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*2d Session*
HOUSE OF REPRESENTATIVES
REPORT
105–732

# TO AMEND THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

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SEPTEMBER 18, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

# REPORT

together with

## MINORITY VIEWS

[To accompany H.R. 2873]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2873) to amend the Occupational Safety and Health Act of 1970, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. STANDARDS.**

Section 6(b)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C 655(b)(2)) is amended by inserting after the first sentence the following: "The notice in the Federal Register shall include identification of the specific industry or industries to which the standard, to be promulgated under the rule, will apply. In promulgating a standard, the Secretary shall ensure that the standard, as applicable to each such industry, is based upon an assessment of the risks to workers in such industry from the hazard which is the subject of the standard, the range of estimates and the best estimate of the quantifiable and nonquantifiable benefits of the standard in each such industry, and an analysis of the costs likely to occur in each such industry as a result of compliance with the standard. To the extent that information is not available on the specific risks to workers in any such industry, the Secretary may determine risks and benefits on information from similar industries, operations, or processes.".

59–006

## PURPOSE

The purpose of H.R. 2873 is to amend the Occupational Safety and Health Act (OSH Act) to provide that proposed occupational safety and health standards identify the industries that will be regulated by the standard, and to require that the information regarding risks to workers and the benefits and costs of the standard be specific to the industries being regulated.

## LEGISLATIVE ACTION

The Subcommittee on Workforce Protections held a series of three hearings in 1997 on the subject of the Occupational Safety and Health Administration's (OSHA's) reinvention plans. Those hearings were the basis of several bills introduced by Representative Cass Ballenger on November 7, 1997, including H.R. 2873.

The first hearing was held on June 24, 1997, to learn the views and perspective of OSHA in its effort to "reinvent" the agency. The Acting Assistant Secretary for OSHA, Greg Watchman, testified at the hearing.

The second hearing was held on July 23, 1997, to examine OSHA's reinvention project, hearing testimony from a variety of individuals who have either studied or had recent experiences with OSHA. The witnesses included Mr. Ronald D. Schaible, Director, Global Safety, AMP Incorporated, Harrisburg, Pennsylvania, testifying on behalf of the National Association of Manufacturers; Ms. M. Kathleen Winters, Corporate Manager, Environmental Health and Safety, Mack Printing Company, Easton, Pennsylvania, testifying on behalf of Printing Industries of America, Inc.; Dr. Gary Rainwater, President, American Dental Association, Dallas, Texas; Mr. James J. Gonzalez, Attorney-at-Law, Holland & Hart LLP, Denver, Colorado; Mr. Richard S. Baldwin, Safety and Health Director, BE & K Engineering and Construction Company, Birmingham, Alabama, testifying on behalf of Associated Builders and Contractors; Professor John Mendeloff, Graduate School of Public and International Affairs, University of Pittsburgh, Pittsburgh Pennsylvania; Ms. Lee Anne Elliott, Executive Director, Voluntary Protection Programs Participants' Association, Falls Church, Virginia; and Mr. Michael J. Wright, Director, Health, Safety and Environment, United Steelworkers of America, Pittsburgh, Pennsylvania.

The third hearing was held on September 11, 1997, to hear from individuals with a first-hand knowledge of OSHA's reinvention program and on changes that should occur as OSHA moves into the 21st century. The following witnesses testified: Mr. Gerald V. Anderson, President, Anderson Construction Company, Inc., Fort Gaines, Georgia, testifying on behalf of the Associated General Contractors of America; Mr. James L. Abrams, Attorney-at-Law, Denver, Colorado; Mr. Frank A. White, Vice President, Organization Resources Counselors, Inc., Washington, DC; Mr. Michael C. Nichols, Vice President, Management Development/Human Resources, SYSCO Corporation, Houston, Texas; Mr. Norbert Plassmeyer, Vice President and Director of Environmental Affairs, Associated Industries of Missouri, Jefferson City, Missouri; and Nicholas A. Ashford, Ph.D, J.D., Professor of Technology and Pol-

icy, Massachusetts Institute of Technology, Cambridge Massachusetts.

The Subcommittee on Workforce Protections held two legislative hearings in 1998 on several bills amending the OSH Act, including H.R. 2873.

The first hearing on legislative proposals to amend the OSH Act was held on March 27, 1998, and the following witnesses testified: Ms. Claudia Brumm, Director, Risk Management, Borg Warner Automotive, Inc., Chicago, Illinois, testifying on behalf of the Labor Policy Association; Mr. Linwood O. Smith, Vice President, Risk and Safety Management, T. A. Loving Company, Goldsboro, North Carolina, testifying on behalf of the Associated General Contractors of America; Mr. James "Mike" McMichael, The McMichael Company, Central, South Carolina, testifying on behalf of the National Association of Home Builders; Mr. Ronald W. Taylor, Attorney-at-Law, Venable, Baetjer & Howard, Baltimore, Maryland, testifying on behalf of the United States Chamber of Commerce; Mr. Jerry Hartman, President, Reese Press, Inc., Baltimore, Maryland, testifying on behalf of the Printing Industries of America, Inc.; and Ms. Margaret M. Seminario, Director, Occupational Safety and Health Department, American Federation of Labor-Congress of Industrial Organizations (AFL–CIO), Washington, DC.

The second hearing on legislative proposals to amend the OSH Act was held on April 29, 1998. The following witnesses testified at the hearing: Mr. Charles N. Jeffress, Assistant Secretary for Occupational Safety and Health, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC; Mr. George R. Salem, Attorney-at-Law/Partner, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC, testifying on behalf of the National Association of Manufacturers; Mr. Richard E. Schwartz, Attorney-at-Law/Partner, Crowell & Moring LLP, Washington, DC, testifying on behalf of the American Iron & Steel Institute; Mr. John W. Bishop, President, Gurnee Heating & Air Conditioning Corporation, Closter, New Jersey, testifying on behalf of Associated Builders and Contractors; Mr. David G. Sarvadi, Attorney-at-Law, Keller and Heckman, Washington, DC; and Mr. Thomas J. Meighen, Safety & Risk Manager and Vice President, Stromberg Sheet Metal Works, Inc., Beltsville, Maryland, testifying on behalf of the Mechanical Electrical Sheet Metal Alliance.

The Subcommittee on Workforce Protections approved H.R. 2873, as amended, by a roll call vote of 6–4 on May 14, 1998, and ordered the bill favorably reported to the Full Committee. The Committee on Education and the Workforce approved H.R. 2873, as amended, by a roll call vote of 23–17 on June 10, 1998, and ordered the bill favorably reported to the House.

## COMMITTEE VIEWS

### NEED FOR LEGISLATION

Section 6 of the OSH Act authorizes the Secretary of Labor to issue occupational safety and health standards and establishes

most of the criteria and procedures for such standards.[1] Since the OSH Act was enacted in 1970, OSHA has issued approximately 75 health and safety standards.[2] Despite the relatively few standards issued, OSHA's standards have been widely criticized as excessively costly and ineffective in reducing injuries and illnesses.[3]

In 1995, President Clinton made reform of OSHA's standards-setting process one of his Administration's three goals for "OSHA reinvention." Implying his agreement with criticisms of past OSHA standards, President Clinton defined the Administration's goal for standards in "the New OSHA" as "worker safety rules [which] are as simple and sensible and flexible as they can be."[4]

Whether and to what extent OSHA has met this goal and improved its standards-setting process was one of the questions raised by a series of hearings conducted by the Subcommittee on Workforce Protections in 1997. The testimony of the witnesses showed that OSHA has made few improvements in its standards-setting process and has given little assurance that future occupational safety and health standards would be an improvement over past standards, or would meet the President's goal of rules that are "simple and sensible and flexible."

For example, Mr. Ronald D. Schaible, Director, Global Safety, AMP Incorporated, Harrisburg, Pennsylvania, expressed concern about two of OSHA's pending rulemakings, on ergonomics and on safety and health programs. Mr. Schaible criticized such "super regulation of the workplace" which "regulates every aspect of work in an extreme manner. * * * It is not possible for OSHA to always anticipate how a rule may affect industry. Often laws and regulations have unintended consequences. In the case of OSHA, compliance with a regulation may seem entirely feasible to agency staff, but it may be that for some industries, compliance is difficult and would incur significant costs without improving safety and health."[5]

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[1] 29 U.S.C. Section 655. In addition to the criteria and procedures for promulgation of standards in section 6, the definition of "occupational safety and health standard" in section 3(8) of the OSH Act, 29 U.S.C. Section 652(8), requires that such standards be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

[2] "Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health," pp. 6–8 (Office of Technology Assessment, 1995). Section 6(a) of the OSH Act authorized the Secretary of Labor to adopt "national consensus standards" and existing federal standards during the first two years after enactment. OSHA enforces these standards in addition to the 75 standards issued under section 6(b).

[3] See, e.g., the summary of studies of the costs and benefits of OSHA regulations in Max Lyons, "The Economics of Workplace Safety," (Washington, DC: The Employment Policy Foundation, 1996) and in Kniesner and Leeth, "Abolishing OSHA," "Regulation," Number 4 (1995). A more personal account of the impact of the ineffectiveness of OSHA standards in improving safety and health was given in testimony before the Subcommittee on Workforce Protections on June 20, 1995, by Vitas Plioplys, Manager of Safety Services, R.R. Donnelley and Sons Company, testifying on behalf of the Printing Industries of America, Inc. He testified that when his company focused their safety program on compliance with OSHA standards, accident rates and workers compensation costs went up. "In the beginning of 1992, we returned to our historical focus on managing safety and not compliance. * * * With this change in our fundamental working, the results have been a 16 percent decrease in accident rate, a 15 percent decrease in lost time accident rates, and workers compensation costs per claim reduction of 24 percent." He concluded, "OSHA compliance is still a part of our safety program, but it no longer drives our safety program. Safety drives our safety program. We manage safety to prevent accidents and to reduce costs. We comply with OSHA because we have a legal obligation."

[4] Remarks by the President on Reinventing Worker Safety Regulation, delivered at Stromberg Sheet Metal Works, Inc., Washington, DC, May 16, 1995.

[5] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, "Hearings to Examine the Occupational Safety and Health Administration's Reinvention Project," 105th Cong., 1st sess., ser. no. 105–25. Testimony of Mr. Ronald D. Schaible, Director, Global Safety, AMP Incorporated, Harrisburg, Pennsylvania, July 23, 1997.

Similarly, Ms. M. Kathleen Winters, Corporate Manager, Environmental Health and Safety, Mack Printing Company, Easton, Pennsylvania, described OSHA's enforcement of one particular OSHA standard in her company's printing operations. The standard was not written with the printing industry in mind, and OSHA enforcement personnel had given inconsistent interpretations with regard to its application to printing operations. As a result, Ms. Winters' company was faced with a competitive disadvantage which threatened to put the company out of business. Ms. Winters concluded: "The problem with one-size-fits-all regulation is what works great in one industry, may not be feasible in others." [6]

Dr. Gary Rainwater, President, American Dental Association, Dallas, Texas, testified that from the point of view of his association some of the changes made by OSHA's "reinvention" efforts had been positive: "In any event, the truth is this: the dental profession's relationship with OSHA today is better than it ever has been. There is an important caveat, however. At the moment, OSHA is developing a number of standards that could have a major impact on dental offices." Dr. Rainwater went on to express his concern that there was no assurance that OSHA would "regulate with a more discriminating hand" with regard to dentistry than had been the case in the past.[7]

Mr. Michael C. Nichols, Vice President, Management Development/Human Resources, SYSCO Corporation, Houston, Texas, also addressed the issue of OSHA rulemaking in his assessment of OSHA's reinvention: [8]

> * * * Several of OSHA's pending, significant rulemaking initiatives—its desired safety and health program standard, its contemplation of an indoor air pollution rule, and of course its long-desired standard for workplace ergonomics programs— continue to cause enormous concerns for employers, including those in our industry. * * *
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> [W]e are very skeptical of such initiatives because they are supported by inadequate science, are likely to be vague in critical respects (raising daunting compliance challenges), and seek to superimpose uniform Federal government "solutions" to problems and safety challenges that many employers successfully handle on their own. * * *
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> Of course, a major concern that employers have with these potential rules is how they will be applied and enforced in the field. Many of us are enormously troubled by the expanded authority that may be provided by rules of very broad scope, which can be used as something approaching a 'catch-all' penalty provision where no standard exists, and/or as a source of additional penalty 'multipliers' * * * The possibility that such a rule might be utilized as a 'super regulation,' enforced by the same compliance officers who do not appear to be in step with 'partnership'

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[6] Ibid. Testimony of Ms. M. Kathleen Winters, Corporate Manager, Environmental Health and Safety, Mack Printing Company, Easton, Pennsylvania, July 23, 1997.

[7] Ibid. Testimony of Dr. Gary Rainwater, President, American Dental Association, Dallas, Texas, July 23, 1997.

[8] Ibid. Testimony of Mr. Michael C. Nichols, Vice President Management Development/Human Resources, SYSCO Corporation, Houston, Texas, September 11, 1997.

concepts, is a prospect that is—to say the least—unwelcome.

Raising a similar concern with regard to OSHA's draft proposed standard on ergonomics, Mr. Jerry Anderson, President, Anderson Construction Company, Inc., Fort Gaines, Georgia, testified that—[9]

> Although several policies within OSHA have been changed by the "Reinvent" initiative, one policy area within OSHA remains unchanged—OSHA's regulatory agenda. Presently, OSHA has several major rulemakings in progress that reflect the one-size-fits-all regulatory strategy that is common with the old way of thinking within OSHA.
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> The draft ergonomics standard is the best example of the "one-size-fits-all" regulatory approach of OSHA. * * * The compliance costs of the proposed ergonomics standard could be in the billions of dollars. The job task analysis required by the proposed ergonomics standard could force construction companies to 're-engineer' every construction job, with no guarantees that the changes will prevent repetitive motion injuries. The result of the proposed ergonomics standard will be higher construction costs transferred to consumers, and fewer job opportunities for construction workers.

The consistent message from these and other witnesses before the Committee is that changes are needed to improve OSHA's standards and to realize President Clinton's stated goal "that worker safety rules are as simple and sensible and flexible as they can be." To address the continued problems and concerns with OSHA's standards-setting, the Committee on Education and the Workforce has considered and passed two bills, H.R. 2661, the Sound Scientific Practices Act of 1997, and the bill which is the subject of this report, H.R. 2873.

## EXPLANATION OF LEGISLATION

H.R. 2873, as passed by the Committee on Education and the Workforce, adds two provisions to section 6(b)(2) of the OSH Act. First, the bill requires that when OSHA issues a notice of proposed rulemaking for a standard, as provided in section 6(b)(2) of the OSH Act, it must include in the proposed rule specific identification of the industry or industries to which the standard will apply. Second, H.R. 2873 requires that the assessment of risks to worker health and safety and the analysis of benefits and costs of the standard—the technical economic and scientific data which is the basis of the standard—relate specifically to the industries being regulated.

The first requirement of H.R. 2873, that proposed standards identify the specific industries to which the standard will apply, in effect "codifies" the procedure adopted by OSHA in its recent proposed rule on tuberculosis. (62 F.R. 54160–54308) The proposed

[9] Ibid. Testimony of Mr. Gerald V. Anderson, President, Anderson Construction Company, Inc., September 11, 1997.

standard on occupational exposure to tuberculosis specifies that the standard would apply to ten "industries" or workplace settings: hospitals, long-term care facilities for the elderly, correctional facilities, hospices, shelters for the homeless, drug abuse treatment facilities, facilities conducting high-hazard procedures (as defined in the standard), certain laboratories and emergency medical services, home health care, and home-based hospice care.

OSHA's action in limiting the scope of the proposed tuberculosis standard by specifying the workplace settings to which the standard would apply is in contrast to the procedure used in the preceding standard written primarily for occupational exposures in health care settings, the standard on bloodborne pathogens. (29 C.F.R. Section 1910.1030) OSHA's failure in the case of the bloodborne pathogens standard to identify the scope of the standard during the rulemaking led to a great deal of confusion after the standard was issued as to whether individuals in various non-health care settings were covered by the requirements of the standard.[10]

Specifically identifying the intended scope of a proposed standard benefits both OSHA and the affected industries. Identifying the scope of the standard should help OSHA to limit the issues involved in the standard and focus its attention on those issues in the rulemaking process.[11] On the other hand, industries deserve fair notice that they will be covered by a proposed OSHA standard—notice which they do not now always receive. For example, during hearings on H.R. 2873, Mr. Richard E. Schwartz described the lack of notice to the steel industry in the case of an asbestos standard: [12]

> [Regarding the notice requirements of H.R. 2873,] I'd like to relate two lessons learned by the American Iron & Steel Institute from its experience with the asbestos standard. First is that ignorance is not bliss. We discovered that we were covered by the asbestos standard only after it was promulgated. The reason was that it was regarded as a construction industry standard, and historically, general

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[10] The standard appeared to cover any employee who could "reasonably anticipate" contact with skin, eye, mucous membrane, or blood. After the standard was issued and the standard's broad scope became evident, OSHA was forced to more carefully define the scope of the standard through a series of "compliance directives." See, Bor and Artz, eds., "Occupational Safety and Health Law, 1997 Cumulative Supplement" (BNA Books, 1997), pp. 476–477. Nonetheless, the standard remains a primary example of a "one-size-fits-all" government regulation that made little sense in many of the workplaces to which it applied. For example, on February 16, 1995, the Subcommittee on Oversight and Investigations conducted a hearing on "The Need for Regulatory Reform: The Case of OSHA and NIOSH." Dr. Connie Verhagen, testifying on behalf of the American Dental Association, stated, "The OSHA bloodborne pathogen standard was established to protect workers from exposure to bloodborne pathogens but with hospitals primarily in mind. Consequently, some portions of the standard are unnecessary and costly for dental offices. Based on the Dental Association's study, this standard costs each dental practice an average of $23,700 annually. This amount is 27 times greater than the OSHA cost estimates. * * * Dentists in general are very willing to comply with reasonable regulations, but we are a science-based profession. We want to be sure that what we are told to do is necessary and effective. We also want to be shown that the benefit justifies the additional costs."

[11] In subsequent proceedings on OSHA's tuberculosis standard, considerable attention and focus has been given to whether a standard written primarily for hospitals and similar health care settings is appropriate to homeless shelters. It is less likely that such a focus on the particular circumstances of homeless shelters would occur if OSHA were attempting to write a standard that applied to all employers.

[12] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, "Review of the Occupational Safety And Health Act," 105th Cong., 2nd sess. Testimony of Mr. Richard E. Schwartz, Attorney-at-Law/Partner, Crowell & Moring LLP, Washington, DC, testifying on behalf of the American Iron & Steel Institute, April 29, 1998.

industries like the steel industry are not covered by construction standards. The notices were simply inadequate to inform AISI's members that they would be covered, even though they're experienced professionals who make it their life's work to deal in these sorts of matters. As a result of this ignorance, there were no AISI comments, no steel industry comments on the proposed standard. The final standard had no analysis of the risks that asbestos might pose to the steel workers, and as a result of that, AISI commenced litigation. That was followed by protracted settlement discussions with OSHA which eventually ended in agreement, but only after both OSHA and the steel industry had expended an immense amount of time that should not have been required, and would not have had to happen if the notice had been proper in the first place.

The second lesson that AISI learned from the asbestos experience is that life is short, but the Federal Register is long. The final rule covered almost 200 pages; the coverage of the steel industry could only be discovered by wading through it, and finding mention of the industry in a couple of pages of the Federal Register. Although the AISI member companies have experienced professionals who make it their life's work to protect their workforces, it is a waste of their time to have to wade through lengthy Federal Register notices that don't apply to them.

What this bill would do is require OSHA to make it clear up-front, exactly who the proposed or final regulation does apply to. This will not only allow us to know that we're covered, but at the proposal stage will make for better regulations because affected industries will be able to comment on what OSHA has proposed.

Similarly, in 1994, OSHA issued a revised safety standard for logging operations. (29 C.F.R. Section 1910.266) There was no mention in the proposed or final rule of application of the standard to industries outside of logging. Nonetheless, more than three years after the standard was issued, in March 1998, OSHA announced that the logging standard also applied to tree care work, despite the fact that arborists did not have notice that they would be covered when the standard was proposed and did not participate in the rulemaking process. H.R. 2873 would prohibit such unfair and arbitrary actions by OSHA.[13]

H.R. 2873 requires that a proposed standard include identification of the specific industry or industries to which the standard will apply. The bill does not further define the term "industry." In some cases, OSHA may best notify the affected industries by listing the most specific Standard Industrial Classification (SIC) numbers of the industries affected. In other cases, fair notice may be better given by identifying types of workplaces which may be more specific than SIC numbers, such as OSHA did in the proposed tuberculosis standard. In each case the purpose of this requirement is

[13] The tree care industry protested OSHA's March 1998 announcement, and in the face of threatened legal action, OSHA has indicated that it may rescind its decision to apply the logging standard to the tree care industry.

to ensure that OSHA identifies the scope of the standard when the standard is proposed so that both OSHA and the affected industries have fair notice of the rulemaking and full opportunity to see that the differing circumstances and concerns of different industries and workplaces are adequately addressed in the rulemaking process.

As described above, in addition to requiring OSHA to identify which industry or industries will be covered by the proposed rule, H.R. 2873 also requires that OSHA's risk assessment and estimates of costs and benefits used to justify the standard be related to the industry or industries which will be regulated.

Generally the federal courts already require OSHA to do the type of "industry-specific" analysis that H.R. 2873 requires. H.R. 2873 "codifies" this requirement, applies it uniformly and consistently to OSHA standards, and ensures that OSHA will conduct such industry-specific analysis in the rulemaking process, rather than waiting for a reviewing court to remand the case before conducting industry-specific analysis.

In testimony on H.R. 2873, Assistant Secretary for Occupational Safety and Health Charles N. Jeffress acknowledged that "cost estimates and feasibility analyses are commonly conducted at the industry level," and therefore H.R. 2873 does not involve a change in what OSHA is required to do with regard to economic data.[14] Indeed, OSHA has consistently been ordered to consider economic and feasibility information on an industry-specific basis when standards have been challenged in federal court on the basis of OSHA's failure to do so.[15]

Mr. Jeffress did, however, disagree with the requirement in H.R. 2873 that OSHA also provide industry-specific information on risks to workers. He, along with other opponents of H.R. 2873, argued that it would put an impossible burden on OSHA because the agency often does not have sufficient information on workers in each industry to conduct a full risk assessment of the health risk to workers in that industry from the hazard which is the subject of the regulation.[16]

In response to the Assistant Secretary's concern, H.R. 2873 was amended during markup by the Subcommittee on Workforce Protections to clarify that it does not require a full risk assessment of employees in each industry to which the standard applies. During the Subcommittee markup the following sentence was added to the bill as introduced: "To the extent that information is not available on the specific risks to workers in any such industry, the Secretary may determine risks and benefits on information from similar industries, operations, or processes." Thus if risk information specific to workers in an industry which OSHA seeks to regulate is not

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[14] Workforce Protections Subcommittee hearing of April 29, 1998; testimony of Assistant Secretary Charles N. Jeffress, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC.

[15] See, for example, *Color Pigments Manufacturers Ass'n., Inc.* v. *OSHA,* 16 F.3d 1157 (11th Cir. 1994) (challenging OSHA's cadmium standard); *AFL–CIO* v. *OSHA,* 965 F. 2d 962 (11th Cir. 1992) (challenging OSHA's permissible exposure limits for 428 chemical substances); *Building & Construction Trades Dept., AFL–CIO* v. *Brock,* 838 F. 2d 1258 (DC Cir. 1988) (challenging OSHA's asbestos standard); *United Steelworkers of America, AFL–CIO* v. *Marshall,* 647 F.2d 1189 (DC Cir. 1981) (challenging OSHA's lead standard).

[16] Workforce Protections Subcommittee hearing of April 29, 1998; testimony of Assistant Secretary Charles N. Jeffress, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC.

available to OSHA, OSHA may meet its burden of providing "industry-specific" analysis of risk by showing in the rulemaking why it believes that those risks are comparable to another group of workers for whom information is available.

By requiring OSHA to provide this industry-specific information on the level of risk to workers, H.R. 2873 clarifies an issue on which court decisions have been split, and on which the courts seem generally reluctant to specify a result in the absence of clear legislative language. In *Color Pigments Manufacturers Association* v. *OSHA,* 16 F.3d 1157 (11th Cir. 1994), the Court of Appeals, without specifically addressing whether there is a general requirement for industry-specific risk assessment, found OSHA's cadmium standard deficient with regard to the dry color formulator industry because OSHA had not assessed the risks specific to workers in that industry: "OSHA first determined the existing airborne levels of cadmium in the industry. However, the method OSHA employed in doing so was inadequate. Rather than analyzing exposure levels in the dry color formulator industry, OSHA analyzed such exposures generically. * * * In this case, the method of determining these initial levels was unreliable and insufficient, since the workers and plants to which the dry color formulator industry was analogized were not shown to be sufficiently similar to justify such a comparison." *Color Pigments Manufacturers,* at 1162–1163.

On the other hand, in *American Dental Association* v. *Martin,* 984 F.2d 823 (7th Cir. 1993), the Seventh Circuit Court of Appeals, ruling on a challenge to OSHA's bloodborne pathogens standard, agreed that OSHA "cannot impose onerous requirements on an industry that does not pose substantial hazards to the safety and health of its workers merely because the industry is part of some larger sector or grouping and the agency has decided to regulate at wholesale." at 827. But in that case the Seventh Circuit ruled that OSHA could effectively meet its burden for "industry-specific" assessment of risk by stating that the risks in any industry are similar to those in other industries—"OSHA was required neither to quantify the risk to workers' health nor to establish the existence of significant risk to a scientific certainty"—and the burden was on each individual industry or sector to show that the risks to workers in that industry were different. at 827.

In *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW* v. *OSHA,* 938 F.2d 1310 (DC Cir. 1991), the Court of Appeals considered an appeal of OSHA's "lockout/tagout" standard dealing with how and when electrical equipment must be disabled during maintenance and servicing. Among other issues before the court was OSHA's failure to disaggregate risk information. at 1322.

> Uncontrolled energy unquestionably poses greater risks in some industries than in others. Even among the manufacturing industries that OSHA classifies as 'high impact' for purposes of the lockout regulation, a report by OSHA's consultants shows a nearly 20-fold difference between the high and low injury rates. And the observed injury rate was zero in many of the 'low impact' and 'negligible impact' industries covered by the lockout regulation.

> OSHA nowhere explains its logic. Just because paper mill equipment (which was already subject to a lockout requirement) poses a significant hazard does not mean that sewing machines do. While we have recognized OSHA's need to avoid 'miniscule industry subcategories' for administrative convenience, (citing case) there are no obvious barriers to disaggregation here. In fact, OSHA has in past years promulgated a wide variety of industry- and equipment-specific lockout standards. As we have insisted that OSHA explain its refusal to disaggregate at the behest of unions claiming that reliance on overbroad categories denied them adequate protection, we similarly remand for it to explain how its aggregated approach here conforms to its interpretation of the Act.

The main issue on remand of the lockout/tagout standard was whether the standards-setting authority, as a whole, granted to the Secretary of Labor under the OSH Act, was an unconstitutional delegation of legislative authority. In "Lockout/Tagout II" (*International Union, United Automobile, Aerospace, & Agricultural Workers of America, UAW* v. *OSHA,* 37 F.3d 665 (DC Cir, 1994), the court of appeals decided that OSHA had met the burden of showing that the statute as construed by OSHA is constitutional. On the secondary question of whether OSHA was required to "disaggregate" risk data, as the court of appeals suggested was required in its initial decision, after the remand the court instead took a position closer the Seventh Circuit's position in *American Dental Association* v. *Martin,* 984 F.2d 823, suggesting that the burden is on the party challenging a standard to justify such a requirement. *International Union,* at 675.

The variety of outcomes in these cases demonstrates the need to clarify OSHA's obligations with regard to industry-specific risk assessment. Under H.R. 2873, OSHA must justify the application of a standard to each industry to which the standard would apply; the burden does not shift to a party challenging a standard to justify specific consideration of the risks to the workers in each industry. This is consistent with OSHA's obligation to demonstrate that a hazard constitutes a "significant risk" to workers before it may regulate that hazard.[17] The Department of Labor apparently reads the current state of the law as allowing it to assume "significant risk" exists, rather than requiring it to demonstrate significant risk exists, whenever it claims that a hazard affecting workers in one industry also may affect workers in an entirely different industry.[18] Not only is this a misreading of the current law, but also, as one witness before the Committee pointed out, the Department's position means that the easiest way for OSHA to conclude "that there is significant risk in all sectors [is] by avoiding looking at them in detail." [19]

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[17] *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute,* 448 U.S. 607 (1980).

[18] Letter from Secretary of Labor Alexis Herman to the Honorable William F. Goodling, Chairman, Committee on Education and the Workforce, June 10, 1998.

[19] Workforce Protections Subcommittee hearing of April 29, 1998; testimony of Mr. David G. Sarvadi, Attorney-at-Law, Keller and Heckman, Washington, DC.

As described above, H.R. 2873 does not require that a complete risk assessment be conducted for every industry, nor for every minor change in a regulation.[20] It does, however, require that, at a minimum, OSHA consider the specific risks to workers in each industry to which a new standard applies, either by conducting a risk assessment based on data from that industry or by showing that the risks are comparable to those of workers in another industry for which detailed information is available. Such industry-specific analysis is essential to ensuring that standards are "sensible" in the workplaces to which they apply.

## SUMMARY

H.R. 2873 requires the Secretary of Labor to publish in a proposed rule for an occupational safety and health standard the list of industries to which the standard will apply. The bill also requires that information on risk to workers and on the costs and benefits of the standard which provide the scientific and economic basis for the standard contain information and analysis specific to the industries being regulated.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1. STANDARDS

This section amends section 6(b)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 655(b)(2)) and requires the agency to identify the specific industries that it intends to regulate when it proposes a standard. This section also requires industry-specific analysis of risk, benefits, and costs.

## EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill amends the Occupational Safety and Health Act (OSH Act) to provide that proposed occupational safety and health standards identify the industries that will be regulated by the standard, and to require that the information regarding risks to workers and the benefits and costs of the standard, on which the standard is based, be specific to the industries being regulated. The bill does not prevent legislative branch employees from receiving the benefits of this legislation.

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[20] Secretary of Labor Alexis Herman makes this claim in her letter of June 10, 1998, to Chairman Goodling. H.R. 2873 does not apply to "minor changes in a regulation." It does require that if a standard is applied to new industries, that the industry be given notice and opportunity to comment, and that OSHA demonstrate, rather than assume, risks to workers in that industry and the benefits of the standard in reducing that risk.

## CONSTITUTIONAL AUTHORITY STATEMENT

The Occupational Safety and Health Act and the amendments thereto made by this bill are within Congress's authority under Article I, section 8, clause 3 of the Constitution.

## UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill amends the Occupational Safety and Health Act (OSH Act) to provide that proposed occupational safety and health standards identify the industries that will be regulated by the standard, and to require that the information regarding risks to workers and the benefits and costs of the standard, on which the standard is based, be specific to the industries being regulated. As such, the bill does not contain any unfunded mandates.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 2(l)(3)(A) of rule XI and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

## STATEMENT OF OVERSIGHT FINDINGS OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 2873.

## COMMITTEE ESTIMATE

Clause 7 of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 2873. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act.

## BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 2(l)(3)(B) of rule XI of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 2(l)(3)(C) of rule XI of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2873 from the Director of the Congressional Budget Act:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, July 14, 1998.*

Hon. WILLIAM F. GOODLING,
*Chairman, Committee on Education and the Workforce,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2873, a bill to amend the Occupational Safety and Health Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cyndi Dudzinski.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

*H.R. 2873—A bill to amend the Occupational Safety and Health Act*

Summary: H.R. 2873 would require the Secretary of Labor when promulgating, modifying, or revoking an occupational safety and health standard to identify the industries affected. The Secretary would have to ensure that the standard as applied to each industry is based upon an industry-specific assessment of the risks, benefits, and costs. If information on a particular industry affected is not available, the Secretary would be able to use information from a similar industry to assess the effects of the standard.

The Occupational Health and Safety Administration (OSHA), administers such standards. H.R. 2873 would require OSHA to do more extensive analysis when setting or amending standards than it does under current law. If appropriations are made in the full amount of the additional resources required to fulfill the requirements of this legislation, CBO estimates that H.R. 2873 would result in additional discretionary spending of $2 million over the 1999–2003 period.

H.R. 2873 would not affect direct spending or receipts; therefore pay-as-you-go procedures would not apply. The legislation also does not contain any intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not have a significant effect on the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 2873 is shown in the following table. The costs of this legislation fall within budget function 550 (health).

[By fiscal year, in millions of dollars]

| | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 |
|---|---|---|---|---|---|---|
| SPENDING SUBJECT TO APPROPRATION | | | | | | |
| Spending Under Current Law: | | | | | | |
| Budget authority [1] | 336 | 348 | 360 | 372 | 384 | 396 |
| Estimated outlays | 335 | 347 | 358 | 370 | 382 | 394 |
| Proposed Changes: | | | | | | |
| Authorization level | 0 | (2) | (2) | (2) | 1 | 1 |
| Estimated outlays | 0 | (2) | (2) | (2) | (2) | 1 |
| Spending Under H.R. 2873 | | | | | | |
| Authorization level[1] | 336 | 348 | 360 | 372 | 385 | 397 |
| Estimated outlays | 335 | 347 | 358 | 370 | 382 | 395 |

[1] The 1998 level is the amount appropriated for that year.
[2] Less than $0.5 million.

Basis of estimate: Under current law when OSHA makes a rule, it conducts risk assessment, feasibility studies, and benefit evaluations on a level it deems necessary. Benefit analysis is done on an aggregate basis and cost analysis is done on an industrial sector level. The bill would require significant additional benefit analysis and, depending on the detail in which industries would be defined, would require more detailed cost analysis as well.

Assuming that OSHA already performs cost analysis in sufficient detail and using information from OSHA, CBO estimates that additional benefit analysis for each standard would require $70,000 in additional contract costs and about one-quarter of one employee's time. OSHA promulgates or modifies about 5 standards per year. In total, CBO estimates that H.R. 2873 would increase OSHA's costs by about $0.4 million in fiscal year 1999. If appropriations are made in the full amount of these additional costs, discretionary federal spending would increase by $2 million over the 1999–2003 period. Cost could increase as much as $1 million in fiscal year 1999 if "industry" is defined in more detail that the industrial sector level. The estimate assumes that appropriations would be made by the start of each fiscal year and that outlays would follow the historical spending patterns for OSHA.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: H.R. 2873 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not have a significant effect on the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Cyndi Dudzinski. Impact on State, Local, and Tribal Governments: Marc Nicole. Impact on the Private Sector: Kathryn Rarick.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

# ROLL CALL VOTE

**COMMITTEE ON EDUCATION AND THE WORKFORCE**

**ROLL CALL 1** **BILL H.R. 2873** **DATE June 10, 1998**
**PASSED 23 - 17**

**SPONSOR/AMENDMENT** Mr. Ballenger / motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to and that the bill as amended do pass

| MEMBER | AYE | NO | PRESENT | NOT VOTING |
|---|---|---|---|---|
| Mr. GOODLING, Chairman | X | | | |
| Mr. PETRI, Vice Chairman | X | | | |
| Mrs. ROUKEMA | X | | | |
| Mr. FAWELL | X | | | |
| Mr. BALLENGER | X | | | |
| Mr. BARRETT | | | | X |
| Mr. HOEKSTRA | X | | | |
| Mr. McKEON | X | | | |
| Mr. CASTLE | X | | | |
| Mr. JOHNSON | X | | | |
| Mr. TALENT | | | | X |
| Mr. GREENWOOD | X | | | |
| Mr. KNOLLENBERG | X | | | |
| Mr. RIGGS | X | | | |
| Mr. GRAHAM | X | | | |
| Mr. SOUDER | X | | | |
| Mr. McINTOSH | X | | | |
| Mr. NORWOOD | X | | | |
| Mr. PAUL | X | | | |
| Mr. SCHAFFER | X | | | |
| Mr. PETERSON | X | | | |
| Mr. UPTON | X | | | |
| Mr. DEAL | X | | | |
| Mr. HILLEARY | X | | | |
| Mr. PARKER | X | | | |
| Mr. CLAY | | X | | |
| Mr. MILLER | | | | X |
| Mr. KILDEE | | X | | |
| Mr. MARTINEZ | | X | | |
| Mr. OWENS | | X | | |
| Mr. PAYNE | | X | | |
| Mrs. MINK | | X | | |
| Mr. ANDREWS | | X | | |
| Mr. ROEMER | | X | | |
| Mr. SCOTT | | X | | |
| Ms. WOOLSEY | | X | | |
| Mr. ROMERO-BARCELO | | | | X |
| Mr. FATTAH | | X | | |
| Mr. HINOJOSA | | X | | |
| Mrs. McCARTHY | | X | | |
| Mr. TIERNEY | | X | | |
| Mr. KIND | | | | X |
| Ms. SANCHEZ | | X | | |
| Mr. FORD | | X | | |
| Mr. KUCINICH | | X | | |
| **TOTALS** | 23 | 17 | | 5 |

## MINORITY VIEWS

We strongly oppose H.R. 2873 as reported by the Committee. H.R. 2873 effectively prohibits the Occupational Safety and Health Administration (OSHA) from issuing broad standards to protect workers. H.R. 2873 requires OSHA to perform separate and individual risk assessments and economic feasibility studies on every industry affected by a proposed standard before OSHA may promulgate the standard. This legislation renders it virtually impossible for OSHA to issue an indoor air quality standard, an asbestos standard, or a safety and health program standard that affects large numbers of workers across many industries. To simply name every industry that might be affected by a safety and health program standard is an exceedingly difficult proposition. To then conduct a separate risk assessment and economic feasibility study for each of the affected industries would be practically impossible.

The requirements that H.R. 2873 would impose on OSHA are not only impractical, they are also illogical. The same amount of methylene chloride is likely to cause cancer regardless of the industry in which the employee works. There is no reasonable basis for requiring OSHA to do a separate risk assessment for every industry in which workers are exposed to methylene chloride. Yet, H.R. 2873 requires OSHA to perform separate analyses.

OSHA is already generally required to conduct industry specific economic feasibility analyses and the failure to do so may serve as a basis for setting aside the standard. The recently issued methylene chloride standard, for example, included extensive economic feasibility studies of all industries using methylene chloride. However, the current requirement is subject to reasonable interpretation. For example, if OSHA changed the ladder standard, it is unlikely that OSHA would perform or that a court would require OSHA to perform, a separate economic feasibility study for every industry using ladders. H.R. 2873, however, imposes such a requirement.

Industry specific data on costs and risks is often not readily available. In Subcommittee an amendment was adopted that seeks to account for this by providing that the Secretary of Labor must determine risks and benefits for similar industries where information regarding a specific industry is not available. Is the Secretary to have sole discretion as to whether information is available and what constitutes a similar industry, operation, or process? If not, then we are inviting endless litigation over such matters. The bill is silent on this important point.

Many contend that the existing process by which standards are developed is already seriously flawed. It took between 12 and 16 years for OSHA to issue standards on respiratory protection, methylene chloride and 1,3-butadiene. In the meantime, workers contin-

ued to suffer injuries and illnesses. H.R. 2873 will only serve to slow the process further.

More than 6,000 workers are killed every year in workplace accidents. Between 50,000 and 70,000 workers die every year as a result of occupational illnesses. There are 350,000 new cases of occupational illness a year. Workplace injuries and illnesses cost businesses in excess of $65 billion a year in direct costs. Indirect costs impose more than $100 billion in additional costs on businesses. The costs of occupational injuries and illnesses to the economy exceed those of HIV-AIDS and are comparable to the costs imposed by heart disease and cancer.

If we are serious about improving the health and safety of American workers, we should be seeking methods to improve the efficiency with which occupational safety and health standards are regulated. H.R. 2873 would instead bring that process to a grinding halt. H.R. 2873 is bad legislation that promotes government inefficiency and waste. More seriously, it jeopardizes the health and welfare of workers and their families.

WILLIAM L. CLAY.
DALE E. KILDEE.
MAJOR R. OWENS.
PATSY T. MINK.
LYNN WOOLSEY.
CAROLYN MCCARTHY.
RON KIND.
HAROLD E. FORD, JR.
GEORGE MILLER.
MATTHEW G. MARTINEZ.
DONALD M. PAYNE.
ROBERT E. ANDREWS.
BOBBY SCOTT.
CARLOS ROMERO-BARCELÓ.
RUBÉN HINOJOSA.
JOHN F. TIERNEY.
LORETTA SANCHEZ.
DENNIS J. KUCINICH.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

## SECTION 6 OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Sec. 6. (a) * * *

(b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) * * *

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. *The notice in the Federal Register shall include identification of the specific industry or industries to which the standard, to be promulgated under the rule, will apply. In promulgating a standard, the Secretary shall ensure that the standard, as applicable to each such industry, is based upon an assessment of the risks to workers in such industry from the hazard which is the subject of the standard, the range of estimates and the best estimate of the quantifiable and non-quantifiable benefits of the standard in each such industry, and an analysis of the costs likely to occur in each such industry as a result of compliance with the standard. To the extent that information is not available on the specific risks to workers in any such industry, the Secretary may determine risks and benefits on information from similar industries, operations, or processes.* Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

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