not involve the death of an employee. Under PAWA, employers or responsible corporate officers who commit a willful violation that results in the serious bodily injury of an employee would be subject to a felony criminal prosecution, with imprisonment up to five years for a first offense and up to 10 years for subsequent convictions.

Civil Penalties

Civil penalties for willful and repeated violations would be increased under PAWA from a

current maximum of \$70,000 to a new maximum of \$120,000 per violation. The bill would also increase the minimum penalty for a willful violation from \$5,000 to \$8,000 per violation. If a willful or repeated violation results in the death of an employee, PAWA would increase the penalties even higher, to a minimum of \$50,000 and a maximum of \$250,000 per violation. In conjunction with OSHA's new "per employee" penalty rule, these increases could result in enormous proposed penalties.

Under the bill, the maximum civil penalty for serious and other-than-serious violations, and the maximum daily penalty for a failure to abate, would increase from \$7,000 to \$12,000 per violation. Should an employee death result from such a violation, the minimum penalty under the legislation would be \$20,000 and the maximum would be \$50,000 per violation.

Finally, regarding penalty amounts generally, PAWA would require OSHA to adjust these civil penalty minimums and maximums at least once every four years to account for increases or decreases in the Consumer Price Index.

Conclusion

The comprehensive reform envisioned under PAWA, which is far more sweeping than just the criminal and civil penalty changes discussed here, would dramatically change the regulatory regime faced by employers. These changes would require careful consideration of current practices and policies to ensure compliance, and will almost certainly increase litigation of OSHA enforcement actions. **EW**

Robert C. Gombar Sr. is a partner in the law firm of McDermott Will & Emery LLP based in the Washington, D.C., office. He is head of the firm's OSHA, MSHA & Catastrophe Response Group. He is a former member of the firm's management committee, compensation committee, and strategic planning committee. Robert can be reached at 202-756-8242 or rgombar@mwe.com.

Eric J. Conn is a partner in the Washington, D.C., office of McDermott Will & Emery LLP. As a member of the firm's OSHA, MSHA & Catastrophe Response Practice Group and Trial Department, he focuses his practice on occupational safety and health law and complex commercial litigation. Eric can be reached at 202-756-8248 or econn@mwe.com.