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U.S. SENATE CONSIDERS REFORMS TO OSHA LAW

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Following reforms passed by the U.S. House of Representatives in 2004, Senator Enzi introduced two bills in the U.S. Senate this winter aimed at significantly reforming the Occupational Safety and Health Administration (OSHA). Senator Enzi's reforms, contained in S.2065, titled the "Occupational Safety Partnership Act" ("Partnership Act"), and S.2066, titled the "Occupational Safety Fairness Act" ("Fairness Act"), go beyond the measures passed by the House. These efforts are intended to encourage employers to be proactive on worker safety issues, and to increase the fairness and sensibility of the citation-issuance process.

The original reforms, contained in both the House and Senate would:

- Require federal courts to defer to the independent Occupational Safety and Health Review Commission, rather than OSHA;
- Expand the Commission to five members rather than three, in an effort to increase the stability and efficiency of their decision-making process;
- Enhance the ability of small employers to recover attorney fees and costs incurred when they successfully defend against OSHA citations; and
- Excuse employers from being penalized for filing late notices of contest when lateness is due to "mistake, inadvertence, surprise, or excusable neglect."

See Arthur G. Sapper, *Passage of House Bill Advances Important OSHA Reforms*, LGL. BACKGRND. (WLF), Oct. 1, 2004. The new measures contained in the Partnership Act and Fairness Act go much further, tackling a wide range of problems facing both employers and workers.

The Occupational Safety Partnership Act – S. 2065. The Partnership Act allows business owners to approach worker safety and health more proactively. If enacted, the bill would resolve problems such as the unavailability of third-party safety certification, barriers to alcohol and drug testing in the workplace, and the limited availability of beneficial cooperative programs to smaller businesses.

Third-party safety inspections: Section three of the Partnership Act encourages employers to conduct voluntary safety audits using independent third-party consultants. The section authorizes physicians, engineers, seasoned state inspectors, and others to act as consultants upon licensing. As consultants, they would conduct inspections and deliver a comprehensive report to the employer detailing areas of concerns and recommendations on how to best remedy them. When an employer is found to be in full compliance with OSHA standards, a certificate of compliance is issued providing the employer with immunity from certain civil penalties for a period of two years. The Act provides exceptions to this immunity in the case of bad faith or a fundamental change to the work place, and makes clear that nothing in the Act affects the

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Secretary's right to have the workplace inspected directly.

Workplace alcohol and drug testing: Realizing that drug and alcohol abuse are a common cause of workplace-related injury and death, section four of the Partnership Act eases legal barriers currently preventing employers from instituting drug and alcohol testing programs. The section allows for tests in limited instances including: a) as a condition of employment; b) as a part of a scheduled medical examination; c) for-cause when the employer has reasonable suspicion to believe that the employee is abusing alcohol or drugs; d) in cases of accidents or incidents involving the loss of human life, bodily injury, or property damage; and e) on a random, nondiscriminatory basis.

Voluntary protection programs: Section five of the Act encourages small-business participation in Voluntary Protection Programs. In Voluntary Protection Programs, employers, labor groups, and OSHA officials establish cooperative relationships in an effort to achieve healthy and safe workplaces. In the past, these partnerships have been highly successful; however the program was predominately used only by larger employers.

The Occupational Safety Fairness Act – S. 2066. When the regulatory weight of the federal government descends on private enterprise, the results can be disastrous in terms of efficiency, productivity, and the survival of small business. The Fairness Act aims to make this process more evenhanded to employers by permitting innovative workplace safety methods; allowing for the issuance of warnings rather than citations when violations are quickly corrected; requiring detailed feedback be given to employers after an inspection; modifying the time periods under which a citation may be given or contested; and allowing for civil penalties in the case of certain willful violations of OSHA rules and standards.

Alternative compliance methods: Under current law, employers are allowed little room to innovate and protect workers by the best methods for their particular worksite. The Act remedies this by requiring the Department of Labor to vacate citations issued to employers for violations of OSHA standards when employees have been protected by alternative methods that are *substantially equivalent* or *better* than the standard methods.

Discretionary compliance assistance: Section three permits the Secretary of Labor to issue warnings in lieu of citations for OSHA violations when a violation a) has no significant relationship to employee safety or health, and b) when the employer, in good faith, quickly corrects the problem.

Right to correct violative conditions: Section nine allows employers to correct non-serious, non-repeated, and non-willful violations within seventy-two hours of inspection. If such violations are corrected, the section prohibits the assessment of penalties.

Time limits for issuing and contesting citations: Sections eleven and twelve shorten the time within which OSHA may issue a citation, and expands the time for employers to contest citations, respectively. Under current law, OSHA is only required to issue citations with “reasonable promptness” following an inspection. Section eleven limits OSHA further by requiring citations to be issued within thirty working days of the *initiation* of an inspection. Section twelve allows employers to take more time in contesting citations, replacing the current rule of fifteen days with a more generous thirty days.

Employee Responsibility: Section 16 allows for citations to be issued against employees found in willful violation of certain OSHA rules and standards. The penalties are required not to exceed \$50 per violation, and must be issued within six months following the violation.

Conclusion. These Acts are currently before the Senate Committee on Health, Education, Labor & Pensions. The Occupational Safety Partnership Act and Occupational Safety Fairness Act present critical reforms of the current worker safety and health regime. If enacted, they would not only increase OSHA's efficiency, but transform the inspection and citation process from one which is top-down, and citation driven, to one in which employers and regulators act as partners in their mutual goal of worker safety and health.