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With several recent mine disasters making headlines across the country, and safety incidents resulting in high profile fatalities, Congress recently released new draft legislation amending both the Mine Safety and Health Act and the Occupational Safety and Health Act. Although the legislation was prepared based on public support for mine safety reform, the proposed changes will have an effect reaching far beyond the mining industry.

New Safety and Health Act Legislation Proposed

By Thomas Benjamin Huggett, Ilyse Schuman and Jennifer Mora

Combining the Massey Energy Upper Big Branch mine accident in West Virginia, the Tesoro Refinery explosion in Washington, and the Kleen Energy explosion in Connecticut (but without mentioning the BP Deepwater Horizons tragedy), on June 29, 2010, members of the U.S. Senate and House of Representatives released new draft legislation to amend both the Mine Safety and Health Act and the Occupational Safety and Health Act. Moving quickly, the bill was introduced into the U.S. House of Representatives Committee on Education and Labor as H.R. 5663 on July 1, and a hearing was scheduled and held on Tuesday, July 13. Solicitor of Labor M. Patricia Smith, Assistant Secretary of Labor for Mine Safety and Health Joseph A. Main, and Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels all testified in favor of the changes in the Miner Safety and Health Act of 2010 legislation. The General Counsel of the AFL-CIO, the President of the United Mine Workers of America, a Professor of Mine Engineering, and a miner also testified in favor of the changes. Two industry lobbying groups testified against various aspects of the legislation. At the hearing, Chairman Miller stated that he would continue to move the bill quickly and intended to rename it in honor of the Late Senator Robert Byrd.

This combined legislation picks up where the Mine Improvement and New Emergency Response Act of 2006 left off and includes major provisions of the previously proposed Protecting America's Workers Act (PAWA), draft legislation that has been pending in Congress since at least 2007. As a result of the national emphasis surrounding these tragedies and the continuing issues in the Gulf of Mexico, along with the quick action and hearing in the House of Representatives, employers should pay careful attention to this legislation as there may be enough political interest to get it passed in this election year or in a lame duck session of Congress following the November elections. Even if the legislation is not passed, it clearly reflects a continued emphasis on safety and health that employers should consider in their planning.

Occupational Safety and Health Act Revisions

Although the focus and initiation of this legislation is mine safety accidents, the last 30 pages of the legislation incorporate many of the provisions of the previously introduced Protecting America's Workers Act of 2009 (S. 1580 & H.R. 2067), which included proposed amendments to the Occupational Safety and Health Act ("OSH Act"). The OSH Act has not been significantly changed since its enactment in 1971. The following is a summary of the most significant proposed changes to the OSH Act.

Penalty Increases

- Increase maximum civil penalties for "Willful" and "Repeat" violations from \$70,000 to \$120,000.
 - Add an additional increase of up to \$250,000 (but not less than \$50,000) for Willful or Repeat violations that cause a fatality.
 - Specifically incorporate consideration of State Plan citation history into determination of Repeat violations.
- Increase maximum civil penalties for "Serious" and "Other-than-Serious" violations from \$7,000 to \$12,000.
 - Add an additional increase of up to \$50,000 (but not less than \$20,000, with a small employer exception) for Serious violations that cause a fatality.
- Increases civil penalties for failure to abate violations to \$12,000 per day.
 - In addition, based on the obligation to abate pending contest (discussed below), failure to abate penalties can begin to accrue even before the citation becomes a final order.
- Add interest to penalties starting from the date of contest such that, even though the citations have not been adjudicated, interest begins accruing.

Criminal Enforcement

- Make felony criminal charges available for an employer's "knowing" violation of an Occupational Safety and Health Administration (OSHA) standard, rule or order that results in a worker's death or serious bodily harm.
- Redefine *employer* to include any "officer or director," thereby making prison sentences of up to 10 years applicable to individuals.
- Increase criminal penalties up to \$1,000,000 for a violation that results in a worker's death or serious bodily harm.

Mandatory Abatement

- Require employers, upon receipt of a citation, to abate the alleged violation pursuant to the deadline unilaterally established by OSHA. In so doing, abatement would be required before the alleged violation was proved to be a violation in fact.
- Establish a process for a Motion to Stay abatement wherein the employer would have to meet the preliminary injunction standard of proving "substantial likelihood of success" in defeating the citation.
- Mandate that hearings on Motions to Stay abatement be heard within 15 days of the issuance of a citation, and any appeal thereof be heard within 30 days.

Expansion of Whistleblower Provisions

- Expand whistleblower protections to cover:
 - Report of an injury, illness or unsafe condition to the employer, any agent of the employer, a safety and health committee, or employee safety and health representative; and

- Refusal to perform work if there is a reasonable apprehension of injury or impairment to the employee or other employees.
- Extend the time for filing whistleblower complaints from 30 days to 180 days after the alleged retaliation, and any repeat thereof.
- Require OSHA to issue an initial determination within 90 days.
- Require OSHA to issue a remedial order if the agency finds merit to the complaint. Remedies may include compensatory and consequential damages, and immediate reinstatement, all before a hearing to establish the actual merits of the allegation, and without stay pending such hearing or appeal therefrom.
- Require the Department of Labor Administrative Law Judge hearing the appeal to issue a decision within 90 days of the appeal, and for any appeal thereof, require the Department of Labor Administrative Review Board to issue a decision within 90 days of the appeal.
- Establish an employee right to bring a lawsuit in federal court if the time deadlines for issuance of a decision are not met. All that the employee is required to prove is that the alleged protected activity was a “contributing factor” to the retaliation, and then the burden is on the employer to prove that the action would have been taken regardless.
- Prohibit requiring arbitration of whistleblower claims.
- Allow employees to choose whether to file a complaint with either a state plan administrator or federal OSHA.

Establish Victims’ Rights Provisions

- Create a statutory right for a victim or representative to meet with OSHA during an inspection, receive copies of citations and reports, and be informed of contests.
- Create a statutory right for a victim or representative to meet with OSHA prior to any settlement, and to appear at the hearing of any contested citation and make a statement.
- Establish the position of “Family Liaison” at each OSHA Area Office.

Provisions of PAWA That Were Not Included

Several provisions of the PAWA, which has lingered in Congress for more than two years, are not included in these latest proposed amendments to the OSH Act. The amendments:

- do not expand coverage to public sector employees of state and local governments;
- do not include a requirement for posting whistleblower rights;
- do not specifically preclude policies or programs discouraging injury and illness reporting;
- do not require pay for employee time spent on OSHA inspections;
- do not require accident scene preservation for fatalities and significant injuries;
- do not prohibit unclassified violation settlements; and
- do not include union or employee representative rights to contest citations for inadequate penalties or classification.

Mine Safety and Health Act Revisions

The Miner Safety and Health Act of 2010 (“the Act”) would have a significant impact on mining operations in the United States

if enacted. Indeed, according to the announcement of the legislation, one reason for the legislative proposals was to respond to recent tragedies at mines. The Act seeks to prevent these types of disasters from occurring in the future in the following ways:

- Modify the Mine Safety and Health Administration's (MSHA) "pattern of violations" process to focus more on rehabilitating mines with deteriorating safety records and less on punitive measures. This would require a mine with a degraded safety record to implement a remedial safety plan and meet certain benchmarks to establish compliance and improvement. When a mine is placed on pattern status, miners would be withdrawn from the mine until violations or unsafe conditions identified in the remedial order are remedied and the operator commences or completes other safety actions identified in the order.
- Provide MSHA with: enhanced enforcement authority, including the ability to order additional training when necessary; increased authority to obtain injunctions, which could include temporarily shutting down the mine; and the ability to subpoena documents and testimony.
- Increase the maximum criminal penalties, to include felonies for repeat offenders, and increase maximum civil penalties.
- Strengthen existing whistleblower protections for employees, including annually requiring mine operators to provide "miner's rights training," expanding the time limit for an employee to complain about retaliation, and authorizing punitive damages and criminal penalties against mine operators that knowingly retaliate against workers.
- Create an underground coal miner just cause employment standard that would prohibit an operator from discharging a miner who has completed a probationary period, unless unsatisfactory job performance, failure to follow safety requirements, or other legitimate business reasons can be established. This right would be enforceable in a private lawsuit in federal court.

Employer Response and Preparation

Although it is unclear what the final amendments to the Occupational and Mine Safety and Health Acts will include (if passed), the legislative proposal indicates that the changes would be substantial. Given the momentum behind passing this sweeping overhaul of mine safety law, employers and mine operators should understand the implications of the legislation and how best to prepare for it.

Although Congressional Republicans have complained about the rush on the legislation, and the lack of bi-partisan input, they are not able to stop its consideration, at least in the House. Without the intervention of business-minded Congressional Democrats who recognize that the legislation creates an unduly adversarial system that will likely result in significant expenditure of both business and agency resources on litigation – litigation that will not directly address safety and health concerns – the legislation may be considered this fall or in a lame duck session of Congress. Employers subject to OSHA's jurisdiction and mine operators should contact their representatives, industry associations, and lobbyists to discuss the most effective means of expressing their opinion on this legislation.

Employers should reduce their OSHA exposure by clearly defining internal procedures for reporting and responding to safety concerns, so as to formalize and minimize the impact of any alleged whistleblower activity. Employers should also continue safety and health programs and training. Where questions regarding compliance exist, employers should carefully consider conducting privileged audits and seeking appropriate legal advice to ensure they are following the law.

Mine operators certainly can prepare for the future by continuing to train supervisors and employees on safe practices in the mine, responding to employee concerns about unsafe conditions, and seeking to avoid MSHA's "pattern of violations" process. Even so, mine operators should recognize that training, communications, human resources, and operations may have to be significantly altered to conform to the proposed legislative changes. Along with these changes, mine operators should also recognize that the proposed regulations would significantly strengthen MSHA's investigative and enforcement tools and the penalties for safety violations. Should this legislation become law, operators should undertake a comprehensive review of their safety and health policies and practices.

If you have any questions, Littler Mendelson’s nationwide Workplace Safety Practice Group attorneys and Government Affairs Practice attorneys are available to help employers and mine operators address these difficult issues.

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