

## Calendar No. 300

105TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
105-159

### SAFETY ADVANCEMENT FOR EMPLOYEES ACT OF 1997

JANUARY 27, 1998.—Ordered to be printed

Mr. JEFFORDS, from the Committee on Labor and Human  
Resources, submitted the following

## REPORT

together with

### ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1237]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1237) to amend the Occupational Safety and Health Act of 1970 to further improve the safety and health of working environments, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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## I. PURPOSE OF LEGISLATION

The Occupational Safety and Health Act (OSH Act) of 1970 paved the way for the creation of the Occupational Safety and Health Administration (OSHA) within the U.S. Department of Labor. The 1970 act charged OSHA with ensuring safe and healthful working conditions for all workers “by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment.”<sup>1</sup> Since its creation, critics have bitterly debated whether OSHA has met its statutory mandate.

OSHA has consistently relied upon an adversarial approach rather than placing a greater emphasis on a collaborative strategy geared toward increasing worker safety and health. The committee believes that the agency’s approach has failed American workers because it falls short of effectively addressing safety problems or helping employers in their compliance efforts. Even while OSHA admits that “95 percent of the employers in the country do their level best to try to voluntarily comply” with the law, the agency still treats those employers as adversaries—issuing them citations for what they haven’t done rather than assisting them in complying with regulations to make the workplace safer.<sup>2</sup> The result of this approach has been an unproductive enforcement climate which is ineffective and frustrating for both employers and workers, as it fosters poor communication and little cooperation between OSHA and the business and labor communities.

Critics have claimed that OSHA has operated since its conception as a reactionary regulator—inspecting worksites primarily after a fatality or injury has occurred. While it is important that OSHA retain its ability to enforce the law and respond to employee complaints in a timely fashion, it is apparent that the agency can maintain those objectives and still broaden preventative initiatives so that fewer workplace fatalities and injuries occur. The committee is convinced that OSHA is primarily geared to address workplace safety and health after injuries and fatalities have occurred and urges OSHA to place a greater emphasis on being a preventative regulator.

The Safety Advancement for Employees Act of SAFE Act, S. 1237, is structured to increase the joint cooperation of employers, employees, and OSHA in the effort to improve safe and healthful working conditions for employees. By strengthening and expanding voluntary and cooperative compliance initiatives currently available to employers while preserving OSHA’s enforcement responsibilities, the objectives prescribed by Congress when it wrote the act in 1970 will finally be achieved.

The SAFE Act reflects a new approach to worker safety that is centered on cooperation. This important legislation has been crafted to promote and enhance workplace safety and health—rather than dismantle it. The SAFE Act would not waive any of OSHA’s power to inspect workplaces, but it would recognize that employers who actively seek expert assistance to improve safety should not be

<sup>1</sup> Occupational Safety and Health Act, 29 U.S.C. 651(b)(1)(1970).

<sup>2</sup> See Ellen Byerrum, “Decline in Inspection Numbers Prompts Renewed Enforcement Emphasis, Says OSHA,” BNA, February 26, 1997, No. 38 at A-8.

treated as adversaries. The committee believes that the spirit of cooperation must overpower political polarization if true improvements in occupational safety and health are to be achieved. By encouraging employers to seek individualized compliance assistance from OSHA qualified third party consultants, the SAFE Act would ensure that more American workplaces are in compliance with the law while allowing OSHA to concentrate its enforcement resources on those worksites that truly need its immediate attention. Simply put, the SAFE Act would result in increased compliance by employers resulting in greater safety for workers.

## II. THE NEED FOR LEGISLATION

### INEFFECTIVE ADVERSARIAL APPROACH

Committee members recognize that most employers want to improve worker safety and comply with OSHA regulations.<sup>3</sup> It is apparent that a growing number of employers need compliance assistance and timely information. The threat of fines has little impact on bad actors, because they will continue to play the odds of not being inspected. As a result, OSHA's adversarial model neither assists nor deters effectively. OSHA has consistently neglected the compliance needs of the good faith employer and has failed to adequately police the existing minority of those employers who ignore OSHA's regulations. The result is an ineffective adversarial approach that doesn't achieve its mandate of creating safer workplaces—leaving the worker to face the consequences.

There is little, if any, conclusive evidence that OSHA's adversarial approach has actually improved worker safety. After numerous attempts, the committee failed to locate a comprehensive study that proves that OSHA's 25 year presence is responsible for the steady decline in the number of workplace injuries and fatalities. In fact, prior to the creation of OSHA, the total number of disabling injuries in the United States between 1942 and 1970 actually declined by 3 percent despite a rapidly growing workplace.<sup>4</sup> Factoring in this same expansion in the American workplace, the injury rate declined by 45 percent.<sup>5</sup> Since the passage of the OSH Act of 1970, however, the total number of workdays lost because of injuries—a measure of injury severity—has significantly increased.<sup>6</sup> In fact, the average number of lost workdays per 100 full-time workers actually rose from 54.6 in 1974 to 76.1 in 1988.<sup>7</sup> Such statistical inconsistencies prompted the General Accounting Office (GAO) to conclude that “OSHA's impact on injury and illness is largely unknown.”<sup>8</sup>

The committee also recognizes that the total number of inspections throughout the United States fell from 42,377 in 1994 to 24,024 in 1996 and the number of OSHA's citations dropped 62

<sup>3</sup> See Ellen Byerrum, *supra* note 2, at A-8, quoting OSHA Deputy Assistant Secretary Frank Strasheim. “95 percent of the employers in the country do their level best to try to voluntarily comply with OSHA.”

<sup>4</sup> See Max Lyons, “OSHA: The Case for Reform,” Employment Policy Foundation (1995), at 5-6.

<sup>5</sup> *Ibid.*

<sup>6</sup> U.S. General Accounting Office, “Options for Improving Safety and Health in the Workplace,” Washington, D.C., 1990 at 15.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

percent from 145,900 to 55,100 during that same time.<sup>9</sup> It is logical to conclude that the federal government shutdown and agency budget cuts were contributing factors to this decline. Despite this occurrence, however, work-related injuries and illnesses dropped to their lowest rate in nearly a decade during that same period.<sup>10</sup>

#### INABILITY TO REGULATE EVERY WORKPLACE

OSHA is an agency plagued by its inability to regulate every American workplace. OSHA only has 2,451 state and federal inspectors to regulate 96.7 million workers in 6.2 million worksites.<sup>11</sup> The AFL-CIO has recognized that under current conditions, it would take OSHA 167 years to visit every workplace under its jurisdiction.<sup>12</sup> In addition to this monumental time lapse, the sheer diversity of safety and health concerns stemming from restaurants to funeral homes, prohibits an inspector from fully comprehending each individual worker's needs and concerns.

Even more revealing is the fact that in 1994 and early 1995, three quarters of worksites in the United States that were the scene of serious accidents had never been inspected by OSHA during this decade.<sup>13</sup> Those accidents claimed the lives of 1,835 workers and injured thousands more.<sup>14</sup> OSHA officials acknowledge that their inspectors do not investigate most lethal worksites until after accidents occur.<sup>15</sup> Yet, despite such a profound disparity, OSHA requested an additional 110 inspectors for fiscal 1998 so that the agency "can respond quickly to any reports of injury or death that occur."<sup>16</sup> Such inconsistencies lead committee members to conclude that the agency defines its success by its failures, and that philosophy is jeopardizing the lives of American workers.

#### REGULATORY MORASS

Time spent by businesses addressing safety and health in the workplace should be dedicated to abating hazards, not sifting through and trying to understand hundreds of pages of regulations. Witnesses have testified that the volume of OSHA regulations that employers are expected to read, understand, and implement is staggering. Many of OSHA's regulations are so vague that to expect a small business employer to correctly interpret them is practically inconceivable. As a result, employers are left to fend for themselves, spending a significant portion of their time and money misinterpreting regulations and making safety improvements that are either not required by law or not related to workplace safety, or both.

<sup>9</sup> Ann Scott, "A kinder, gentler, OSHA?" *Bus. Rec.*, Des Moines, April 7, 1997, at 10.

<sup>10</sup> "On-Job Injuries, Illnesses Drop In 1995 to Lowest Level in Decade," *Daily Labor Report*, BNA, March 13, 1997, No. 49 at D-1.

<sup>11</sup> Letter from OSHA Acting Assistant Secretary of Labor, Gregory Watchman, to Rep. James Talent, Chairman, U.S. House of Representatives Small Business Committee, August 15, 1997, at 4.

<sup>12</sup> AFL-CIO, *Death on the Job: The Toll of Neglect* (April 1997) (A State-by-State Profile of Worker Safety and Health in the United States, 6th Edition) at 3.

<sup>13</sup> The Associated Press, "OSHA Failed to Inspect Majority of Workplaces Where Workers Died in '94," *Asheville Citizen Times*, September 5, 1995, at 1-A.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> See Ellen Byerrum, *supra* note 2 at A-8.

In a GAO Report entitled, “Inspectors’ Opinions on Improving OSHA’s Effectiveness,” the following conclusion was drawn:

Most inspectors think that lack of knowledge of legislation, regulation, and standards among both employers and workers contributes to a “great” or “very great” extent to workplace injuries and illnesses as well as health and safety violations.<sup>17</sup>

And as one inspector remarked:

Too many employers, employees and compliance personnel are left guessing as to what they judge to be, or assume to be, correct and complying with the standard.<sup>18</sup>

The committee recognizes the difficulties that confront employers when trying to comply with the overwhelming number of complex regulations prescribed by OSHA. An employer’s ability to comprehend what he or she is required to do by law will only occur if OSHA “improve[s] communication with business and labor, including making information more accessible, and enhance[s] cooperation with employers and workers throughout the regulatory process.”<sup>19</sup>

OSHA, in an attempt to counter the criticism of regulatory morass, points to the wide variety of informational resources and programs to help employers. OSHA promotes its more than 80 different publications, safety and health standards in CD-ROM format (available for purchase), its presence on the world wide web, its safety and health courses, and its consultation programs.<sup>20</sup> In fact, OSHA has remarked that it believes that “determining which standards apply to a particular worksite can be done *easily* (by regulated business) through a process of elimination.”<sup>21</sup> GAO has rejected this claim, noting that the “dizzying array of brochures, toll-free numbers, and other methods to inform businesses of their regulatory requirements” does not go far enough towards alleviating the vast communication problem in the regulatory arena.<sup>22</sup>

A 1996 GAO report entitled “Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies,”<sup>23</sup> reviewed the cumulative impact of Federal regulations, including those promulgated by OSHA, on a limited number of businesses. Fifteen geographically dispersed companies voluntarily chose to participate in the review. The report’s theme revolved around one of GAO’s initial requests: GAO asked each of the businesses to supply an aggregate list of regulations with which the company must comply. While the responses to the requests varied, the overall result was the same; not one of the 15 participating businesses was able to determine every regulation that applied to their business.

<sup>17</sup> U.S. General Accounting Office, “Inspectors’ Opinion on Improving OSHA’s Effectiveness,” Washington, DC 1990, at 34.

<sup>18</sup> *Id.* at 29.

<sup>19</sup> OSHA: Potential to Reform Regulatory Enforcement Efforts: Hearing before the Subcommittee on Human Resources and Intergovernmental Relations of the House Committee on Government Reform and Oversight,” 103rd Cong., 1st Sess., 1995, (statement of Cornelia M. Blanchette, Associate Director, U.S. General Accounting Office) at 99.

<sup>20</sup> “Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies,” U.S. General Accounting Office, Washington, DC, 1996, at 33–34.

<sup>21</sup> *Id.* at 32 n.2 (emphasis added).

<sup>22</sup> *Id.* at 81.

<sup>23</sup> See *supra* note 20.

GAO concluded that employers were left in the dark when it comes to regulatory compliance, stating that:

Companies do not seem to have enough information about their regulatory responsibilities, and they may be reluctant to seek that information from regulatory agencies. Agencies, on the other hand, have an array of information about their regulatory requirements; however, they do not appear to be getting the information to companies in such a way that the companies understand what regulations are applicable to them and how to comply with those regulations.<sup>24</sup>

Compliance-seeking employers who strive to achieve regulatory compliance continuously encounter monumental obstacles. As described by an official employed by one of the participating companies, the overwhelming range of regulatory requirements is akin to “getting pecked to death by ducks—each bite may not hurt, but all together they are very painful.”<sup>25</sup> The sheer volume of regulations was cited by both government and business as one of the most burdensome elements of Federal regulatory compliance.<sup>26</sup> Moreover, participating businesses did not understand certain regulatory requirements because they were vague or complex, and as a result, the companies were unsure whether and how the regulation applied to them.<sup>27</sup> They cited “confusing, ambiguous, or conflicting terminology used in the regulations themselves or on the required forms.”<sup>28</sup>

Businesses noted that they do not understand some regulatory requirements because of frequent changes to the regulations, thereby making it difficult to stay current and to know what was required of them in order to be in compliance.<sup>29</sup> Dramatically compounding this compliance problem is the fact that employers are left feeling stranded without helpful assistance. Businesses were not able to get the clarifications they needed from agency staff.<sup>30</sup> Among one of the most widespread concerns of the participating businesses was that regulators lacked knowledge of the particular business and provided little assistance so they could comply with the regulations.<sup>31</sup>

Committee members have expressed deep concern that the GAO cited so many misinterpretations of regulations by businesses. In one instance, officials from a participating business said that OSHA lead exposure standards required that even routing maintenance workers put on personal protective equipment and be “fit tested”—a process the business said was extremely expensive. When the GAO questioned OSHA about the requirement, OSHA said that the regulations cited did not apply to the type of routine maintenance activities the business described.<sup>32</sup> In another instance, business officials said that OSHA’s guarding provisions for

<sup>24</sup> Id. at 73.

<sup>25</sup> Id. at 27.

<sup>26</sup> Ibid.

<sup>27</sup> Id. at 63.

<sup>28</sup> Ibid.

<sup>29</sup> Id. at 64.

<sup>30</sup> Id. at 63.

<sup>31</sup> Id. at 58–59.

<sup>32</sup> Id. at 80.

their machinery was very expensive, and that retrofitting their existing machines would cost between \$225,000 and \$300,000 per machine. But when OSHA was asked about this compliance measure, officials replied that "it is unclear why this company would need to retrofit existing equipment to meet safety and health standards.\* \* \*" <sup>33</sup>

#### SADDLING OF PAPERWORK

The GAO cited paperwork as a cause of frequent miscommunication and wasted resources. Fourteen of 15 businesses participating in the GAO study complained that paperwork or other procedural requirements were excessive, while the agencies said that in several of those cases, the businesses had misinterpreted the paperwork requirements and therefore were incurring unnecessary expenses.<sup>34</sup> In one instance, a participating business explained how OSHA required them to retain certain employee safety training records "forever," while OSHA said that no such employee safety training records were required and, therefore, no retention requirement existed.<sup>35</sup>

By far, the largest number of citations issued to employers by OSHA are for paperwork violations.<sup>36</sup> In 1994, the top six (and 11 of the top 20) of the most-cited violations involved paperwork deficiencies.<sup>37</sup> As OSHA continues to channel its resources toward paperwork, serious safety concerns go uninspected. In fact, even OSHA officials acknowledge that their inspectors "do not get to a lion's share of the lethal sites until after accidents occur."<sup>38</sup> The end result is that incompetent, reckless employers go undetected while good faith employers spend additional time and money on paperwork rather than safety.

The committee has concluded that workplace safety and health suffer when the employer's resources are tied up with paperwork that even OSHA acknowledges as being unnecessary. Nor is the safety and health of workers benefitted when OSHA fines employers who are making a good faith effort to comply with all the existing regulations. The committee heard testimony that small businesses, in particular, are concerned "that overzealous OSHA inspectors, determined to meet monthly citation quotas, were citing them for minor paperwork violations and other inconsequential actions that posed little or no threat to workers."<sup>39</sup>

#### INADEQUATE COMPLIANCE ASSISTANCE

Vice President Gore helped pour the foundation for a new cooperative approach by harnessing the expertise of private sector OSH Act compliance experts to consult employers on how to achieve greater workplace safety. Acknowledging that OSHA "doesn't work

<sup>33</sup> Id. at 100-101.

<sup>34</sup> Id. at 65-66.

<sup>35</sup> Id. at 66.

<sup>36</sup> "OSHA '97: Tackling the Tough Issues," BNA, January 15, 1997, at 1173.

<sup>37</sup> "Oversight of the Occupational Safety and Health Administration: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Committee," 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1997 (testimony of F.M. Lunnie Jr., Executive Director of COSH) at 94.

<sup>38</sup> The Associated Press, *supra* note 13 at 1A.

<sup>39</sup> Lunnie testimony *supra* note 37 at 94.

well enough,” because there are “only enough inspectors to visit even the most hazardous workplace once every several years,”<sup>40</sup> the Vice President has called on OSHA to rely on private consultation companies in its effort to ensure the safety and health of American workers.<sup>41</sup> In this way:

[OSHA] would use the same basic technique the federal government uses to force companies to keep honest financial books: setting standards and requiring periodic certification of the books by expert financial auditors. No army of Federal auditors descends upon American businesses to audit their books; the government forces them to have the job done themselves. In the same way, no army of OSHA inspectors need descend upon corporate America.<sup>42</sup>

OSHA must understand and embrace the concept that employers who hire and pay for the expertise of a OSHA qualified, professional, third party consultant are by definition, cooperating with the agency. Fining such employers for their good faith compliance efforts does not constitute a similar spirit of cooperation and, in fact, poses a disincentive to voluntarily undertaken compliance. By promoting cooperation with employers through the use of private sector compliance auditors, the “health and safety of American workers could be vastly improved.”<sup>43</sup>

In its effort to adhere to Vice President Gore’s initiatives, however, OSHA has failed to go beyond rhetoric. Current voluntary and cooperative compliance programs impact a mere fraction of worksites and consume only a small share of the agency’s annual budget.<sup>44</sup> Despite OSHA’s claim that it is “putting a lot of resources into compliance assistance and partnership initiatives,”<sup>45</sup> only 22 percent of OSHA’s 1997 fiscal appropriation was spent on federal and state plan state compliance assistance.<sup>46</sup> It is difficult for anyone to say that current initiatives are having an impact on the number of workplace fatalities and injuries when OSHA spends so little of its annual funds on preventive measures.

It is truly unfortunate that good faith compliance efforts fail to score an employer any points whatsoever by OSHA. Businesses have begged OSHA to stop policing them and to start working to help them understand how to achieve better worker safety.<sup>47</sup> In fact, over half of the businesses in the GAO Report cited incidents in which regulators evidenced a “gotcha” manner or were “more interested in finding companies in noncompliance with regulatory requirements than helping companies comply with the regulations.”<sup>48</sup> One company official remarked that:

<sup>40</sup> Albert Gore, “From Rept. pg. — loss; The Gore Report on Reinventing Government,” 1993, at 62.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> The Voluntary Protection Program, OSHA’s partnership program, includes approximately 400 participant companies.

<sup>45</sup> “Oversight of the Occupational Safety and Health Administration: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Committee,” 105th Cong., 1st Sess., 1997, (testimony of Gregory Watchman, OSHA Acting Assistant Secretary of Labor), at 28.

<sup>46</sup> H. Rep. No. 659, 104th Cong., 2nd Sess. (1996).

<sup>47</sup> “Regulatory Burden,” *supra* note 20 at 117–119.

<sup>48</sup> *Id.* at 67.



OHSA's policy of immediately imposing fines for violations places an emphasis on finding violations to justify enforcement actions, rather than on working with the company to encourage compliance. [The company official] said that many OHSA inspectors focus on finding something wrong because citing violations demonstrates what OHSA views as good job performance.<sup>49</sup>

To bring a greater number of American workplaces into compliance, OHSA's ineffective adversarial approach must be modified to reflect increased cooperation. The committee recognizes that the agency's current approach pits the employer against the inspector—fostering distrust and suspicion. This environment does not encourage employers and employees to work together with OHSA to provide safe and healthful working conditions as prescribed by the OHS Act of 1970. Both the government and the private sector devote vast resources to trying to discover employers in violation of regulations as part of an effort that few believe will advance worker safety and health. In its current form, however, the agency is incapable of handling the safety problems of millions of individual workplaces as America races toward the 21st Century. As recognized by Vice President Gore, OHSA's system “doesn't work well enough.”<sup>50</sup>

#### COOPERATIVE APPROACH

To successfully adopt a new approach, significant changes in the relationship that exists between employers and OSHA must be made. It is not productive to threaten employers with fines non-compliance when millions of safety conscious employers don't know how they are supposed to comply. Nor is it effective to burden employers with more compliance materials than they can possibly digest or understand. To achieve the new, cooperative approach, the vast majority of employers who are concerned about worker safety and health must have compliance assistance programs made more accessible to them. Creating true partnerships between businesses and OSHA will ultimately empower the honest employers to improve worker safety, while allowing OSHA to concentrate its enforcement on the small number of employers who constitute the “bad actors.”

The committee believes that fostering partnerships between employers and OSHA is the key element in constructing and effectively implementing a cooperative approach. The committee heard testimony illustrating that “job and health is everyone's responsibility and that all parties can contribute to making it happen. Ultimately, however, workplace protection is the product of cooperative efforts between employers and their employees. In it is an essential component of effective employee relations and constitutes good business practice. It is an important responsibility that business take seriously and to which substantial resources are devoted.”<sup>51</sup> In addition, the committee recognizes that all OSHA compliance officers must fully understand every regulation and guideline implemented and administered by OSHA. OSHA personnel

<sup>49</sup> Id. at 117.

<sup>50</sup> “Reinventing Government,” *supra* note 40 at 62.

<sup>51</sup> Lunnie testimony, *supra* note 37, at 93.

must be able to demonstrate a comprehensive understanding of the law if they are to expect employers to do the same.

Several cooperative approach concepts that effectively address workplace safety and health are outlined in the Clinton administration's report entitled, "The New OSHA."<sup>52</sup> The Administration described OSHA as being driven "too often by numbers and rules, and not by smart enforcement and results. Many people see OSHA as an agency so enmeshed in its own red tape that it has lost sight of its own mission."<sup>53</sup> Such criticisms echoes GAO's testimony before the House of Representatives Education and Labor Committee:

The most fundamental weakness of OSHA's oversight process continues to be its lack of information about the out comes and effectiveness of both its own program and state programs \* \* \* [I]t basically focuses on program activity measures, as on number of inspections conducted, without emphasizing program outcome measures, such as reduction workplace injuries, as well.<sup>54</sup>

The safest workplaces will be achieved through effective communication and cooperation—where employees are encouraged to ask for help from experts who can not only identify occupational hazards, but who can also provide guidance on how they may be remedied as well. OSHA should not have a monopoly on compliance assistance—particularly when it has been unable to effectively fulfill its promise to ensure safer workplaces by enforcement

#### THIRD PARTY CONSULTATIONS

The committee has found that one of the most effective means of communicating the importance of cooperative compliance assistance to employers would be to use individuals qualified in the safety and health field—the certified industrial hygienist, the safety engineer, the professional engineer, the occupational nurse, and the physician. Acting in the capacity of third party consultants for decades, these qualified individuals have been effectively interpreting complex OSHA regulations for employers who do not have the expertise to do it for themselves—thereby advancing OSHA's goal of increased employer compliance.

Businesses choose to make their workplaces safe because caring for workers is simply good business. Pressures of the market to lower costs, retain skilled workers, minimize legal and insurance costs, and avoid bad publicity have driven employers to make workplaces safer.<sup>55</sup> It is clear that employers are committed to the concept of voluntarily improving worker safety—a clear sign of co-operation. In many instances, however, they simply need additional

<sup>52</sup> "The New OSHA: Reinventing Worker Safety and Health," National Performance Review, May 1995, reprinted in Hearing of the Senate Committee on Labor and Human Resources, "Occupational Safety and Health Reform and Reinvention Act, S. 1423," 104<sup>th</sup> Cong., 1<sup>st</sup> Sess., S. Hrg. 104-353, at 63.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> "Changes Needed in the Combined Federal-State Approach to Occupational Safety and Health: Hearing Before the Subcommittee on Labor Standards of the House Committee on Education and Labor," 101<sup>st</sup> Sess., 1993 (Statement of Clarence C. Crawford, Associate Director, U.S. General Accounting Office) at 5.

<sup>55</sup> John Hood, OSHA's Trivial Pursuit, Policy Review (Summer 1995 Edition) (unpublished work on file at The Heritage Foundation) at 61.

assistance in understanding where problems exist and how remedies can be achieved.

Employers may not understand the sheer volume of OSHA regulations that govern safety and health, but they do know their own workplace. By broadening existing cooperative compliance initiatives, employers can identify and respond more promptly to safety and health problems at their worksites. Vice President Gore has publically stated that third party auditing is the path to greater worker safety. In his 1993 Report on Reinventing Government, the Vice President concluded that employers should be encouraged by OSHA to use third party auditors as a way to vastly improve the health and safety of American workers “without bankrupting the Federal treasury.”<sup>56</sup> Such a cooperative approach would “ensure that all workplaces are regularly inspected, without hiring thousands of new employees.”<sup>57</sup> By establishing incentives designed to encourage workplaces to comply, “[w]orksites with good health, safety, and compliance records would be allowed to report less frequently to the Labor Department, to undergo fewer audits, and to submit less paperwork.”<sup>58</sup> In the meantime, OSHA could “impose higher fines for employers whose health and safety records worsened or did not improve.”<sup>59</sup>

Following Vice President Gore’s lead, OSHA has gone so far as to recommend to employers seeking help from a state plan state OSHA consultation service that in the event of a backlog, the employer “may be able to obtain similar services from [its] insurance carrier or private consultant in a more timely fashion.”<sup>60</sup> GAO also has concluded that an important way for OSHA to “stretch the existing inspection workforce” would be to allow “consultations by OSHA-certified private sector safety and health specialists as substitutes for targeted inspections.”<sup>61</sup> Such a suggestion far exceeds any third party consultation proposal being currently debated by Congress.

Safety professionals have become experienced at understanding OSHA’s requirements and implementing individual solutions that fit workplaces as diverse as manufacturing plants, funeral homes and retail stores.<sup>62</sup> Perhaps one of the most notable benefits provided by third party consultants is that they are not limited to conducting compliance inspections (as OSHA inspectors are), but can also target other safety problems that exist in each work environment. And because each worksite is unique, employer-specific solutions will be more effective at truly meeting the needs of workers.

Third party consultants are also able to fill another vital niche that is closed to OSHA inspectors; aiding those employers who are reluctant to communicate their compliance problems with OSHA

<sup>56</sup> “Reinventing Government”, supra note 40 at 62.

<sup>57</sup> Ibid.

<sup>58</sup> Id. at 63.

<sup>59</sup> Ibid.

<sup>60</sup> “Occupational Safety and Health Reform and Reinvention Act, Hearing on S. 1423: Before the Senate Committee on Labor and Human Resources,” 104th Cong., 1st Sess., S. Hrg. 104-353, 1995 (memorandum from John B. Miles, Jr., Director, Directorate of Compliance Programs, and Nelson Reyneri, Director, Office of Reinvention, to OSHA Regional Administrators, May 2, 1995).

<sup>61</sup> “Improving Safety and Health,” supra note 6 at 35.

<sup>62</sup> See American Board of Industrial Hygiene certification handbook, p. 7-12, also see Board of Certified Safety Professionals, Certified Safety Professional Candidate Handbook, May 1997, p. 3-5.

personnel for fear of being fined. Such fear can, in fact, have a chilling effect on workplace safety and health, because employers who don't feel safe in seeking the answers they need are often unable to solve workplace safety problems. Accordingly, the neutral third party consultant is best able to make successful strides towards achieving better safety and health for workers, because businesses will not hesitate to supply them with all the facts.

The committee has concluded that OSHA needs to pay more attention to the small number of employers who are unconcerned about safety and health. These employers should be inspected, fined and forced into compliance. But when a safety-conscious employer has the desire to protect workers, a cooperative approach should be applied. GAO made the following recommendation with regard to opportunities for improvement at OSHA:

With a ratio of one inspector to 3,000 worksites, OSHA and the states must find ways to extend their resources and impact far beyond the limited number of worksites they can directly inspect. OSHA and the states need to encourage employers to voluntarily identify and correct occupational safety and health hazards without an OSHA directed inspection.<sup>63</sup>

It is clear that workers and businesses need clarification on a whole host of issues. America needs good common sense legislation that advances safety and health in the American workplace. This is a matter of great importance and it must be considered in a serious and rational manner by Congress, by the Occupational Safety and Health Administration, by employers, and of course, by employees, too.

#### THE SAFE ACT

The SAFE Act addresses these issues by sticking to a theme—the advancement of safety and health in the workplace. The bill's theme was primarily derived from the thoughts, suggestions and good ideas of employees, employee representatives, employers and certified safety and health professionals prior to the bill's initial draft. The committee understands past concerns regarding OSHA's ability to meet its responsibilities as an enforcement agency, as well as the importance of maintaining an employee's right to an inspection. The committee listened carefully to these concerns and as a result, the SAFE Act has been crafted to promote and enhance workplace safety and health—rather than dismantle it.

The spirit of cooperation must overpower polarization if true improvements in occupational safety and health are to be achieved. It is essential that stereotypical rhetoric be set aside with the understanding that an overwhelming majority of employers cherish their most valuable assets—their employees. The committee believes that without the employee, management will ultimately have no production, no profits, and no business. It is logical to surmise

<sup>63</sup>“Changes Needed in the Combined Federal-State Approach to Occupational Safety and Health: Hearing before the Subcommittee on Labor Standards of the House Committee on Education and Labor.” 101st Cong., 1st Sess., 1993 (statement of Clarence C. Crawford, Associate Dir., U.S. General Accounting Office) at 11.

that by promoting cooperation, good business will ultimately prevail.

When the Occupational Safety and Health Act was enacted 27 years ago, it was intended to make the workplace free from recognized hazards that are causing, or likely to cause death or serious physical harm to employees.<sup>64</sup> The committee has found that OSHA has strayed too far from its original mission of protecting people from occupational safety and health hazards. The focus has instead been placed on heavily weighted penalties and enforcement. Although OSHA would retain its ability to punish employers who don't embrace workplace safety and health, the SAFE Act would encourage OSHA to reward those who do primarily by expanding cooperative and voluntary compliance initiatives. As previously noted, enforcement alone cannot ensure safe workplaces and the health of our working population. Thus, workers would be better served by an OSHA that places an equal emphasis on both its cooperative compliance initiatives and its enforcement responsibilities.

The SAFE Act would promote cooperation, as well as communication, by encouraging employers to implement employee/employer participation programs that are centered on addressing occupational safety and health hazards. These programs would help encourage employees and employers to discuss, identify and correct occupational safety and health hazards in their respective worksites. The committee has concluded that participation programs require flexibility and that effective cooperation can never be mandated. In addition, it is important that such programs not be confused with Senate bill 295, the Teamwork for Employees and Management Act (TEAM Act). The TEAM Act's employee and employer involvement committees would cover issues of quality, productivity and efficiency as well as safety and health. Safety and health participation programs as prescribed by the SAFE Act complements what the Clinton administration had in mind when it stated that "employer commitment and meaningful employee participation and involvement in safety and health is a key ingredient in effective programs."<sup>65</sup>

The SAFE Act would promote voluntary compliance by allowing employers to hire third party consultants to assist them in the identification and correction of safety and health hazards. Studies have shown that many sites where serious workplace accidents have occurred were not inspected by federal OSHA inspectors for several years prior to the accident. This lack of attention to potential problem areas is due in part to an overemphasis on enforcement. Since only 2,400 inspectors from OSHA and approved state programs are tasked with ensuring the safety and health of 93 million workers and 6.2 million worksites, Vice President Gore has called on OSHA to rely on private consultation companies in its effort to ensure the safety and health of American workers.<sup>66</sup> It is clear that by injecting third party consultative services into the mix, the availability of technical assistance to employers who vol-

<sup>64</sup> Occupational Safety and Health Act, 29 U.S.C. 651(b)(1)(1970).

<sup>65</sup> "The New OSHA", *supra* note 52, at A-1.

<sup>66</sup> "Reinventing Government", *supra* note 40 at 62.

untarily seek to make their workplace safer for their employees will dramatically increase.

The SAFE Act would help ensure that all federal occupational safety and health standards are based on sound, scientific data. By injecting independent scientific peer review into the rulemaking process, future regulations will reflect greater clarity and simplicity—helping businesses to better understand what they are required to do. It is the committee's hope that the addition of an independent scientific peer review will ultimately speed up the implementation process for OSHA's rules. Under the present system, draft rules can idle in this process for several years. At the same time, annual funding continues to be channeled toward research at the expense of the taxpayer. By incorporating independent scientific peer review in the rule-making process, the promulgation period for new rules will likely be shortened over time without compromising the integrity, validity or need for regulation.

OSHA personnel performing inspections and consultations must have a detailed knowledge of and expertise in the respective industry they are inspecting. OSHA personnel currently are not required to be certified in a safety and health profession. The SAFE Act would require that certain OSHA personnel receive continuing education and professional certification to ensure that the rapid advancement of technology does not surpass OSHA's ability to identify occupational safety and health hazards in the workplace. These personnel are responsible for the safety and health of America's workers. It is essential that their skills reflect proper training and education in their respective professional fields prior to entering and inspecting a worksite. In doing so, the communication between OSHA and employers as well as the safety and health of employees will be enhanced.

The committee recognizes OSHA's limited resources and believes that federal law should provide the agency with greater discretion in handling formal complaints by codifying OSHA's phone/fax policy. Under current law, OSHA is required to respond to every formal, written complaint with an onsite inspection.<sup>67</sup> By statutorily providing OSHA with the ability to use a phone or fax machine to see if an employer has taken corrective action, the agency will more effectively identify which worksites need immediate attention.

The committee acknowledges the volume of paperwork that employers—small and large—are mandated to understand and prepare. It is practically inconceivable to expect employers to read and remember hundreds of pages of technical language. Such mandates are a deterrent for individuals considering starting their own business. The SAFE Act would waive civil penalties for posting or paperwork requirements except when an employer willfully or repeatedly violates this mandate. This change would refocus OSHA inspections on the most serious hazards, while allowing employers to expend resources on the elimination of hazards.

The SAFE Act would promote cooperation among employees, too, by placing additional emphasis on the importance of wearing personal protective equipment. The committee has concluded that employees have the ultimate control as to whether they wear their

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<sup>67</sup> Occupational Safety and Health Act, 29 U.S.C. 651(b)(1)(1970).

steel-toed shoes, hard hats or safety goggles. The SAFE Act would allow OSHA the discretion of issuing citations to employees who refuse to wear their personal protective gear. Employees also must contribute to the advancement of workplace safety, not only for their personal protection, but for those working around them as well.

To expand cooperative initiatives currently provided by OSHA to employers, the SAFE Act would codify OSHA's state plan program. After listening to small businesses from states with safety and health plans, the committee recognizes that employers sometimes face a lengthy waiting period after requesting a free consultation. Meanwhile, the employer is left vulnerable to routine OSHA inspections and fines and employees are potentially subject to hazards—despite the employer's good faith effort to request compliance assistance. To help address potential backlogs, the SAFE Act would establish a "pilot" program to provide expedited consultation services to small business employers who generally cannot afford a third party consultation service.

The availability of voluntary compliance initiatives would be further expanded for employers. The SAFE Act would codify OSHA's 15 year-old Voluntary Protection Programs (VPP) to further establish cooperative agreements that encourage comprehensive safety and health management systems including requirements for the systematic assessment of hazards; comprehensive hazard prevention, mitigation, and control programs; and, active and meaningful management and employee participation in the VPP. Currently, OSHA has approximately 400 participants nationwide in the VPP. The SAFE Act would help increase that number by encouraging more small businesses to participate by providing additional outreach and assistance initiatives and developing program requirements that meet their unique needs.

Overall, the SAFE Act constitutes an important first step to passing rational and sensible legislation. Rather than dismantling OSHA's enforcement responsibilities or eliminating agencies and programs within the Administration, the SAFE Act clearly focuses on expanding employer/employee participation, consultative compliance services, individual responsibility, and voluntary compliance initiative as well. This legislation represents a fresh start to the establishment of a cooperative approach between OSHA, employers and employees.

### III. LEGISLATIVE HISTORY AND COMMITTEE ACTION

On March 18, 1997, Senator Hutchison, for herself and Senators Helms and Inhofe, introduced S. 461, the Occupational Safety and Health Reform Act of 1997.

On April 10, 1997, Senator Gregg introduced S. 551, The OSHA Modernization Act of 1997.

On May 20, 1997 Senator Enzi, for himself and Senators Allard, Burns, Craig, Hagel, McConnell, Roberts, Sessions, Thomas, and Hutchinson, introduced S. 765, the Safety and Health Advancement Act of 1997.

On July 10, 1997, the Senate Committee on Labor and Human Resources held a hearing on oversight of OSHA, OSHA's reinven-

tion efforts, and the three bills previously introduced (S. Hrg. 105–101). The following individuals provided testimony:

The Honorable Judd Gregg (R–N.H.)

The Honorable Kay Bailey Hutchison (R–TX)

The Honorable Mike Enzi (R–WY)

Gregg Watchman, Acting Assistant Secretary, Department of Labor, Washington, DC

Harry Morley, Taylor-Morley Homes, Inc., St. Louis, MO

Jeff W. Johnston, P.E., CSP, Manager of OSHA Resources, Eastman Chemical Company, Kingsport, TN

Michael A. Lail, Raines Brothers Inc., Chattanooga, TN

Eric Frumin, Director of Health and Safety, UNITE, AFL–CIO, NY

F.M. Lunn, Jr., Coalition for Occupational Safety and Health, Falls Church, VA

Steven Lewis, Ph.D., DABT, American Industrial Health Council, Washington, DC

Nancy Lessin, Massachusetts Coalition for Occupational Safety and Health, Boston, MA

Additional statements and letters regarding OSHA reform were received and placed in the record.

On September 30, 1997, Senator Enzi, for himself and Senators Gregg, Frist, Jeffords, Coats, DeWine, Hutchinson, Collins, Warner, McConnell, Allard, Brownback, Burns, Craig, Hagel, Nickles, Roberts, Sessions, Smith (OR), and Thomas, introduced S. 1237, the Safety Advancement for Employees Act of 1997.

On October 22, 1997, the Senate Committee on Labor and Human Resources met in Executive Session to consider Senate bill 1237, the Safety Advancement for Employees Act. The committee voted on the following amendments:

Senator Enzi offered an amendment in the form of a substitute making technical corrections to S. 1237. The amendment was accepted by voice vote and was used as the underlying vehicle.

Senator Murray offered an amendment to modify the provisions related to employee involvement. The amendment failed (7–11) on a rollcall vote:

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Wellstone	DeWine
Murray	Enzi
Reed	Hutchinson
	Collins
	Warner
	McConnell
	Bingaman

Senator Wellstone offered an amendment providing enhanced “whistle blower” protection and remedies to complainants, which failed (8–9) on a rollcall vote:



YEAS	NAYS	PASS
Kennedy	Jeffords	Collins
Dodd	Coats	
Harkin	Gregg	
Mikulski	Frist	
Bingaman	DeWine	
Wellstone	Enzi	
Murray	Hutch- inson	
Reed	Warner McCon- nell	

Senator Dodd offered an amendment establishing an office of construction safety within OSHA and mandating that construction sites maintain health and safety programs. The amendment failed (8–9) on a rollcall vote:

YEAS	NAYS	PRESENT
Kennedy	Jeffords	Collins
Dodd	Coats	
Harkin	Gregg	
Mikulski	Frist	
Bingaman	DeWine	
Wellstone	Enzi	
Murray	Hutch- inson	
Reed	Warner McCon- nell	

Senator Reed offered an amendment modifying the Third Party Audit Program. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Reed offered an amendment regarding small farm inspections and investigations. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist

Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Reed offered an amendment relating to criminal penalties. The amendment failed (8–10) on a rollcall vote:

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

The committee then voted (10–8) to report the bill, as amended, on a rollcall vote:

YEAS	NAYS
Jeffords	Kennedy
Coats	Dodd
Gregg	Harkin
Frist	Mikulski
DeWine	Bingaman
Enzi	Wellstone
Hutchinson	Murray
Collins	Reed
Warner	
McConnell	

#### IV. EXPLANATION OF THE BILL AND COMMITTEE VIEWS

##### EMPLOYEE AND EMPLOYER PARTICIPATION PROGRAMS

Employees are an important resource for advancing workplace health and safety. In addition, employee involvement is critical to workplace safety. Employees on the shop floor know where the hazards are and how to fix them. OSHA has begun to “promote worker participation in efforts to achieve safe and healthful workplaces. Employers have an obvious interest in working with their employees to improve safety and health at their own establishment.”<sup>68</sup>

This section would permit employers to establish employer and employee participation programs which exist for the sole purpose of addressing safe and healthful working conditions.<sup>69</sup> The committee has found that open discussion of safety and health issues has a positive impact on addressing potential hazards. This section clearly states that an entity created under an employee and em-

<sup>68</sup> “The New OSHA,” supra note 52 at 6.

<sup>69</sup> S. 1237, section 3.

ployer participation program shall not constitute a labor organization or be construed to affect employer obligations when dealing with a certified or recognized employee representative.

The Administration has stated that “employer commitment and meaningful employee participation and involvement in safety and health is a key ingredient in effective programs.”<sup>70</sup> In fact, OSHA’s Augusta, Maine, area office issued a guidance statement, CPL 2.1A, on its Maine 200 Program encouraging employers to establish safety programs that included employee involvement.

#### THIRD PARTY CONSULTATION SERVICES PROGRAM

The Committee recognized Department of Labor concerns that additional time may be needed to construct and implement the regulations that administer the Third Party Consultation Services Program. The Enzi substitute amendment accepted by the committee would provide an additional nine months. As a result, no later than 3 months after the date of enactment, OSHA must establish an advisory committee pursuant to the Federal Advisory Committee Act of 1972 (FACA) for the sole purpose of advising and making recommendations to the Secretary with respect to the establishment and implementation of the third party consultation services program.<sup>71</sup> The advisory committee will exist for a period of two years and would be broadly represented by 3 employees, 3 employers, 2 members of the general public, and 1 member who is a state official from a state plan state.<sup>72</sup> All committee members are required to have expertise in workplace safety and health. The advisory committee will provide OSHA with valuable comments and recommendations from employees, employers, and the general public when constructing and implementing the third party consultation program—alleviation potential “conflicts of interest.”

No later than 18 months after the date of enactment, OSHA must establish and implement by regulation a third party consultation program that qualifies individuals to provide consultation services to employers to assist them in the identification and correction of safety and health hazards.<sup>73</sup> Individuals that would be eligible to be qualified by OSHA must be: An individual licensed by a state authority as a physician, industrial hygienist, professional engineer, safety engineer, safety professional, or registered nurse; a state plan state or Federal inspector with 5 years experience; an individual qualified in an occupational safety or health field by an organization whose program is accredited by a nationally recognized private accreditation organization or by OSHA; an individual with a minimum of 10 years of safety and health experience; and, individuals determined to be qualified by OSHA.<sup>74</sup>

If eligible individuals are qualified by OSHA, they are to kept on a registry by the agency allowing them to serve as consultants in the third party consultation program and provide services in all 50 states, DC and territories. A consultation visit would consist of a qualified individual evaluating an employer’s fixed or non-fixed

<sup>70</sup> “The New OSHA,” *supra* note 52 at A-1.

<sup>71</sup> Federal Advisory Committee Act, 5 U.S.C. App. I (1972).

<sup>72</sup> S. 1237, section 4.

<sup>73</sup> S. 1237, section 5.

<sup>74</sup> *Ibid.*

workplace to identify any violations under the OSH Act and provide appropriate corrective measures to address any violations found. Through regulations, OSHA could determine the type of worksites to be serviced by a qualified individual. No later than 30 business days after the initial consultation, the qualified individual must provide a written report to the employer identifying any violations and corrective measures for abatement. No later than 90 days after the employer receives the written report or on a date agreed by the qualified individual or employer, the qualified individual will reinspect the workplace to verify that the corrections were made. The committee recognizes that adequate time must be provided so a participating employer can order additional equipment, for instance, to abate a potential hazard as well as ensuring that all consultations and recommendations are not hindered by time constraints.

If the qualified individual determines that identified hazards have been abated or that a written abatement plan is in order,<sup>75</sup> a declaration of resolution may be provided to the employer—exempting them from civil penalties for a 2 year period for that workplace. The employer, however, jeopardizes this exemption if a good faith effort has not been made to remain in compliance as required under the declaration of resolution and/or if there has been a fundamental change in the hazards of the workplace. Thereby, if an employee suffers an injury or is killed as a result of an employer's failure to abide to the declaration of resolution, the employer would be liable for a willful violation based on a lack of good faith effort to remain in compliance. Moreover, if an employer fundamentally changes the hazards of the workplace after receiving a declaration of resolution, the two year exemption would not apply. Of course, if that occurs, OSHA could issue a penalty as prescribed under current law.<sup>76</sup>

All records related to consultation services in this section or records connected with voluntary safety and health inspections conducted by or for an employer are not admissible in a court of law or administrative/enforcement proceeding against the employer except to show evidence of fraud, gross negligence, malfeasance or a failure to meet the requirements of the program on the part of a qualified individual. If such evidence is present, OSHA would have the authority to revoke the qualified individual's participation in the program. This section would also not prohibit OSHA from inspecting a workplace.

The committee has concluded that the third party consultation services program is an incentive driven safety and health program. Employers seeking compliance assistance from an OSHA qualified consultant would surpass what is already required by Federal occupational safety and health law. The third party consultation program would be a program constructed, implemented, and administered by OSHA to allow employers the option of hiring third party consultants to assist them in the identification and correction of safety and health hazards. OSHA's inability to inspect hazardous worksites is primarily due to only 2,400 Federal and State program

<sup>75</sup> See OSHA Standards, 29 CFR 1903.19(e)(2).

<sup>76</sup> Occupational Safety and Health Act, section 17(e), 29 U.S.C. 666 (1970).

inspectors ensuring the safety and health of 93 million workers and 6.2 million worksites.<sup>77</sup> By implementing an OSHA third party consultation service, the availability of technical assistance to employers who voluntarily seek to make their workplace safer for their employees will be drastically broadened.

#### INDEPENDENT SCIENTIFIC PEER REVIEW

Prior to issuing a final standard, OSHA would be required to submit the draft final standard and a copy of the rule-making record to the National Academy of Sciences (NAS) for review and comments. The NAS will appoint an independent scientific review committee to conduct an independent review of the final rule and the scientific literature and then make written recommendations to OSHA—including the appropriateness and adequacy of the scientific data, scientific methodology, and scientific conclusions adopted by OSHA. If OSHA decides to modify the final rule in response to the recommendations provided by the scientific review committee, the committee will be given the opportunity to review and comment on the changes before the final standard is issued. The NAS recommendations will be published with the final rule in the Federal Register.

The committee agrees with testimony that supports basing all safety and health standards on sound science. It is clear that most OSHA safety and health standards are burdensome and difficult for employers to comply with and understand.<sup>78</sup> Moreover, OSHA's safety and health standards do not have to be based on peer-reviewed sound science.<sup>79</sup> Without such a requirement OSHA takes, on average, 10 years to issue a standard.<sup>80</sup> In the meantime, taxpayers dollars continue to fund the promulgation of a proposed draft standard.

The committee also heard testimony from the American Industrial Health Council (AIHC), a body that has dedicated over 20 years to advancing the role of peer review as a means to assure sound application of science in regulations. The council's representative, Dr. Steven Lewis, testified that in 1995, AIHC undertook a study to evaluate the state of peer review practices within the Federal Government.<sup>81</sup> In fact, that study revealed that OSHA is one of several Federal regulatory agencies which has not yet implemented a formal external scientific peer review process as part of rule-making.<sup>82</sup> In addition, the committee recognizes the 1983 NAS "Red Book," which places strong emphasis on peer review as an essential component of the risk assessment process.<sup>83</sup>

<sup>77</sup> "Reinventing Government," *supra* note 40 at 62.

<sup>78</sup> "Oversight of the Occupational Safety and Health Administration: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Committee," 105th Cong., 1st Sess., S. Hrg. 105-101, 1997 (testimony of Mike Lail, President of Rains Brothers Inc.) at 84.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> "Oversight of the Occupational Safety and Health Administration: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Committee," 105th Cong., 1st Sess., S. Hrg. 105-101, 1997 (testimony of Dr. Steven Lewis, Chairman of Science Policy Committee of the American Industrial Health Council) at 97.

<sup>82</sup> *Ibid.*

<sup>83</sup> National Academy of Sciences, "Risk Assessment in the Federal Government: Managing the Process," Washington, DC, National Academy Press, 1983, at 156-160.

Although this provision prescribes additional review, the committee recognizes that the removal of any “conflict of interest” at OSHA by having an independent review would inevitably speed up the process and ensure that all standards are based on sound, scientific data. The injection of additional scientific review is a positive addition to the rule-making process. Such review will help ensure that all standards are rational, logical and clear so that employers can more easily understand what they are expected to do concerning workplace safety and health.<sup>84</sup>

#### CONTINUING EDUCATION AND PROFESSIONAL CERTIFICATION FOR CERTAIN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION PERSONNEL

The committee has concluded that all OSHA personnel performing inspection, consultation and standards promulgation functions must have knowledge of safety or health disciplines and obtain private sector professional certification within 2 years of initial hire at OSHA.<sup>85</sup> In addition, OSHA personnel who carry out inspections or consultations under this section must also receive ongoing professional education and training every 5 years. The committee heard testimony stating that the agency does “not require a specific license” for a person applying for an inspector position.<sup>86</sup>

Currently, Federal and State plan State inspectors are not required to be certified in a safety and health profession. There are no specific qualifications necessary in order to apply for employment as an inspector. Accepted applicants are sent to a training academy for a short period of time prior to being placed in the field as an inspector. The SAFE Act would require that the Federal employees charged with enforcing the OSH Act be capable and qualified. A Federal or State plan State inspector needs to exhibit knowledge and expertise in the respective industry they are inspecting. The SAFE Act would guarantee just that.

#### INSPECTION PROCEDURES AND QUOTAS

This section gives OSHA the discretion on whether to conduct an onsite inspection if the agency determines that the complaint was made for reasons other than health or safety. For instance, in circumstances where OSHA determines that a complaint was made for fraudulent reasons by a former, disgruntled employee or a competitor and OSHA determines that the employees are not at risk, then this section would grant the agency discretion to determine whether or not to conduct an onsite inspection.

This section would formalize inspection procedures by ensuring that all employee complaints state whether the alleged violation has been brought to the attention of the employer and if so, whether the employer has refused to take any action to correct the alleged violation.<sup>87</sup> The committee recognizes that this section preserves employee anonymity, while providing OSHA with valuable

<sup>84</sup> See also *General Electric v. Joiner*, No. 96-188 (U.S. Supreme Court, Dec. 15, 1997) (Breyer, J., concurring) at 1.

<sup>85</sup> S. 1237, section 7.

<sup>86</sup> “Oversight of the Occupational Safety and Health Administration: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Committee,” 105th Cong., 1st Sess., 1997, at 29.

<sup>87</sup> S. 1237, section 8.

information for prioritizing which worksites need its immediate attention. This section also states that when OSHA conducts an on-site inspection in response to a complaint, the inspection shall be conducted for the limited purpose of determining whether the complained of violation or danger exists. This provision further promotes a cooperative relationship between the employer and the agency. At the same time, the committee does not expect OSHA inspectors to inspect with a “blind eye.” This section would permit OSHA to take “appropriate actions with respect to health and safety violations that are not within the scope of the inspections and that are observed” during the course of an inspection.<sup>88</sup>

This section would provide OSHA with greater discretion in handling formal complaints by codifying the agency’s phone/fax policy. Under current law, OSHA is compelled to respond to every formal, written complaint with an onsite inspection. The committee has concluded that codifying OSHA’s phone/fax policy will not undermine the agency’s deterrent effect because its use is discretionary. Employers would continue to not receive advance warning of an OSHA inspection as prescribed under current law. In addition, OSHA would retain its authority to conduct an onsite inspection at the outset if the agency decides that is appropriate.

Senate bill 1237 would eliminate OSHA inspector quotas. This section would prohibit OSHA from establishing any numerical quota with respect to the number of inspections conducted, the number of citations issued, or the amount of penalties collected. Inspectors must not face institutional pressure to issue citations or collect fines, but rather work to identify potential hazards and assist the employer in abating such hazards. OSHA’s success must depend upon whether the nation’s workforce is safer and healthier, and not upon meeting or surpassing numerical goals for inspections, citations, or penalties. In addition, this section would require OSHA to report annually on the number of employers that are inspected and determined to be in compliance with the requirements prescribed under the act.

#### PERSONAL RESPONSIBILITIES

OSHA must recognize that it does not have all the answers. Moreover, OSHA regulators cannot possibly account for the variety of problems and solutions that individual supervisors and workers encounter. This section states that “no citations may be issued unless the employer knew, or with the exercise of reasonable diligence, would have known, of the presence of an alleged violation. No citation may be issued to an employer if the employer demonstrates: (A) the employees of the employer have been provided with the proper training and equipment to prevent such violation; (B) work rules designed to prevent a violation have been established, adequately communicated to the employees, and the employer has taken reasonable measures to discipline employees when the violation of the work rules have been discovered; (C) the failure of the employee to observe the work rule led to the violations; and (D) reasonable measures have been taken by the em-

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<sup>88</sup> Ibid.

ployer to discover any such violation.”<sup>89</sup> In addition, any citation given to an employer shall be vacated if the employer demonstrates that the employees were protected with alternative methods that are equally or more protective than the methods required.

The committee has concluded that this language is necessary to avoid a one-size-fits-all solution. In addition, administrative convenience should not override workplace safety and health. If an employer can show that workers receive equal or better safety and health benefits from an alternative method than with compliance to an OSHA standard, that would constitute a valid defense. After all, worker safety is the bottom line.

To further ensure that employees adhere to Federal and State safety and health regulations, a citation may be issued by an inspector to an employee found liable for violating occupational safety and health law in relation to personal protective equipment (i.e. hard hats, eye wear, steel-toed shoes). The committee recognizes that Section 5(b) of the OSH Act says that “each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to the act which are applicable to his own actions and conduct.”<sup>90</sup> The SAFE Act would back this provision of current law by making citations a possibility as is already the mandated practice for employers.

#### ELIMINATING PENALTIES FOR NONSERIOUS PAPERWORK VIOLATIONS

Senate bill 1237 would eliminate penalties for certain posting or paperwork requirements. The committee has concluded that OSHA needs to encourage inspectors to focus on violations that place workers at risk, rather than nonserious paperwork violations. In 1995, OSHA inspectors issued the most citations (over 3,000 citations) to employers for failure to properly maintain a written program under the hazard communication standard. In fact, record keeping, the written program and information/training under the hazard communication standard (general industry and construction), and container labeling were among the most frequently cited standards by OSHA inspectors.<sup>91</sup>

The committee intends for the term “paperwork and posting requirements” to be interpreted consistent with the definitions the Department of Labor adopted in its “posting and paperwork” regulation, CPL 2.111. That regulation applies to “record keeping, posting of the OSHA notice, written program requirements in standards such as lockout-tagout, permit-required confined spaces, blood borne pathogens, hazard communication, personal protective equipment, and other essentially similar requirements found in OSHA standards.”<sup>92</sup>

To its credit, the Department of Labor conceded that “in the past \* \* \* OSHA cited employers not for genuine safety hazards, but also for minor or paperwork violations.”<sup>93</sup> In an attempt to inject some “common sense” into the enforcement system, “citations for violations of paperwork requirements are declining. \* \* \* OSHA

<sup>89</sup> S. 1237, section 9.

<sup>90</sup> Occupational Safety and Health Act, 29 U.S.C. 651(b)(1)(1970).

<sup>91</sup> U.S. Department of Labor (October 30, 1995).

<sup>92</sup> OSHA Instruction CPL 2.111, at 2.

<sup>93</sup> “The New OSHA,” supra note 52, at 8, see also S. Hrg. 104–353 at 68.



inspectors no longer penalize employers who have not put up the required OSHA poster if the employer agrees to post it right away. \* \* \* [and] OSHA has issued new inspection guidelines that will better assure that employers are not fined for failure to have a material safety data sheet for a common consumer product. \* \* \*

<sup>94</sup> OSHA recognized that citations for “minor technical violations of paperwork and written program requirements undermine the agency’s efforts to promote the agency’s mission.”<sup>95</sup>

Consistent with the Department of Labor’s reinvention efforts, Senate bill 1237 assures that firms will not be fined for non-willful, nonserious posting and paperwork violations. The committee reaffirms the importance of identifying and eliminating serious hazards and intends OSHA inspectors to focus on those violations, rather than insignificant paperwork violations. Although OSHA has made progress in reducing citations for posting the OSHA notice and failure to properly maintain material safety data sheets, the committee believes legislation is necessary to codify the advances that have been made.

#### REVIEW BY THE COMMISSION

Senate bill 1237 expands the criteria that the OSHA Review Commission utilizes to assess civil penalties. The current OSH Act authorizes the Commission to consider the following factors: the size of the firm being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.<sup>96</sup> S. 1237 includes the following criteria; the size of the employer, the number of employees exposed to the violation, the likely severity of any injuries directly resulting from the violation, the probability that the violation could result in injury or illness, the employer’s good faith in correcting the violation after the violation has been identified, the history of previous violations by an employer, and, whether the violation is the sole result of the failure of an employer to meet a requirement under this act, of prescribed by regulation, with respect to the posting of notices, the preparation or maintenance of occupational safety and health records, or the preparation, maintenance, or submission of any written information.<sup>97</sup>

Both current law and S. 1237 authorize the OSHA Review Commission to consider the size of the firm, and current law’s “gravity of the violation” is roughly equivalent to the “number of employees exposed,” the “likely severity” of injury, and the “probability that the violation could result in injury or illness.” In addition, both current law and S. 1237 refer to the good faith of the employer and the history of previous violations. Accordingly, S. 1237 simply expands the criteria by authorizing the OSHA Review Commission to consider whether the violation is the sole result of posting or paperwork deficiencies. The committee has concluded that the OSHA Review Commission should consider these criteria as mitigating factors.

<sup>94</sup> Id. at 68.

<sup>95</sup> OSHA Instruction CPL 2.111 at 2.

<sup>96</sup> Occupational Safety and Health Act, section 17(j), 29 U.S.C. 666 (1970).

<sup>97</sup> S. 1237, section 11.

## TECHNICAL ASSISTANCE PROGRAM

This section of the legislation would allow States to give technical assistance through cooperative agreements with OSHA and be reimbursed in an amount that equals 90 percent. To increase health and safety awareness, the SAFE Act mandates that not less than 15 percent of OSHA's total amount of funds appropriated for a fiscal year shall be used for education, consultation, and outreach. The SAFE Act's overall objective is to increase safety and health in workplaces of all size. To that end, this legislation would establish a pilot program in 3 States to provide expedited consultation services to small business employers (as defined by the Small Business Administration) for a nominal fee.<sup>98</sup> Consultation services under this pilot program must occur no later than 4 weeks after being requested by an employer. In addition, where violations were discovered during the consultation, OSHA would issue a warning in lieu of citations and conduct no more than 2 visits to the workplace to determine if corrective measures have occurred. If the violation was not corrected, OSHA could issue a citation. The committee has found that small businesses often lack the necessary resources to seek a third party consultant. Moreover, small businesses who currently request a free consultation under existing State cooperative agreements often confront an excessive waiting period. Under this pilot program, small businesses could still seek a free consultation, or opt for an expedited consultation in a participating State.

## VOLUNTARY PROTECTION PROGRAMS

In addition to providing cooperative initiatives for employers to establish employer/employee participation programs and seek third party consultation services, Senate bill 1237 would also codify Voluntary Protection Programs (VPP) created by OSHA in 1982. VPP currently recognizes larger worksites for their extraordinary commitment to health and safety. After an extensive work site review, OSHA awards VPP status to work sites with effective health and safety programs and superior lost workday records. Such work sites are removed from OSHA's programmed inspection list.

By codifying the VPP, the committee intends to provide stability and permanence to these important programs. Moreover, the committee recognizes that codification reaffirms the Federal commitment to providing the private sector with the occupational safety and health information needed to comply with the law. In addition to codifying the VPP, section 13 of S. 1237 would also require OSHA to encourage small businesses (as the term is defined by the Administrator of the Small Business Administration) to participate in the voluntary protection program by carrying out assistance and outreach initiatives and to develop program requirements that address the needs of small businesses. The committee heard testimony and agrees that the VPP fosters cooperation and communication which would provide the nation's businesses with experience

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<sup>98</sup>S. 1237, section 12.

on OSHA procedures, techniques, and associated protocols.<sup>99</sup> Such traits are precisely what Senate bill 1237 is designed to promote.

#### PREVENTION OF ALCOHOL AND SUBSTANCE ABUSE

Senate bill 1237 would permit employers to establish and carry out an alcohol and substance abuse testing program. The committee heard testimony and has found that a comprehensive safety plan without drug testing falls short of providing the necessary protection employees expect from their employers.<sup>100</sup> Such programs would permit the use of on-site or off-site drug testing so long as the confirmation tests are performed in accordance with the requirements of subpart B of the mandatory guidelines published by the Secretary of Health and Human Services, State certification, the Clinical Laboratory Improvements Act or the College of American Pathologists. In addition, the alcohol testing component of the program would take the form of alcohol breath analysis and would conform to any guidelines developed by the Secretary of Transportation for alcohol testing of mass transit employees under the Department of Transportation and Related Agencies Appropriations Act, 1992. The committee recognized concerns raised regarding Federal preemption of State alcohol and substance abuse testing laws. S. 1237 would not preempt any State law pertaining to alcohol and substance abuse testing programs.

Testing requirements under Senate bill 1237 would not prohibit an employer from requiring an employee-applicant to submit to and pass a pre-employment alcohol or substance abuse test. Nor does it prohibit the employer from requiring an employee or manager to submit to or pass an alcohol or substance abuse test on a for-cause basis or where the employer has reasonable suspicion to believe that an employee or manager is using or is under the influence of alcohol or a controlled substance; where such test is administered as part of a scheduled medical examination; in the case of an accident or incident involving the actual or potential loss of human life, bodily injury, or property damage; during the participation of an employee in an alcohol or substance abuse treatment program, and for a reasonable period of time (not to exceed 5 years) after the conclusion of such program; or, on a random selection basis in work units, locations, or facilities.<sup>101</sup>

The committee has concluded that OSHA should have the discretion to conduct testing of employees (including managerial personnel) of an employer for use of alcohol or controlled substances during any investigation of a work-related fatality or serious injury as prescribed by Senate bill 1237.<sup>102</sup> S. 1237 recognizes that preventing drug and alcohol related deaths and injuries is imperative to increasing worker safety in America. Employees and managers who are under the influence of alcohol or a controlled substance not only threaten their own lives, but others working along side them. Providing employers with the option of implementing a testing pro-

<sup>99</sup> "Oversight of the Occupational Safety and Health Administration: Hearing before the Senate Subcommittee on Public Health and Safety of the Senate Labor and Human Resources Committee," 105th Cong., 1st Sess., 1997 (Testimony of Jeff Johnston, Manager of OSHA Resources for Eastman Chemical Company) at 75.

<sup>100</sup> Lail testimony, *supra* note 78 at 83.

<sup>101</sup> S. 1237, section 14.

<sup>102</sup> *Ibid.*

gram would, at the very least, help lower the number of workplace fatalities and injuries.

#### CONSULTATION ALTERNATIVES

Under current law, Federal and State plan State inspectors are not permitted to consult an employer on how to abate a hazard, but are required to issue a citation. Senate bill 1237 would give inspectors the ability to provide employers with technical or compliance assistance in correcting a violation discovered during an inspection or investigation without issuing a citation.<sup>103</sup> This consultative flexibility would be entirely discretionary on the part of the inspector and would not undermine the agency's enforcement responsibilities.

This section would permit, not require, OSHA inspectors to issue warnings in lieu of citations in appropriate situations. The OSH Act states that inspectors must issue a citation when they see a violation, although the Act does provide for a "de minimis notice" (which is not a citation and carries no penalty) under sec. 9(a) of the Act for violations that have "no direct or immediate relationship to safety or health."<sup>104</sup> The committee expects OSHA inspectors to use good judgement. If they see a problem, then perhaps a citation is required. But if the employer has tried to comply with the law and the problem is not serious, a warning could be in order. The committee recognizes that current law fails to provide inspectors with this type of flexibility.

#### V. COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, November 14, 1997.*

Hon. JAMES M. JEFFORDS,  
*Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1237, the Safety Advancement for Employees Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEIL, *Director.*

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Summary: S. 1237 would require the Secretary of Labor to establish a third party consultation service program to help employers comply with the Occupational Safety and Health (OSH) Act and avoid a citation. The Secretary would also consider the employers' and employees' effort in complying with the act when issuing a citation. In addition, it would require the National Academy of Sciences to review and make recommendations on regulations

<sup>103</sup> S. 1237, section 15.

<sup>104</sup> Occupational Safety and Health Act, 29 U.S.C. 651(b)(1) (1970).

issued by the Occupational Safety and Health Administration (OSHA) before they become final.

The bill would result in small additional costs to OSHA. CBO estimates such costs could be several million dollars in the first few years, but would be less than \$1 million annually thereafter, subject to the availability for appropriations. Because S. 1237 would not affect direct spending on receipts, pay-as-you-go procedures would not apply.

The bill contains no intergovernmental mandates, as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would impose no costs on state, local, or tribal governments. S. 1237 would impose requirements on workers and on the National Academy of Sciences that would constitute private-sector mandates under UMRA. CBO estimates that the direct cost of these mandates would be well below the statutory threshold specified in UMRA (\$100 million in 1996, adjusted annually for inflation).

Basis of estimate: Sections 4 and 5 would require the Secretary to implement a third party consultation services program within 18 months of enactment. An employer would have the opportunity to hire a consultant to evaluate its workplace or safety and health program and report to the employer any violations of the OSH Act and appropriate corrective measures. Within a specified amount of time, the consultant would reinspect the workplace to verify that any violations identified in the report had been corrected. If, after the reinspection, the consultant determined those violations had been or were being corrected pursuant to a written plan, he would provide the employer a declaration of resolution. For 2 years after receiving the declaration, the employer would be exempt from the assessment of any civil penalty. However, this exemption would not apply if the employer did not make a good faith effort to remain in compliance or if there was a fundamental change in the hazardousness of the workplace.

The bill would require the Secretary to establish an Advisory Committee to advise her on the consultation services program and assist her in developing guidelines for consultants to use in evaluating a workplace. In addition, the Secretary would approve consultants and develop a registry of those who had been approved. The Secretary would be permitted to revoke the status of a qualified individual if she determined that the individual failed to meet the requirements of the program.

These sections could increase or decrease spending. On the one hand, OSHA would require additional staff to process the applications of individuals wanting to be certified as consultants, maintain a public data bank of those individuals who qualified, and monitor practicing consultants to ensure compliance. On the other hand, OSHA would presumably inspect fewer workplaces than under current law because it could not give citations to employers with a declaration of resolution.

Most of the costs would arise in processing applications for occupational registered nurses and physicians, industrial hygienists, and safety professionals who sought certification as consultants. Without knowing the required qualifications or the demand for consultants, CBO cannot estimate how many individuals would apply. If all of the 25,000 people in the eligible fields specified in the bill

applied, OSHA would spend \$6 million over the first few years to process applications. This estimate assumes that OSHA would employ 32 full-time employees at \$60,000 per year to process about 8,000 applications per year. The actual number of applicants would likely be only a fraction of the number eligible, however. CBO estimates that maintaining the program after the initial pool of applications was processed would cost less than \$1 million annually.

Assuming that OSHA would rarely inspect facilities with declarations of resolution, giving employers the option to hire private consultants would shrink the pool of employers OSHA needed to inspect, thus decreasing the agency's need for resources. However, CBO estimates that the decrease would be negligible. First, many of the people eligible to be consultants might inspect few workplaces. Second, it is unlikely that OSHA would otherwise have inspected many of the employers seeking declarations of resolution.

Section 6 of the bill would require the Secretary to have all rules reviewed by the National Academy of Sciences (NAS) before they were finalized. Under current law, the Secretary may issue a final standard if she publishes the proposed rule in the Federal Register and if there are no objections to the proposed rule, or after a hearing in response to any objections. Under this section, the Secretary would not be able to publish the final rule without first submitting it to NAS for its recommendations. The Secretary could decide whether to include the recommendations of the NAS in the final rule, but the bill would require the recommendations to be published with the final standard in the Federal Register. This provision could require the Secretary to hire one additional employee, but the annual cost would be negligible.

Section 7 would require Federal employees responsible for enforcing the OSH Act to meet the same eligibility requirements as qualified individuals under the consultation services program created in Sections 4 and 5. Many of the inspectors currently working for OSHA do not meet the criteria specified in the bill, and many could require additional training and certification if OSHA inspectors were held to these standards. However, because the bill would allow the Secretary to determine criteria by which current employees would qualify, CBO estimates this provision would result in minimal additional costs.

Section 9 would provide additional grounds on which employers could contest citations for noncompliance issued by OSHA. It would require citations to be vacated if employers could demonstrate that employees were protected by methods at least as stringent as the OSHA regulation being violated. These provisions could increase OSHA's litigation costs by increasing the incentive for employers to contest citations, but the increase would not be significant.

In addition, this section would authorize the Secretary to assess a civil penalty against an employee who willfully violated an OSHA requirement with respect to personal protective equipment. If the employee contested the citation or penalty, the Occupational Safety and Health Review Commission would be required to have a hearing and make a determination on the citation. Under current law, the Secretary cannot cite employees. This provision could increase the amount of penalties collected, but the increase would not be significant.

Section 12 would require the Secretary to establish a pilot program providing expedited consultation services to small businesses in three States for a maximum period of 2 years. Within 90 days of the termination of the program, the Secretary would submit a report to Congress evaluating the pilot program. CBO estimates that the pilot program would not significantly affect Federal spending.

Section 14 would permit employers to establish an alcohol and substance abuse testing program. It would also authorize the Secretary to test employees for use of alcohol or controlled substances during any investigations of a work-related fatality or serious injury. Under current law, the Secretary has access to the tests performed through the employer. CBO estimates that the cost of any additional tests the Secretary would perform as a result of this provision would not be significant.

Pay-as-you-go-consideration: None.

Estimated impact on State, local, and tribal governments: S. 1237 contains no intergovernmental mandates as defined in UMRA and would impose no costs on State, local, or tribal governments. State participation in the affected programs is voluntary. The bill would codify an existing OSHA program that funds cooperative agreements with States that provide workplace safety consultation services to businesses. In fiscal 1997, \$34 million was appropriated for this program.

Estimated impact on the private sector: S. 1237 would impose two mandates on private-sector entities—one regarding the scientific review of OSHA standards by NAS and the other regarding testing of certain workers for controlled substances. Section 6 of the bill would require the NAS—which is a private organization, not a governmental entity—to appoint a scientific review committee to review and make recommendations on draft versions of OSHA standards. Ordinarily, Federal agencies contract with NAS for research or analysis and providing funding for those endeavors. However, S. 1237 is silent on the issue of funding. CBO estimates that the cost to NAS of undertaking these reviews would be about \$2 million annually. Section 14 of the bill would give the Secretary of Labor the authority to conduct tests for alcohol or controlled substances on private-sector workers during investigations of work-related fatalities or serious injuries. CBO estimates that taking such test would impose negligible monetary costs on affected workers.

Estimate prepared by: Federal Cost: Cyndi Dudzinski; Impact on State, local, and tribal governments: Marc Nicole; Impact on the private sector: Katherine Rarick.

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

## VI. APPLICATION OF LAW TO LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. S. 1237 amends the Occupational Safety and Health Act of 1970 (OSH Act) to further improve the safety and health of working environments, and for other purposes. S. 1237 amends section 8(f) of the OSH Act to require additional information to be included in an employee’s written request for an

inspection, and to provide alternative methods, in addition to on-site inspections, to determine whether reasonable grounds exist to believe that the complain of hazard exists. S. 1237 also amends section 9 of the OSH Act to consider employer knowledge of an alleged violation when issuing a citation, and to permit demonstration by an employer of satisfactory alternative methods of protection of the safety and health of its employees. S. 1237 further amends section 9 to allow inspectors to exercise discretion regarding the issuance of a citation. Section 215(a)(1) of the CAA requires each employing office and each covered employee of the legislative branch to comply with the provisions of section 5 of the OSH Act. Section 215(b) of the CAA requires that the remedy for a violation shall be an order to correct the violation as would be appropriate under section 13(a) of the OSH Act. Section 215(c)(1) and (2) of the CAA grants the General Counsel of the Office of Compliance the authority granted the Secretary of Labor in sections 8(a), 8(d), 8(e), 8(f), 9 and 10 of the OSH Act. Section 215(c)(4) of the CAA grants the Board of Directors of the Office of Compliance the authority granted the Secretary of Labor in sections 6(b)(6) and 6(d) of the OSH Act. S. 1237 amends sections 8(f) and 9 of the OSH Act. Therefore, the changes made by S. 1237 to sections 8(f) and 9 apply to the legislative branch.

## VII. REGULATORY IMPACT STATEMENT

The committee has determined that there will be only a negligible increase in the regulatory burden of paperwork as a result of this legislation.

## VIII. SECTION-BY-SECTION ANALYSIS

*Section 2: Purpose.*—To increase the joint cooperation of employers, employees, and OSHA in an effort to ensure safe and healthful working conditions for employees.

*Section 3: Employee and Employer Participation Programs.*—Would permit employers to establish employer and employee participation programs which exist for the sole purpose of addressing safe and healthful working conditions. This section would not amend the National Labor Relations Act or the Railway Labor Act.

*Section 4: Establishment of Special Advisory Committee.*—Would establish an advisory committee pursuant to the Federal Advisory Committee Act of 1972 for the sole purpose of advising OSHA on the construction, implementation, and administration of the Third Party Consultation Services Program prescribed in Section 5. The advisory committee shall consist of 3 employees, 3 employers, 2 from general public, and 1 state official from State plan state. Each committee member shall have safety and health experience as defined by education.

*Section 5: Third Party Consultation Services Program.*—Would allow employers the option of hiring OSHA qualified individuals who are State licensed physicians, industrial hygienists, professional engineers, safety engineers, safety professionals, registered nurses, state/OSH inspectors for more than 5 years, accredited by a nationally recognized private accreditation organization, individuals with 10 years workplace safety and health experience, or indi-



viduals determined to be qualified by OSHA to perform workplace safety and health consultations. If an employer complies with the qualified consultant's recommendations, OSHA shall grant a 2-year exemption from civil penalties for that workplace. All qualified consultants are kept on a registry by OSHA and may be revoked from participating if he/she fails to meet the requirements of the program or commits malfeasance, gross negligence, or fraud in connection with any consultation services. All safety and health records shall not be admissible in a court of law, administrative or enforcement proceeding against the employer except to show that a qualified consultant failed to meet program requirements or performed malfeasance, gross negligence or fraud. A participating employer must make a good faith effort to stay in compliance and not fundamentally change the workplace in order to maintain the 2-year exemption from civil penalties.

*Section 6: Independent Scientific Peer Review.*—Prior to issuing a final rule, OSHA must submit the draft rule and copy of the rule-making record to the National Academy of Sciences (NAS) for review and comments. The NAS will appoint an independent scientific review committee to analyze and publish comments on the appropriateness and adequacy of the scientific data, scientific methodology, and scientific conclusions adopted by OSHA in the Federal Register.

*Section 7: Continuing Education and Professional Certification for Certain Occupational Safety and Health Administration Personnel.*—OSHA personnel performance inspection, consultation and standards promulgation functions requiring knowledge of safety and health disciplines would be required to obtain private sector professional certification within 2 years of initial hire at OSHA. Such personnel must also receive ongoing professional education and training every 5-years of employment.

*Section 8: Inspection Procedures and Quotas.*—Would formalize inspection request procedures by alerting OSHA of whether the alleged violation has been brought to the attention of the employer and if so, whether the employer has refused to take any action to correct the alleged violation. Would require OSHA to conduct an inspection for the limited purpose of determining whether a violation exists and provide a written statement of the reasons for the determination to employee or employee representative upon their request. Would codify OSHA policy of contacting an employer by telephone, fax, or other appropriate methods to determine whether the employer has taken corrective action and whether there are reasonable grounds to believe that a hazard exists. This section would also codify OSHA policy that no quota policy for any subordinate within OSHA with respect to the number of inspections conducted, citations issued, or penalties collected may be established. OSHA would be required to report annually on the number of employers in compliance with respect to consultations services and inspections.

*Section 9: Personal Responsibility.*—Would codify OSHA's employee accountability defense which provides a defense to an OSHA citation when an employee disregards an established health and safety work rule that is the subject of the citation, where the employer enforces the work rule and provides appropriate training to

the employee. In addition, the section provides a defense to a citation if an employer can demonstrate that it has provided an alternative means to protect workers that is equally or more protective than the safeguards required by the act. The section would also permit an inspector to issue a citation to an employee who is found liable for violating occupational safety and health law as it pertains to their personal protective equipment.

*Section 10: Reduced Penalties for Paperwork Violations.*—Employers who violate posting or paperwork requirements, other than fraudulent reporting, shall not be assessed a civil penalty for such a violation unless OSHA determines that the employer has willfully or repeatedly violated such requirements.

*Section 11: Review by the Commission.*—Would require the OSHA Review Commission to give “due consideration” to certain factors when assessing the appropriateness of a penalty (i.e. the size of an employer, the number of employees exposed to the hazard, history of previous violations, etc.)

*Section 12: Technical Assistance Program.*—Would codify OSHA/state cooperative programs and establish a 2 year pilot program where small businesses may receive an expedited consultation no later than 4 weeks after the employer’s request for a nominal fee determined by OSHA. This section would also earmark 15 percent of OSHA’s annual appropriation for education, consultation and outreach efforts.

*Section 13: Voluntary Protection Programs.*—Would establish OSHA/business cooperative agreements that encourage safety and health management systems in exchange for inspection and certain paperwork requirement exemptions. This section would also require OSHA to encourage small business participation in the voluntary protection program by providing outreach and assistance initiatives and develop program requirements that address the needs of small businesses.

*Section 14: Prevention of Alcohol and Substance Abuse.*—Would permit employers to establish and carry out an onsite or offsite alcohol and substance abuse testing program in accordance with the requirements of subpart B of the mandatory guidelines published by the Secretary of Health and Human Services, State certification, the Clinical Laboratory Improvements Act or the College of American Pathologists. Testing programs prescribed by this section would not preempt State law.

*Section 15: Consultative Alternatives.*—Would permit an OSHA inspector to provide technical or compliance assistance to an employer in correcting a violation discovered during an inspection or investigation without issuing a citation. Would require each citation to be in writing and describe with particularity the nature of violation including a reference to the provision of the OSH Act of 1970, regulation, rule, or order alleged to have been violated. In addition, the section would permit an inspector to issue a warning in lieu of a citation with respect to a violation that has no significant relationship to employee safety or health or when an employer acts in good faith to promptly abate a violation if the violation is not willful or repeated.

## IX. VIEWS OF SENATORS KENNEDY, DODD, HARKIN, MIKULSKI, BINGAMAN, WELLSTONE, MURRAY AND REED

### INTRODUCTION

The so-called “Safety Advancement for Employees Act” proposes a wholesale reversal of OSHA’s approach, but there is virtually no evidence that the agency or the American workforce would benefit. In essence, the bill seeks to fix a problem that does not exist. But it refuses to address what are genuine concerns about OSHA. Citing outdated statistics and deeply flawed sources, while ignoring more recent data that undermine its assertions, the Majority claims that OSHA should move from what is allegedly an “adversarial” approach to a “collaborative” approach. The Majority fails to acknowledge the changes in approach that OSHA has made since 1993, and instead repeatedly cites anecdotal industry complaints about perceived regulatory burdens. This is not sound lawmaking, and S. 1237 is an unacceptable piece of legislation.

The original OSH Act combines strong enforcement of standards with education and training of employees and employers. The “SAFE” Act is premised on the notion that this balanced approach has failed to reduce job injuries, illnesses, and fatalities. This premise is false. Recent data demonstrate that the “New OSHA” has achieved new levels of effectiveness. Injury and illness rates are at historically low levels—the lowest since the Bureau of Labor Statistics began tracking this data in 1973. According to the Bureau of Labor Statistics Annual Survey of Occupational Injuries and Illnesses, the overall private sector job injury/illness rate declined from 11 per 100 full-time workers in 1973, to a record low rate of 7.4 per 100 workers in 1996. This is an overall decline of 32.7 percent. And, the number of fatal work injuries fell in 1996 to 6,112, the lowest level in the five-year history of this Bureau of Labor Statistics survey. From 1948 through 1970, the occupational death rate declined by 37.9 percent. Between the OSH Act’s enactment in 1970 and 1992, that rate declined by over 60 percent. The current figures are still unacceptably high, but they do not show that OSHA’s approach “has failed American workers,” as the Majority contends.

Further, the evidence shows that OSHA works most effectively where the agency has targeted its enforcement efforts. The most significant reductions in injury/illness rates have occurred in those sectors which have been the most heavily regulated. In manufacturing and construction, the industries which have received the vast majority of OSHA inspections, the injury and illness rates have declined by 30.7 percent and 50 percent respectively, since 1973. The mining industry, which has a much more intensive inspection frequency under the Mine Safety and Health Act, has ex-

perienced the greatest decline in injury and illness rates—57 percent since 1973.

The results have been dramatically different in those industries that have received little or no attention, where safety and health have been left largely to voluntary compliance efforts by employers. Those sectors have made little or no progress in reducing job injuries and illnesses. In both the finance sector and service sector there has been no decline in injury rates. Within the service sector, injury rates in nursing homes and hospitals have been increasing with rates in both of these industries now higher than injury rates in construction, once one of the most hazardous industries. With the large growth in employment in the finance and service industries, they are responsible for a major part of the overall occupational injury and disease burden in this country.

The experience under the Occupational Safety and Health Act argues for more enforcement, not less, and for enforcement that is targeted to those sectors and those workplaces where serious injuries and illnesses are occurring. These enforcement efforts need to be complemented and supported by outreach, compliance assistance and training and education for both employer and employees.

This is the approach that OSHA is now taking with its cooperative compliance program (CCP). The agency is using employer-supplied data on job injuries to target its efforts to those industries and employers with the highest rates of serious injuries. Those with the highest rates are being placed on the primary inspection list and inspected, as is appropriate. Those firms in the next tier have been notified that they have been targeted due to their high rates, but are being offered a chance to take steps to address job hazards before OSHA inspects. If they agree to participate and to establish a safety and health program, identify and correct hazards and involve workers and unions in the process, they are placed on a secondary inspection list with a reduced frequency of inspection. If OSHA does inspect, and the employer is taking appropriate steps to protect workers, the employer's actions will be recognized with the result being a more focused review, fewer citations and reduced penalties for any violations found.

This targeted approach is supplemented by outreach and assistance. It treats employers differently based on their performance in protecting workers. OSHA's current model is much sounder than the approach in the "SAFE" Act, which allows employers to contract out their job safety responsibilities to a third party, immunizes the employer from penalties and takes away OSHA's ability to enforce the law even where serious violations are present.

The burden is on those who want to change OSHA's present system to justify their proposals, but the Majority falls woefully short. This is due in large measure to the inadequate record on which the Majority relies. There has been no hearing on any OSHA "reform" measure in the 105th Congress. There was a hearing before the Subcommittee on Public Health and Safety on July 10, 1997, but it was not a legislative hearing. Moreover, at the time of that hearing, the present bill had not even been introduced. The hearing instead focused on oversight of the Occupational Safety and Health Administration. A panel of Senators discussed possible legislation, and certain of the witnesses did so as well, but the hearing was de-

nominated “OSHA Oversight” and that was its principal emphasis. Comprehensive restructuring of an agency should not be based on so slender a record.

The Majority relies heavily on an eight-year-old report by the General Accounting Office. But it does so selectively, focusing on a single one of the report’s twenty recommendations, while ignoring all the rest. Further, the Majority utterly fails to acknowledge the substantial evidence, obtained since 1990 which demonstrates the deficiencies in the one recommendation it highlights. Such one-sidedness makes the validity of the proposal being advanced highly suspect.

The goal of the 1970 OSH Act is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” OSHA has traditionally sought to achieve this goal by employing a balanced approach that includes compliance assistance, education and training and free consultation services for small businesses, with a foundation of strong enforcement of protective standards. The Majority seeks to replace this balanced approach with a one-sided tilt toward “collaboration” that would erode OSHA’s enforcement foundation. The Majority has chosen to ignore the advice of experts who warn that many employers will lose interest in collaboration if OSHA fails to maintain a credible enforcement program. Because of this and many other deficiencies, the eight members of the Minority oppose the present bill.

So, too, does the Administration. Secretary of Labor Alexis M. Herman advised the Majority that the Administration opposes the enactment of this bill “because it would compromise workplace safety and health.” Contrary to the Majority, the Administration believes that the bill “would greatly diminish the ability of the Occupational Safety and Health Administration to administer and enforce the OSH Act.” Accordingly, the Secretary will recommend a veto if the bill is passed by the Congress and presented to the President. (A complete copy of the Secretary’s letter is appended at the conclusion of the Minority views.)

For all the reasons set forth by the Secretary, as well as those below, the Minority opposes the enactment of this legislation.

#### THIRD-PARTY AUDITS

##### *The majority’s inadequate evidentiary record*

The Majority’s reliance on outdated and anecdotal data is especially glaring in its treatment of section 5 of the bill. First, the Majority contends that “regulatory burdens” make it impossible for employers, especially small businesses, to comply with OSHA standards. As evidence, it relies almost exclusively on a 1996 GAO report entitled “Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies.” But that report does not withstand even the most minimal scrutiny. As the Majority itself admits, “[f]ifteen geographically dispersed companies voluntarily chose to participate in the review.” Comprehensive changes in a statutory scheme should not be based on anecdotes submitted by a tiny number of parties who are both self-selected and self-interested.

The Majority also selectively cites a 1990 GAO report entitled “Occupational Safety and Health—Options for Improving Safety and Health in the Workplace” as support for its third-party consultation proposal. The Majority totally ignores the GAO’s warning that “a possible disadvantage of such an approach is the potential conflict of interest. The safety or health specialists might be reluctant to antagonize employers by identifying all the hazards. A vigorous monitoring role by OSHA would be needed to overcome such difficulties.” Report at 35.

The Majority also relies heavily on recommendations made in 1993 by Vice President Gore’s National Performance Review. That document proposed the use of private firms to audit employers’ safety and health programs. Since that proposal, the Department of Labor and OSHA have become far more cautious about the potential success of a third-party consultant program. The idea of third-party audits was the subject of a two-day meeting of OSHA’s stakeholders in July 1994. Both labor and business representatives expressed concern at that time. Specific concerns included “questions about who would validate the third parties \* \* \* [and] concerns about legal liabilities. Many participants were persistent in asking whether these third parties would act as agents of the courts, OSHA, employees or the company. Still others expressed the view that certification could not be considered outside the context of a safety and health program standard. Some stakeholders encouraged OSHA to examine and evaluate the effectiveness of its existing programs in corporate-wide settlements and labor-management safety and health committees before embarking on new (and untested) one like third-party certification.” Revitalizing OSHA, Stakeholders’ Meeting July 20–21, 1994—Highlights at 4. See also Occupational Safety and Health Reform and Reinvention Act: Hearing on S. 1423 Before the U.S. Senate Committee on Labor and Human Resources, 104th Cong., 1st Sess. 56 (Statement of Assistant Secretary Joseph Dear) (other concerns included “Should OSHA divert its limited resources to facilitate a costly certification process? Who would pay for the audit?”).

Further, a 1996 survey of employers by the State of North Carolina demonstrated a resounding preference on the part of employers for an OSHA consultant rather than a private consultant—even if it meant waiting six months for the consultation. “Having a genuine OSHA inspector employed by the state adds a lot of clout in terms of compliance with recommendations,” according to one survey respondent. “Having been a private management consultant, I know from experience that purchased advice is often not followed, because the purchaser owns it.” The North Carolina respondents also said they feared third-party consultants might try to sell them unnecessary services that would have little impact on workplace safety. Overall, 79 percent of employers in the North Carolina survey reported that they would prefer to have OSHA offer its services exclusively, without any “help” from third-party consultants. Thus there are serious questions whether employers would make use of consultation services, even if they were enacted.

*Deficiencies in the proposal*

Section 5 of the bill requires the Secretary of Labor to establish a program to “qualify” persons to serve as consultants to employers, in order to help them identify and correct workplace safety and health hazards. Employers could then hire or contract with such a consultant for those services. If the consultant declared the employer was in compliance with the OSH Act, or was proceeding under a plan to abate any identified hazards, the employer would be exempt from any assessment of a civil penalty under the act for 2 years, with certain limited exceptions.

The potential for conflict of interest and abuse is obvious. The bill permits employers to use their own employees to conduct the “consultation.” Employees subject to discipline, a failure to be promoted, or discharge are very likely to give their employers only good news. Even an outside consultant is likely to feel pressured to approve the employer’s program, or risk the termination or non-renewal of a contract. And, the bill does not prevent an employer from “shopping” for a consultant until it locates someone willing to approve the employer’s operations. Such consultants will inevitably feel pressure to avoid recommending costly improvements even when they are necessary to prevent an injury or illness. In short, section 5 could effectively permit employers to purchase immunity from OSHA penalties—even where a death or serious injury has resulted from a violation of the law. This will not make workplaces safer.

Section 5’s 2-year penalty exemption for employers using private consultants is deeply troubling. The only large-scale study performed to date found that OSHA inspections resulting in the assessment of penalties led to a 22 percent reduction in injuries at the inspected site for three years following the inspection. Wayne Gray and John Scholz, “Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement,” *Law and Society Review* at 177–213 (July 1993). The study also found that inspections without penalties have no appreciable impact on subsequent rates of injuries. By immunizing employers from penalties for two years, the bill discards one of the most effective tools available to reduce occupational injuries.

The exceptions to the penalty waiver do not improve the provision. If a consultant issued a “declaration of resolution,” a term not defined in the legislation, OSHA could levy a penalty only if the agency could show that there had been a “fundamental change in the hazards” of the workplace, or that the employer had not made a good faith effort to remain in compliance. OSHA would be barred from assessing a penalty for 2 years, even if conditions at the workplace had changed materially since the consultant issued a “declaration.” Again, this will not improve safety on the job.

As introduced, section 5 required that employers abate all violations and be in compliance with the OSH Act before the consultant could issue a declaration of compliance and the employer could be eligible for penalty immunity. However, at the markup the Majority adopted an amendment to allow employers to be declared “in compliance” if they were simply following an abatement plan.

In introducing the amendment, Senator Enzi stated that it was necessary to accommodate those situations that might take longer

to abate. He also stated that it was consistent with OSHA's abatement verification rule, which requires employers to submit plans and a schedule to OSHA for violations with longer abatement periods. This is incorrect. There is a fundamental difference between S. 1237 and OSHA's abatement verification rule. OSHA's rule operates to provide OSHA with verification that abatement of a violation has taken place by a date set by the agency.

By contrast, under section 5 of S. 1237, there is no requirement whatever for *any* abatement date to be set. Under this legislation, the employer is eligible for complete penalty immunity simply if it is following an abatement plan. This is true even if serious hazards are present and there is no schedule for abatement. If the employer nonetheless chose to set a schedule for abating the hazards, that schedule could be many times longer than the time period that would be permitted by OSHA for similar violations identified in enforcement inspections. This provision makes S. 1237 still more objectionable than it was when first introduced.

Section 5 also confers an extremely broad evidentiary privilege on employers' self-audit documents. Under the bill's "Access to Records" provision, documents relating to *any* employer-initiated self-inspection activity could not be used in any legal proceeding involving the employer. This complete privilege would apply even if the employer had not engaged in a third-party "consultation" of the sort described in the bill.

The privilege would complicate OSHA enforcement enormously. The agency would be forced to reach conclusions about workplace hazards, injuries and illnesses without any involvement of those with firsthand knowledge. Access to consultants' reports can be critical to demonstrate who is responsible for occupational injuries. For example, in the Tewksbury Industries case, insurance company and state consultants had recommended safety improvements for years. The employer ignored the recommendations and, in July 1994, two workers were killed as a result. Antonio Lopez, 48, was pulled into the rotating parts of an unguarded conveyor belt and Earl Shikles, 31, was run over by a front-end loader with inoperable brakes. The Massachusetts Attorney General ultimately indicted the company's president for manslaughter, based in part on the president's failure to address the recommendations. In many fatality and catastrophe investigations, self-audit records and reports are the most reliable—and often the only—way to establish the facts. In practice, OSHA does not use an employer's self-audit records against an employer that made good faith efforts to protect its workers. Accordingly, this provision would protect only those employers who identified hazards but consciously chose not to correct them.

The bill says nothing about a consultant's obligations where an employer is found not to be in compliance with the law. Under section 5, a consultant might refuse to provide a declaration regarding a particular workplace, leaving the employer free to "shop" for another consultant. The bill does not require that consultants report an employer's refusal to abate to OSHA—even where serious hazards are present. And, the total confidentiality of the consultant's report denies employees and the agency the ability to verify that the employer did abate the hazards that were identified.



Finally, the bill fails to specify even the most minimal qualifications for a consultant. Accordingly, any medical doctor could be qualified as a health and safety consultant, even without any experience or expertise in identifying and abating occupational safety and health hazards. This could yield absurd results. Contracting with a pediatrician for an OSHA “consultation” will not improve safety in a manufacturing facility, and psychiatrists’ training typically provides little exposure to OSHA’s trenching standards.

*National Academy of Sciences review of OSHA standards*

Section 6 of the bill imposes burdensome new requirements on OSHA’s standard-setting process. It requires the Secretary of Labor to submit draft final standards to the National Academy of Sciences, which would appoint an Independent Scientific Review Committee. That Committee would review the standards in light of the available scientific literature, and provide recommendations before standards could become final.

This process is unnecessary and time-consuming. First, the Majority has made no showing that additional scientific review is needed, and it is doubtful that they could. In fact, OSHA’s standard-setting process already incorporates significant opportunities for scientific review. OSHA issues standards only after a lengthy administrative process, including extensive public hearings, comprehensive scientific testimony, and rigorous review by agency officials and the public. Scientific peer review is an integral part of this process, and it takes place in many ways. During the hearings on a proposed OSHA rule, any scientist—or interested non-scientist, for that matter—can cross-examine OSHA officials or the agency’s expert witnesses regarding any aspect of the proposed rule. The cross-examination is conducted in the open and on the record. As one court observed, “OSHA \* \* \* has wisely acted by regulation to go beyond the minimum requirements of the statute and to expand [its] capacity to find facts by providing an evidentiary hearing in which cross-examination is available.” *Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467, 476, 476 (D.C. Cir. 1974). The National Academy of Sciences panels, by contrast, typically function in private. The Majority fails to demonstrate how adding a layer of secrecy to rule-making would improve job safety.

Not only is OSHA’s process more than adequate, but its results are exemplary. OSHA’s standards are one of the agency’s greatest successes. The lead standard has reduced by over two-thirds the poisoning of smelting and battery plant workers since it was issued in 1978. No longer do thousands of such workers suffer anemia, nerve disorders, seizures, brain damage or even death from prolonged exposure to lead. Similarly, the 1978 cotton dust standard reduces the rate of brown lung cases among textile workers from some 40,000 to a few hundred. The grain dust standard reduced fatalities from grain elevator explosions by more than 50 percent. The trenching standard led to a two-thirds reduction in fatalities at trenching and excavation sites, since OSHA strengthened that standard in 1990. The list goes on and on.

Virtually all of the 93 standards that OSHA has issued since 1970 have been challenged in court. All but three of those chal-

allenges have resulted in the standard's affirmance. The cotton dust standard, for example, was affirmed by the Supreme Court of the United States. *ATMI v. Donovan*, 452 U.S. 490 (1981).

In section 6 as in many other provisions, the bill attempts to correct a problem that does not exist. But section 6 is not just unnecessary—it is dangerous. It will delay the implementation of important safety provisions. The typical National Academy of Sciences panel requires between 18 and 24 months to complete its work. Workers will be left unprotected against occupational hazards for an average of 2 additional years, resulting in more occupational injuries and illnesses that could have been prevented. This outcome is unconscionable.

The Majority's response to these concerns is twofold. First, it asserts that "the addition of an independent scientific peer review will ultimately speed up the implementation process for OSHA's rules." The Majority gives no explanation and cites no support for this astonishing claim—because none exists. Second, and more disturbingly, the Majority cites anecdotal reports from employers complaining about "the overwhelming number of complex regulations prescribed by OSHA." Imposing redundant processes that will delay the issuance of additional standards takes on an ominous appearance in light of the Majority's oft-expressed concern for the employers registering such complaints.

Section 6 also contains a perverse incentive for OSHA to ignore NAS recommendations. If the NAS panel suggests changes in OSHA's standard, and OSHA incorporates those changes, the standard must be returned to the NAS for still another review. OSHA would confront the extraordinary choice between delaying the issuance of its standard for another two years, or simply ignoring NAS's recommendation altogether. Either OSHA's standards would be delayed for some 4 years beyond the time when the agency first deemed them ready for implementation, or the NAS review process would be rendered meaningless. Neither outcome is acceptable, yet both are inevitable.

As the Secretary of Labor explained, NAS review adds "a redundant and unnecessary level of review, thereby delaying the promulgation of safety and health protections." For this reason among many others, the Secretary concluded that the bill "could present unacceptable dangers to the health and safety of American workers." The Minority joins with the Secretary in that conclusion, and endorses her opposition to this provision of the bill.

#### *Penalizing employees*

Section 9 of the bill authorizes OSHA to penalize an employee who willfully violates the requirements of the statute or any rules or standards thereunder by not wearing personal protective equipment. This provision undermines a central principle of the OSHA Act: that employers are in the best position to control workplace safety and health. In so doing, it reduces employers' responsibility for conditions on the job. Current law gives employers the right, and all the tools necessary, to discipline employees. If employees refuse to obey the law, then employers should use that authority.

This provision seeks to instill in employees the same fear that the Majority claims employers already feel toward OSHA. The Ma-

jority admits that section 9 would subject employees to “citations” for failing to wear personal protective equipment. What it carefully fails to mention is that such citations carry maximum penalties of \$70,000—an enormous, crushing financial burden for workers who may earn \$15,000 a year or less. The threat of such penalties may well so terrify employees that they will refuse to call OSHA even when their employer engages in obviously dangerous practices. The system established under current law, which relies heavily on employees to notify OSHA when they face serious threats to safety or health, will be seriously undermined by this provision.

#### *Employer defenses*

Section 9 of the bill also would create an entirely new statutory defense to an OSHA citation, based on an employer’s demonstration that employees were protected by alternate methods as protective as or more protective than those required by the standard the employer violated. This provision could seriously undermine OSHA’s standards, and transform every enforcement action into a costly and time-consuming variance proceeding.

The Occupational Safety and Health Review Commission and the courts have held repeatedly that, when OSHA’s standards require employers to adopt specific precautions for protecting employees, employers must comply in the manner specified. Under current law, employers have the right to select alternative means of compliance only when literal compliance is impossible or would pose a greater hazard to employees. In “greater hazard” cases, the Commission requires an employer to demonstrate that a variance has either been sought or would be inappropriate.

Under these rules, the challenge rate has remained relatively low; fewer than ten percent of all citations are currently contested. Under section 9, however, virtually every employer cited for violating the statute or its interpretive regulations could claim that an alternative means of compliance was as effective as the standard in question. In effect, standards would become guidelines, subject to challenge—and potential waiver—in every contested case.

As a consequence, judges with little or no safety and health expertise would make determinations about the adequacy of worker protections, rather than trained safety and health professionals. This provision could have a substantial impact on agency resources, and greatly increase litigation burdens on OSHA, the OSH Review Commission, and the Federal courts.

#### *Employee participation programs*

Section 3 of the bill would permit an employer unilaterally to establish an employee involvement mechanism, free from the restrictions normally imposed by section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. section 158(a)(2). The employer could designate employees’ representatives on the committee, set the agenda, choose which if any recommendations to implement, and disband the committee if its processes were not to the employer’s liking.

This is the so-called “TEAM Act,” albeit limited to safety and health committees. That legislation, S. 295 in both the 104th and 105th Congresses, permitted employers to establish company

unions. In the present bill, such sham unions would be authorized, as long as they only addressed safety and health issues. Section 3 of the bill would exempt from NLRA protection any employee participation mechanism—no matter how one-sided, coercive, unfair or employer-dominated—that deals with employee safety and health conditions. This provision would overthrow more than 60 years of labor law protecting employees' right to be represented *only* by representatives of their own choosing.

But section 3 of this bill is actually less protective of employee rights than the TEAM Act in two important respects. First, the TEAM Act applies section 8(a)(2) to committees that “have or claim authority to negotiate or enter into collective bargaining agreements.” Section 3 of this bill has no such limitation. Thus, an employer-dominated safety committee could “negotiate” a “collective bargaining agreement” that would bind all employees in the workplace, free from any proscriptions under the NLRA. But management representatives should not be permitted to contract with themselves and purport to be representatives of their workers. This is precisely the sort of conduct that section 8(a)(2) was designed to prevent.

Second, the TEAM Act limits the exemption from section 8(a)(2) to entities “in which employees participate to at least the same extent practicable as representatives of management participate.” Section 3 of this bill contains no such limitation. Thus management could establish a “joint” safety committee with workers, and appoint an unlimited number of managers but only a single rank and file employee. The committee could negotiate agreements with management on safety issues, but still be protected from challenges under the NLRA.

Employee participation is vital to a safe work environment. But giving management the right to dominate employee organizations is not conducive to employee participation or genuine partnership with management. As the NLRB and the courts recognized in the 1930s and reinforced in the 1990s, the prohibition of employer-dominated organizations is essential to the NLRA's purpose.

Section 3 is yet another example of a solution to a nonexistent problem. There is no evidence that section 8(a)(2) has prevented employees from participating in meaningful employee involvement mechanisms. To the contrary—more than three-quarters of American employers, and over 90 percent of the very largest firms, already utilize such programs. All forms of employee participation that do not involve management domination or interference are already legal. And at least 11 States, including Connecticut, Minnesota, New Hampshire, and Washington, have laws requiring employers to establish joint labor-management committees with employee representatives chosen by the employees themselves. The General Counsel of the National Labor Relations Board has made clear in an advice memorandum that establishing a safety committee to comply with such a state law is not a per se violation of section 8(a)(2).

The Majority claims to “complement what the Clinton administration had in mind when it stated that employer commitment and meaningful employee participation and involvement in safety and health is a key ingredient in effective programs.” But the Clinton

Administration has promised to veto this legislation, in large measure because it undermines meaningful employee participation. In light of this, the Majority's assertion that this bill was "primarily derived from the thoughts, suggestions and good ideas of employees, employee representatives, employers and certified safety and health professionals" rings hollow, indeed. Employees, employee representatives and many others advised the bill's proponents from the very start that inclusion of a mini-TEAM Act would doom the legislation. The Administration's veto letter underscored this. Yet this provision appeared in every version of this bill, and remains—unchanged—in the amendment adopted as a substitute by the Majority at the markup. Evidently even the bill's proponents do not believe it can become law.

*Inspection procedures and quotas*

Section 8 of the bill would allow the Secretary to investigate a valid employee complaint by contacting the employer by telephone or fax, instead of conducting an onsite inspection. The right of a worker or worker representative to request and receive an OSHA inspection to investigate serious workplace hazards is one of the cornerstones of the 1970 OSH Act. This and the other provisions of the Act that mandate employee participation in OSHA inspections were adopted because it was recognized that workers could assist in the identification of hazards and to ensure that workers were aware of the content and results of inspections. (Legislative History of the Occupational Safety and Health Act of 1970, pp. 151–52). Section 8 would nullify this important worker protection.

The Majority contends this provision is justified because OSHA has limited resources. Further, the Majority believes that the Secretary should have full discretion to determine the appropriate response to formal complaints requesting an inspection. Such unlimited discretion is unnecessary and unwarranted.

The Majority asserts that "OSHA is required to respond to every formal, written complaint with an onsite inspection." This is false. In fact, Section 8(f)(1) of the OSH Act requires the Secretary to conduct an onsite inspection where the Secretary determines that there are reasonable grounds to believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists. These inspections are to be carried out "as soon as practicable." But according to the Legislative History, in scheduling these inspections, the Secretary has the full discretion to "take into account such factors as the degree of harmful potential involved in the condition described in the request and the urgency of competing demands for inspectors arising from other requests or regularly scheduled inspections." (Legislative History at p. 152).

Section 8 of the bill also would require employees submitting written complaints to state both whether the alleged violation has been brought to the employer's attention, and whether the employer has refused to remove the hazard. The section also limits the scope of an OSHA inspection in response to a complaint: OSHA may investigate for the limited purpose of determining whether the violation alleged in the complaint exists, and may expand the scope of the inspection only in response to health and safety violations

that are observed by the inspector. This section further provides that OSHA is not required to conduct inspections if “a request for inspection was made for reasons other than the safety; and health of the employees of an employer.” Each of these changes is disturbing.

First, the provision dealing with employee notice will discourage workers from filing complaints. In current practice, OSHA typically asks employees whether they have alerted employers to the hazard in question, but the agency does not require workers to respond. Many employees are afraid of retaliation by their employers, and experience with anti-discrimination complaints demonstrates that, in many cases, their fears are well-founded. Forty percent of the discrimination cases filed with OSHA have arisen from employees who were fired for bringing a safety or health violation to the attention of their employer. Establishing the requirements imposed by this bill—especially forcing employees to state “whether the employer has refused to take action” to correct the hazard—could easily be misunderstood as requiring employees to alert their employers as a prerequisite to filing a complaint. Thus, this provision would have a chilling effect on the filing of worker complaints. Workers’ safety would not be improved.

Also deeply troubling is the bill’s prohibition on inspectors’ expanding the scope of an inspection beyond the issues raised in the complaint, or conditions personally observed. This provision would significantly impair OSHA’s power to discover and correct violations. For example, OSHA responded in January 1995 to a complaint at Glacier Vandervill, a manufacturer located near Columbus, Ohio. The complaint charged that employees exposed to lead were not receiving blood lead level evaluations as required by OSHA’s lead standard. When OSHA inspectors entered the plant and examined the injury/illness logs, the compliance officer discovered large numbers of lead exposure violations—but also found that workers had suffered amputations and crushing injuries from mechanical power presses. In response, OSHA expanded the investigation to cover the entire facility. The agency eventually cited the company for overexposure to lead, failure to establish a hearing conservation program deficiencies in power press guarding and safety controls, violations of the standard on confined space, fall protection violations, and deficiencies in the lockout/tagout program.

Under section 8 of the bill, the OSHA inspector could only have considered and acted upon the blood level lead problems recorded in the injury/illness logs. Although the amputations and crushing injuries were also recorded in the logs, they fell outside the scope of the complaint and were not personally observed by the inspector. Accordingly, OSHA would have been precluded from protecting workers from these other substantial hazards. In this respect, too, the bill fails to improve safety on the job.

Finally, section 8 would permit OSHA to refuse to inspect a worksite about which a complaint was lodged, if the agency determined that the complaint was made for reasons other than safety and health. This exception applies even where the workers in question are at substantial risk. But OSHA’s decision whether to inspect following a formal complaint should be based on the likelihood that employees are at risk—not on the motivation of the com-

plainant. Where workers face substantial hazards, the statute rightfully compels OSHA to take action to protect them. Further, it would be very difficult for OSHA to determine a complainant's motivation. This exercise would consume scarce agency resources and delay inspections. The Majority presented no evidence that the resulting delay and denial of inspections would improve occupational safety and health. For this reason, too, the Minority opposes this provision.

*Reduced penalties for paperwork violations*

Section 10 of the bill eliminates penalties for posting or paperwork violations, unless the violations are for "fraudulent reporting requirement deficiencies" or are willful, repeat or failure to abate violations. By including this provision, the Majority ignores the substantial reductions in paperwork violations unrelated to safety and health that OSHA has already implemented. Further, the provision sweeps far too broadly, and would have a seriously detrimental effect on the health and safety of employees and the public.

OSHA continues to take steps to limit citations and penalties for paperwork violations unrelated to safety and health. Citations for the most common paperwork violations declined 75 percent from 1992 to 1997. OSHA's compliance officers no longer cite for violations of minor paperwork requirement; instead, they advise and educate the employer. For example, for many years OSHA issued thousands of citations annually for failing to put up the required OSHA poster. Now, OSHA instead gives employers a poster and asks them to put it up. The number of poster violations is now at or near zero. Similarly, if there are no injuries or illnesses to record, OSHA no longer cites an employer for failing to keep a signed injury log.

Far from applauding these "cooperative" efforts, the Majority views OSHA record-keeping and posting requirements as forcing "good faith employers [to] spend additional time and money on paperwork rather than safety." The Majority thus refuses to acknowledge that OSHA's record-keeping and posting requirements are not trivial matters. For example, OSHA requires employers to post a notice when asbestos is being removed from a building. The notice says: "DANGER. ASBESTOS. CANCER AND LUNG DISEASE HAZARD. AUTHORIZED PERSONNEL ONLY. RESPIRATORS AND PROTECTIVE CLOTHING ARE REQUIRED IN THIS AREA." If an employer fails to post this notice, or similar notices regarding other deadly substances, employees and the public could be exposed unwittingly to carcinogens and other toxins. The Majority offers no justification for changing the law to make such exposures more likely.

Other "paperwork" mandated by the statute requires employers to maintain accurate injury/illness logs. Without accurate data, OSHA could not accurately measure the nature of workplace inspections. Nor could the agency know where to target its inspections, or evaluate the effectiveness of its interventions. Still other important "paperwork" requirements significantly and directly protect employees from serious injury or illness. For example, a certain amount of paperwork is involved in OSHA's worker right-to-know program. This aspect of the Hazard Communication Standard

is critically important. If employees do not know that they are exposed to a hazardous chemical substance, which may not be regulated by a specific OSHA standard, they may be at serious risk of illness or even death.

Section 10 will eradicate the effectiveness of many simple, low-cost mechanisms to improve workers' safety. It would override common-sense reforms that OSHA has already instituted in this area. The provision is dangerous and unnecessary, and the Minority opposes its enactment.

*Additional penalty reductions for employer "good faith"*

Section 11 of the legislation requires the Occupational Safety and Health Review Commission to consider certain factors in assessing the appropriateness of penalties under the OSH Act. Under current law, the Commission may consider several factors—such as company size, seriousness of the violation, history of violations and employer good faith—to determine the appropriate penalty.

The bill would add new factors to this list, which would inevitably reduce the OSH Act's deterrent effect. The section would essentially redefine "good faith," so that an employer who knows of an unsafe condition and waits until it is discovered during an inspection could very well be considered to have acted in "good faith." This is not good faith, and such employers should not be entitled to a reduction in their penalty—yet this provision could permit just such a result.

OSHA penalties are designed to act as a deterrent force, in hopes that employers fix problems long before, not after, they are discovered by an inspector. This principle has long been acknowledged by the Commission, the courts and Congress, which specifically recognized that in the Omnibus Budget Act of 1990 when penalties were increased seven-fold.

OSHA is continually researching methods of developing fair penalty reductions, while maintaining a credible system of deterrents that encourages preventive actions by employers. For example, OSHA is now studying a plan that would give major penalty reductions to employers that install and maintain an effective health and safety program.

Section 11 will undermine OSHA's ongoing efforts to assess tough but fair penalties that will serve as effective deterrents. Further, like so many other sections of the bill, in this provision the Majority tries to fix a problem that does not exist—here, "that good faith compliance efforts fail to score an employer any points whatsoever by OSHA." But the Majority admits elsewhere in the report that "The current OSH Act authorizes the [OSHA Review] Commission to consider the following factors: \* \* \* the good faith of the employer, and the history of previous violations." As the Majority knows full well, OSHA rewards genuine employer good faith by reducing penalty assessments as much as 60 percent, even for serious violations, in addition to other reductions given based on the size of the employer and its history of previous violations. In short, good faith employers already get substantial reductions for their conduct; further cuts are unwarranted.



### *Technical Assistance Program*

Section 12 of the bill requires cooperative agreements between OSHA and the States to provide consultation programs. This section purports to codify OSHA's current consultation policy. It requires a pilot program to be established in three states for up to two years, to experiment with a fee-for-service system. The 50 State agencies that already administer the consultation program have expressed serious reservations about charging fees in the consultation program.

The practical effect of a fee-for-service consultation service is obvious: those who could pay would be visited first. This undermines the Majority's stated desire to direct this service to small employers or very dangerous worksites that cannot afford to hire other consultants.

Section 12 also requires that OSHA spend at least 15 percent of annual appropriations on education, consultation and outreach efforts. This provision is unnecessary. For many years, OSHA has spent more than 15 percent of its budget on those areas. However, the agency needs to have maximum flexibility to address issues in the fast-changing workplace. A decade ago, a string of explosions and fires at chemical plants in this country, as well as the example of the Union Carbide tragedy in Bhopal, India in December, 1984 that killed more than 1,600 people prompted OSHA to move funds quickly toward standard-setting and greater enforcement in the chemical industry. Setting arbitrary limits on what the agency can spend for various programs would prevent OSHA from taking swift and decisive action in response to a similar specific threat in the future.

### *Voluntary Protection Program*

Section 13 attempts to codify OSHA's Voluntary Protection Program, by requiring OSHA to establish cooperative agreements with employers, who would create and maintain comprehensive safety and health management systems. The bill requires enhanced OSHA efforts to include small businesses in the program. Participation would result in exemptions from inspections and certain paperwork requirements.

The VPP has traditionally been, and should remain, a program for work sites, not employers. Although section 13 makes some references to "the worksite," this vital mainstay of the program must be emphasized. Accordingly, the Minority does not support this provision as drafted.

### *Prevention of alcohol and substance abuse*

Section 14 authorizes OSHA to test workers and managers for drugs and alcohol after a work-related death or serious injury. It also allows employers to institute their own testing programs within State and Federal guidelines.

The Minority supports measures that contribute to a drug-free work environment. Reasonable drug testing programs can be appropriate for certain workplace environments, such as those involving safety-sensitive duties. But employees' privacy rights must be protected adequately. This provision would divert scarce OSHA resources to oversee drug and alcohol programs—an area in which

the agency has no expertise. Further, the Majority overlooks the fact that employers are already free to institute substance abuse testing programs, as long as they comply with applicable Federal and State laws. Inserting OSHA into this process seems unnecessary and unwise.

#### *Consultation alternatives*

Section 15 provides that OSHA should be allowed to issue warnings, rather than citations, to violators when the violation poses no significant safety hazard or where the employer has acted in good faith to abate the violation promptly.

The OSH Act says the agency “shall” issue citations, but this provision would change the rule to “may.” The impact of this change is unclear. Federal case law demonstrates that OSHA already has a high degree of prosecutorial discretion and has the power to establish programs such as Maine 200 in which it does not issue a citation for every violation it discovers. So this provision may be simply unnecessary.

But the section could also undermine OSHA’s authority. Some employers could misunderstand the new language as a limitation on OSHA’s authority to issue citations. Especially troubling is the language permitting the issuance of a warning in lieu of a citation for violations that the employer “acts promptly to abate.” Although this provision gives OSHA discretion to issue citations in such circumstances, the provision may encourage employers to let a violation go uncorrected until it is discovered by an OSHA inspection. The provision thus could undermine the preventive purpose and the deterrent effect of OSHA’s enforcement program.

Employers should always be encouraged to abate hazards promptly, but the appropriate mechanism should be through reducing penalties—not eliminating citations altogether. Otherwise, employers who make good faith efforts to protect employees before an OSHA inspector arrives on the doorstep will be treated the same as negligent employers who ignored their employees’ safety until the inspection.

## DEMOCRATIC AMENDMENTS

### GENUINE LABOR-MANAGEMENT SAFETY COMMITTEES

Senator Murray offered an amendment to modify section 3 of the bill regarding employee participation programs. The amendment would have struck section 3 and substituted language mandating genuine employee involvement in safety committees.

As discussed above, section 3 conflicts head-on with section 8(a)(2) of the National Labor Relations Act, by permitting employer-dominated safety committees that purport to represent employees. It is a mini-TEAM Act, and the Administration has promised to veto it.

Senator Murray’s amendment would have substituted mandatory safety and health committees, with genuine representation and participation by employees required. The committees would be made up of an equal number of employee and employer representatives. In unionized settings, employee representatives would be designated by the employees’ bargaining representative; otherwise,

they would be elected by employees. The joint committees could review the employer's safety and health program, conduct inspections, and make advisory recommendations to the employer. The proposal drew on statutes such as the Washington State law, which mandates joint safety and health teams. That law, however, requires that "the number of employer-selected members shall not exceed the number of employee-elected members."

The amendment was defeated by a vote of 7-11.

#### ENHANCE WHISTLEBLOWER PROTECTIONS

Senator Wellstone offered an amendment that would have strengthened and expanded anti-discrimination protections for employees who report workplace health and safety hazards. It was rejected by a vote of 8-9, with all 8 Democrats voting "aye," 9 Republicans voting "no," and one Republican voting "present."

Employees who "blow the whistle" on employers by reporting unlawful or hazardous workplace activities need protection. Instead, too often they are discharged, demoted, harassed or intimidated. Some are afraid to report unlawful activities because of the threat of reprisal. A 1997 report by the Department of Labor Inspector General documents the lack of protection that workers have when they speak out about health and safety on the job. Among that report's key findings are that: workers who complain directly to their employers first—rather than to OSHA—were particularly vulnerable to employer reprisals; workers employed by small firms were also especially vulnerable; and employer reprisals were severe—discharge was the most frequent act of discrimination by employers against employees who reported safety violations.

Senator Wellstone's amendment was designed to provide more uniform treatment for whistleblowers under federal law. The amendment would have strengthened and expanded existing anti-discrimination protections for employees who report possible workplace health and safety violations. It clarifies that the OSH Act prohibits employers from discharging or otherwise retaliating against an employee because the employee (1) has reported an unsafe condition or (2) after unsuccessfully seeking corrective action from the employer has refused to perform duties that he or she reasonably believes would expose employees to a bona fide danger of injury or serious health impairment.

Although the underlying bill contained no protections for whistleblowers, and in fact could force employees to risk retaliation by notifying their employer before filing a complaint with OSHA, the Majority refused to accept the amendment.

#### CONSTRUCTION SAFETY

Although the OSH Act originally made a pledge to protect America's worker, S. 1237 fails to safeguard those workers and, in fact, weakens OSHA. Most specifically, the bill fails the construction industry. According to the Bureau of Labor Statistics, there were over 1,000 deaths in the construction industry in 1996. Although construction workers comprise only 6 percent of the workforce, they account for 17 percent of all workplace fatalities. The injury rate for construction workers is also higher than the national average,

resulting in more lost work days for construction workers than workers in any other industry.

In past Congresses, the Committee, led by Senator Dodd, has looked closely into this issue. The Committee held hearings on one of the worst workplace accidents in OSHA's history—the collapse of the L'Ambiance Plaza construction project, which killed 28 workers in 1987. It became clear that the construction industry presented unique challenges to providing a safe workplace. Specifically, construction is characterized by changing conditions and multiple employers working on one site with uncoordinated or non-existent safety plans. OSHA, with its focus on single employers, is simply unable to address fully these unique problems.

In an effort to deal with this problem, Senator Dodd offered an amendment to provide specific protections for construction workers, by requiring cooperation among contractors on each site to assure safer working conditions, and by establishing an Office of Construction Safety and Health Administration. Specifically, the amendment required every construction project to create a coordinated safety and health plan. To assure a safer worksite, plans would include a hazard analysis, an appropriate construction process protocol, and a method to respond to a request for an inspection of a potentially imminent danger.

These provisions would have significantly improved the safety conditions on construction sites. The internal coordination of safety plans within a work site would have enabled OSHA to spend more time preventing accidents. By rejecting this amendment, without offering any alternative, the Majority indicated that they place no special priority on the safety of the Nation's construction workers.

#### REED AMENDMENT MODIFYING THIRD PARTY AUDIT PROGRAM

Senator Reed offered an amendment modifying the bill's third party audit program. The amendment was rejected on a straight party line vote of 8–10.

The amendment would have made significant improvements in the "consultation" program at the heart of this bill. Specifically, the amendment would have made employers found to be in compliance with the OSH Act by a third party inspector eligible for up to a 50 percent reduction in penalties. Instead of abolishing all penalties for violations where an employer had hired a safety "consultant," the amendment would give OSHA discretion to reduce those penalties. This would have improved the bill substantially, but the Majority refused to consider it. The amendment would also have made records surrounding third party inspections accessible to OSHA and other interested parties, as well as admissible in court. For the protection of employees, hazards found by inspectors would be posted until the danger was abated. Due to conflict of interest concerns, individuals with current contractual relationships with an employer would be ineligible to become 3rd party inspectors. The Health and Safety Advisory Board may review submissions of third party inspectors and suggest safety programs which should augment, replace, or coexist with current regulations to the Secretary. Finally, the amendment authorized the appropriation of such funds as necessary to carry out the new regulations.

The Majority's outright refusal to consider any of the modifications contained in this amendment demonstrates that immunizing employers from violations is central to the mission of this bill. Genuine cooperation would have been enhanced by this amendment, yet the Majority rejected it out of hand.

#### REED AMENDMENT REGARDING SMALL FARMS

A rider currently attached to the Occupational Safety and Health Administration allocation in the Labor, Health and Human Services, and Education Appropriations bill prevents the Agency from obligating or expending funds to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the OSH Act of 1970, when it is applicable to a farming operation that does not have a temporary labor camp and that has 10 or fewer employees.

The Minority recognizes the importance that many Senators place on protecting smaller farms and businesses from undue regulation. The Minority also recognizes that the small farm rider has been part of the Department of Labor appropriation since 1977. However, agriculture remains the second most deadly occupational industry in country, and more than 500 workers died while working in this industry in 1995.

In response to these statistics and a particularly compelling accident in the State of Rhode Island, which claimed the life of a young high school student, Senator Reed offered an amendment to allow OSHA to spend funds to conduct an inspection or investigation in response to a fatal accident at a small farming operation and require the Agency to issue a report on the accident within 90 days.

In deference to the concerns expressed by some Senators, the amendment would have allowed the other limitations of the appropriations rider to stand, including the ban on citations. However, the Minority opposed limiting OSHA's existing authority, as some Senators proposed.

The Minority believes it is critical to the safety of farm workers and in the business interests of farm owners that OSHA be able to investigate and issue a report in cases of fatal accidents at a worksite. Moreover, the Minority feels that it is important for a family to have the answers to important questions about the death of a loved one. Often the only consolation which is derived from such a loss is the knowledge that others will learn from the tragedy and prevent its recurrence.

The amendment was rejected along strict party lines, by a vote of 8-10. The Minority hopes that the issue will be revisited when this legislation is considered on the floor or in the next Labor, Health and Human Services, and Education Appropriations bill.

#### REED AMENDMENT TO ENHANCE CRIMINAL PENALTIES

Many of the provisions of S. 1237 are premised on the notion that OSHA has been too stringent in its enforcement of the OSH Act, and that employers need relief from excessive and excessively costly penalties. Nothing could be further from the truth. By statute, the maximum penalty for a serious violation—one that has a substantial probability of causing death or serious physical harm—is \$7,000. Nationwide, the average penalty for such violations was only \$912 in 1996. And, OSHA has always had and used the au-

thority granted in the Act to reduce penalties based on the size of the employer, the gravity of the offense, the employer's good faith, and its history of previous violations. OSHA already reduces penalties 15 percent or 25 percent for a safety and health program; up to 60 percent based on size; and 10 percent for a good history.

But from the point of view of employees who want the government to discourage and deter employer conduct that could kill or seriously injure them, OSHA's penalties are generally too low—not too high. To give just one example, on March 24, 1997 a 31-year-old worker named Diomedes Robles was killed when he was pulled into an unguarded machine operating on a cranberry bog in Hanson, Massachusetts. His clothing became tangled in the machine because the employer had failed to install a screen around the machine's working parts. OSHA proposed a penalty of \$10,500 for the violation. This penalty was ultimately reduced to \$7,785. In short, this employer paid less than \$8,000 for a violation that killed a husband and stepfather of three. The employer could have prevented this tragedy by installing a simple screening device. In light of stories such as this, it is hard to believe that anyone advocates reducing current penalties—but that is just what this bill does.

Senator Reed offered an amendment to strengthen the current penalty structure. The amendment would have increased the criminal penalties in OSHA by making acts which are now misdemeanors, *i.e.*, willful violations which cause the death of an employee, a felony, carrying a penalty of up to 10 years in jail and a \$250,000 fine for an individual or \$500,000 for an organization. Willful violations which cause the maiming or serious bodily injury of an employee, not now a criminal violation, would be classified as a misdemeanor, warranting 6 months in jail and a \$10,000 fine.

Notwithstanding the obvious shortcoming in OSHA's current penalty structure, the Majority refused to accept this amendment. It was defeated along strict party lines, by a vote of 8–10.

#### CONCLUSION

S. 1237 is bad legislation. For the most part, it attempts to fix problems that do not exist. Where it addresses real problems, its solutions are ineffective or make matters worse. It is based on outdated and unreliable data, and flows from a defective legislative process. Hearings on this bill would have exposed the fatal flaws so that all could see. No doubt the bill's supporters abhor on-the-job illnesses, injuries and deaths every bit as vehemently as do the bill's opponents. Unfortunately, this bill will at best make no improvements in occupational safety and health. At worst, more workers will be killed and maimed if this bill should pass.

This bill is far from acceptable. The Administration is right to say that it will veto this legislation, and we join fully in that opposition. The bill does nothing to improve safety and health conditions on the job, and it does many things that would undermine advances that have taken decades to achieve. For these reasons, the Minority opposes this legislation.

EDWARD M. KENNEDY.  
TOM HARKIN.  
CHRISTOPHER J. DODD.  
BARBARA A. MIKULSKI.  
JEFF BINGAMAN.  
PATTY MURRAY.  
PAUL WELLSTONE.  
JACK REED.

## X. ADDITIONAL VIEWS OF SENATOR BINGAMAN

I join with my colleagues in opposing S. 1237 and concur with the minority views expressed in this report with the exception of those relating to section 3 which allows for cooperative employer/employee committees that address health and safety issues. I have seen firsthand how good employers use EI programs to improve the everyday lives of their employees, especially in the areas of health and safety, and I have heard repeated calls from both employers and employees for Congress to allow for greater flexibility in this area.

I do not concur with the view that the provisions allows for the establishment of sham or company unions. Similarly, I disagree that there is no evidence that Section 8(a)(2) of the NLRA is preventing employers and employees from participating in meaningful employee involvement (EI) programs whether in the areas of safety and health or others. I also disagree with some of the other statements in the minority views relating to Section 8(a)(2) and AS. 295, the TEAM Act, but believe that discussion of those should be left to debate on the TEAM Act and not done in the context of S. 1237.

U.S. DEPARTMENT OF LABOR,  
SECRETARY OF LABOR,  
*Washington, DC, October 22, 1997.*

Hon. JAMES JEFFORDS,  
*Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.*

DEAR CHAIRMAN JEFFORDS: I understand that the Committee on Labor and Human Resources has scheduled a mark-up session for October 22, 1997 on S. 1237, the "Safety Advancement for Employees Act of 1997." I am writing to inform you that the Administration is opposed to the enactment of this legislation because it would compromise workplace safety and health.

I recognize your desire to improve the statutory framework for protecting America's working men and women. At the same time I am convinced that S. 1237 would not advance that goal. In addition, I am concerned that S. 1237 fails to recognize the significant strides OSHA has made in reinventing itself in recent years. For example, OSHA has developed award-winning initiatives based on Maine 200, a concept that will soon be expanded nationwide. OSHA has updated its standard-setting process to ensure that its protective standards are written in plain language. In addition, OSHA is engaged in a series of cooperative efforts with employers that are showing real results in terms of improved worker safety and health. In short, the legislation proposes to change an OSHA that no longer exists.

I am disappointed that the Committee has chosen to consider S. 1237—a bill with significant new proposals—without a hearing and



thorough discussion. The sole OSHA-related hearing conducted by Chairman Frist of the Subcommittee on Public Health and Safety on July 10, 1997 was not a legislative hearing and was held before S. 1237 was even introduced. A panel of Senators discussed legislative proposals as did some of the other witnesses, but the session was called as an oversight hearing, and the testimony of the representative of OSHA was requested and presented as oversight testimony. Fundamental and controversial changes in the Nation's safety and health laws should not be undertaken without thorough public hearings.

In our view S. 1237 could present unacceptable dangers to the health and safety of American workers. Provisions have been included in the name of reform and reinvention of OSHA which would in fact undermine OSHA's self-improvements, while also eliminating significant protections and safeguards.

The Department will provide the Committee with a full analysis of the legislation within one week. In the meantime, some of the provisions that are particularly troublesome include:

- The potential for employer-dominated health and safety committees for which an employer would be permitted to unilaterally determine who would serve on the committee as the representatives of the employees;

- A defective third-party certification program which provides for a two-year exemption from OSHA civil money penalties, a provision the Administration has never proposed—even in the case of violations that have caused death or serious injuries, thereby eliminating the recognized deterrent effect of such penalties;

- A newly-created evidentiary privilege for employer self-audit reports that would adversely affect OSHA enforcement, by preventing the use of otherwise relevant information in an adjudicatory proceeding;

- Required National Academy of Sciences peer review panels for OSHA standards, adding a redundant and unnecessary level of review, thereby delaying the promulgation of safety and health protections;

- Repeal of a core premise of the OSH Act: that workers who file complaints have a right to an inspection if their working conditions pose a threat of physical harm (S. 1237 changes the requirement for a mandatory inspection to a discretionary one);

- Provisions that authorize OSHA to impose fines on individual employees;

- New procedures which would chill employees' willingness to file complaints because of fears of employer retaliation; and

- Elimination of the statutory designation of the position of Assistance Secretary for Occupational Safety and Health.

These provisions, individually and collectively, would greatly diminish the ability of the Occupational Safety and Health Administration to administer and enforce the OSH Act. The bill would undermine OSHA's efforts to achieve the Act's stated purpose: "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." S. 1237 would result in an increase in the risks to the lives and well-being of our Nation's workers and their fami-

lies. This legislation, drafted in the name of reform and retooling, is a step backward, and, accordingly, the Administration opposes its enactment.

Mr. Chairman, I must respectfully inform you that if S. 1237 is passed by the Congress and presented to the President, I will recommend that he veto the legislation.

The Office of Management and Budget advises that there is no objection to the submission of this report and that enactment of S. 1237 would not be in accord with the Administration's program.

Sincerely,

ALEXIS M. HERMAN.

## XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part of section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### TITLE 29, UNITED STATES CODE

\* \* \* \* \*

#### SEC. 651. CONGRESSIONAL STATEMENT OF FINDINGS AND DECLARATION OF PURPOSE AND POLICY.

(a) \* \* \*

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment~~].~~ ; and  
(14) *by increasing the joint cooperation of employers, employees, and the Secretary of Labor in the effort to ensure safe and healthful working conditions for employees.*

\* \* \* \* \*

#### SEC. 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities or employers and employees unaffected.

\* \* \*

\* \* \* \* \*

(c)(1) *In order to further carry out the purpose of this Act to encourage employers and employees in their efforts to reduce occupational safety and health hazards, employers may establish employer and employee participation programs which exist for the sole purpose of addressing safe and healthful working conditions.*

(2) *An entity created under a program described in paragraph (1) shall not constitute a labor organization for purposes of section 8(a)(2) of the National Labor Relations Act (29 U.S.C. 158(a)(2)) or a representative for purposes of sections 1 and 2 of the Railway Labor Act (45 U.S.C. 151 and 151a).*

(3) *Nothing in this subsection shall be construed to affect employer obligations under section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) to deal with a certified or recognized employee representative with respect to health and safety matters to the extent otherwise required by law.*

\* \* \* \* \*

**SEC. 655. STANDARDS.**

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards.—

\* \* \* \* \*

[(4) Within] (4)(A) *Within* sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees, will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(B)(i) *Prior to issuing a final standard under this paragraph, the Secretary shall submit the draft final standard and a copy of the administrative record to the National Academy of Sciences for review in accordance with clause (ii).*

(ii)(I) *The National Academy of Sciences shall appoint an independent Scientific Review Committee.*

(II) *The Scientific Review Committee shall conduct an independent review of the draft final standard and the scientific literature and make written recommendations with respect to the draft final standard to the Secretary, including recommendations relating to the appropriateness and adequacy of the scientific data, scientific methodology, and scientific conclusions, adopted by the Secretary.*

(III) *If the Secretary decides to modify the draft final standard in response to the recommendations provided by the Scientific Review Committee, the Scientific Review Committee shall be given an opportunity to review and comment on the modifications before the final standard is issued.*

(IV) *The recommendations of the Scientific Review Committee shall be published with the final standard in the Federal Register.*

\* \* \* \* \*

**SEC. 656. ADMINISTRATION.**

(a) National Advisory Committee on Occupational Safety and Health; establishment; membership; appointment; Chairman; functions; meetings; compensation; secretarial and clerical personnel.—

\* \* \* \* \*

(d)(1) *Not later than 3 months after the date of enactment of this subsection, the Secretary shall establish an advisory committee (pursuant to the Federal Advisory Committee Act (5 U.S.C. App)) to carry out the duties described in paragraph (3).*

(2) *The advisory committee shall be composed of—*

(A) *3 members who are employees;*

- (B) 3 members who are employers;
- (C) 2 members who are members of the general public; and
- (D) 1 member who is a State official from a State plan State.

*Each member of the advisory committee shall have expertise in workplace safety and health as demonstrated by the educational background of the member.*

*(3) The advisory committee shall advise and make recommendations to the Secretary with respect to the establishment and implementation of a consultation services program under section 657A.*

**SEC. 657. INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING.**

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner.—

\* \* \* \* \*

(f) Request for inspection by employees or representative of employees; grounds; procedure; determination of request; notification of Secretary or representative prior to or during any inspection of violations; procedure for review of refusal by representative of Secretary to issue citation for alleged violations.—

(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, *and shall state whether the alleged violation has been brought to the attention of the employer and if so, whether the employer has refused to take any action to correct the alleged violation*, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. *The inspection shall be conducted for the limited purpose of determining whether the violation exists. During such an inspection, the Secretary may take appropriate actions with respect to health and safety violations that are not within the scope of the inspection and that are observed by the Secretary or an authorized representative of the Secretary during the inspection.* If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination, *and, upon request by the employee or employee representative, shall provide a written statement of the reasons for the determination of the Secretary.*

\* \* \* \* \*

(3) *The Secretary or an authorized representative of the Secretary may, as a method of investigating an alleged violation or danger under this subsection, attempt, if feasible, to contact an employer by telephone, facsimile, or other appropriate methods to determine whether—*

*(A) the employer has taken corrective actions with respect to the alleged violation or danger; or*

*(B) there are reasonable grounds to believe that a hazard exists.*

(4) *The Secretary is not required to conduct an inspection under this subsection if the Secretary determines that a request for an inspection was made for reasons other than the safety and health of the employees of an employer or that the employees of an employer are not at risk.*

\* \* \* \* \*

(h) *Any Federal employee responsible for enforcing this Act shall (not later than 2 years after the date of enactment of this subsection or 2 years after the initial employment of the employee) meet the eligibility requirements prescribed under subsection (a)(2) of section 657A.*

(i) *The Secretary shall ensure that any Federal employee responsible for enforcing this Act who carries out inspections or investigations under this section, receive professional education and training at least every 5 years as prescribed by the Secretary.*

\* \* \* \* \*

#### **SEC. 657A. THIRD PARTY CONSULTATION SERVICES PROGRAM.**

(a) **ESTABLISHMENT OF PROGRAM.—**

(1) *IN GENERAL.—Not later than 18 months after the date of enactment of this section, the Secretary shall establish and implement, by regulation, a program that qualifies individuals to provide consultation services to employers to assist employers in the identification and correction of safety and health hazards in the workplaces of employers.*

(2) *ELIGIBILITY.—Each of the following individuals shall be eligible to be qualified under the program:*

*(A) An individual licensed by a State authority as a physician, industrial hygienist, professional engineer, safety engineer, safety professional, or registered nurse.*

*(B) An individual who has been employed as an inspector for a State plan State or as a Federal occupational safety and health inspector for not less than a 5-year period.*

*(C) An individual qualified in an occupational health or safety field by an organization whose program has been accredited by a nationally recognized private accreditation organization or by the Secretary.*

*(D) An individual who has not less than 10 years expertise in workplace safety and health.*

*(E) Other individuals determined to be qualified by the Secretary.*

(3) **GEOGRAPHICAL SCOPE OF CONSULTATION SERVICES.—***An individual qualified under the program may provide consultation services in any State.*

(b) *SAFETY AND HEALTH REGISTRY.*—The Secretary shall develop and maintain a registry that includes all individuals that are qualified under the program to provide the consultation services described in subsection (a) and shall publish and make such registry readily available to the general public.

(C) *DISCIPLINARY ACTIONS.*—

(1) *IN GENERAL.*—The Secretary may revoke the status of an individual qualified under subsection (a) if the Secretary determines that the individual—

(A) has failed to meet the requirements of the program;

or

(B) has committed malfeasance, gross negligence, or fraud in connection with any consultation services provided by the qualified individual.

(d) *CONSULTATION SERVICES.*—

(1) *SCOPE OF CONSULTATION SERVICES.*—

(A) *IN GENERAL.*—The consultation services described in subsection (a), and provided by an individual qualified under the program, shall include an evaluation of the workplace of an employer to identify any violations of this act and appropriate corrective measures to address the violations that are identified.

(B) *NON-FIXED WORK SITES.*—With respect to the employees of an employer who do not work at a fixed site, the consultation services described in subsection (a), and provided by an individual qualified under the program, shall include an evaluation of the safety and health program of the employer to identify any violations of this Act and appropriate corrective measures to address the violations that are identified.

(2) *CONSULTATION REPORT.*—Not later than 30 business days after an individual qualified under the program completes the evaluations described in this subsection, or on a date agreed on by the individual and the employer, the individual shall prepare and submit a written report to the employer that includes an identification of any violations of this Act and appropriate corrective measures to address the violations that are identified.

(3) *REINSPECTION.*—Not later than 90 days after an individual qualified under the program submits a written report to an employer under paragraph (2), or on a date agreed on by the individual and the employer, the individual shall reinspect the workplace of the employer to verify that any occupational safety or health violations identified in the report have been corrected. If, after such reinspection, the individual determines that the violations identified in the report have been corrected or are being corrected pursuant to a written plan described in this paragraph, the individual shall provide the employer a declaration of resolution for that workplace. The written plan must identify the violation and the steps to be taken to achieve abatement and, where necessary, how employees will be protected from exposure to the violative condition in the interim until abatement is complete. Compliance with the written plan shall be verified by progress reports or reinspection by the qualified individual.

(4) *GUIDELINES.*—The Secretary, in consultation with an advisory committee established in section 656(d), shall develop model guidelines for use in evaluating a workplace under paragraph (1).

(e) *ACCESS TO RECORDS.*—Any records relating to consultation services (as described in subsection (a)) provided by an individual qualified under the program, or records, reports, or other information prepared in connection with safety and health inspections, audits, or reviews conducted by or for an employer and not required under this Act, shall not be admissible in a court of law or administrative proceeding or enforcement proceeding against the employer except that such records may be used as evidence for purposes of a disciplinary action under subsection (c).

(f) *EXEMPTION.*—

(1) *IN GENERAL.*—If an employer utilizes an individual qualified under the program, to provide consultation services described in subsection (a), and receives a declaration of resolution under subsection (d)(3), the employer shall be exempt from the assessment of any civil penalty under section 17 for the workplace covered by the declaration of resolution for a period of 2 years after the date the employer receives the declaration.

(2) *EXCEPTIONS.*—Paragraph (1) shall not apply—

(A) if the employer involved has not made a good faith effort to remain in compliance as required under the declaration of resolution; or

(B) to the extent that there has been a fundamental change in the hazards of the workplace.

(g) *DEFINITION.*—In this section, the term “program” means the program established by the Secretary under subsection (a).

\* \* \* \* \*

#### **SEC. 658. CITATIONS.**

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations.

【If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.】

(1) *Nothing in this Act shall be construed as prohibiting the Secretary or the authorized representative of the Secretary from providing technical or compliance assistance to an employer in correcting a violation discovered during an inspection or investigation under this Act without issuing a citation.*



(2) Except as provided in paragraph (3), if, upon an inspection or investigation, the Secretary or an authorized representative of the Secretary believes that an employer has violated a requirement of section 5, of any regulation, rule, or order promulgated pursuant to section 6, or of any regulations prescribed pursuant to this Act, the Secretary may with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of a violation, including a reference to the provision of the Act, regulation, rule, or order alleged to have been violated. The citation shall fix a reasonable time for the abatement of the violation.

(3) The Secretary or the authorized representative of the Secretary—

(A) may issue a warning in lieu of a citation with respect to a violation that has no significant relationship to employee safety or health; and

(B) may issue a warning in lieu of a citation in cases in which an employer in good faith acts promptly to abate a violation if the violation is not a willful or repeated violation.

\* \* \* \* \*

(d) The Secretary shall not establish for any employee within the Occupational Safety and Health Administration (including any regional director, area director, supervisor or inspector) a quota with respect to the number of inspections conducted, the number of citations issued, or the amount of penalties collected, in accordance with this Act.

(e) Not later than 12 months after the date of enactment of this subsection and annually thereafter, the Secretary shall report on the number of employers that are inspected under this Act and determined to be in compliance with the requirements prescribed under this Act.”

(f)(1) No citation may be issued under subsection (a) to an employer unless the employer knew, or with the exercise of reasonable diligence, would have known, of the presence of an alleged violation.

(2) No citation shall be issued under subsection (a) to an employer for an alleged violation of section 5, any standard, rule, or order promulgated pursuant to section 6, any other regulation promulgated under this Act, or any other occupational safety and health standard, if the employer demonstrates that—

(A) The employees of the employer have been provided with the proper training and equipment to prevent such a violation;

(B) work rules designed to prevent such a violation have been established and adequately communicated to the employees by the employer and the employer has taken reasonable measures to discipline employees when violations of the work rules have been discovered;

(C) the failure of employees to observe work rules led to the violation; and

(D) reasonable measures have been taken by the employer to discover any such violation.

(g) A citation issued under subsection (a) to an employer who violates section 5, any standard, rule, or order promulgated pursuant

to section 6, or any other regulation promulgated under this Act shall be vacated if such employer demonstrates that the employees of such employer were protected by alternative methods that are equally or more protective of the safety and health of the employees than the methods required by such standard, rule, order, or regulation in the factual circumstances underlying the citation.

(h) Subsections (f) and (g) shall not be construed to eliminate or modify other defenses that may exist to any citation.

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**SEC. 659A. EMPLOYEE RESPONSIBILITY.**

(a) *IN GENERAL.*—Notwithstanding any other provision of this Act, an employee who, with respect to personal protective equipment, willfully violates any requirement of section 5 or any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, may be assessed a civil penalty, as determined by the Secretary, for each violation.

(b) *CITATIONS.*—If, upon inspection and investigation, the Secretary or the authorized representative of the Secretary believes that an employee of an employer has, with respect to personal protective equipment, violated any requirement of section 5 or any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, the Secretary shall within 60 days issue a citation to the employee. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of this Act, standard, rule, regulation, or order alleged to have been violated. No citation may be issued under this section after the expiration of 6 months following the occurrence of any violation.

(c) *NOTIFICATION.*—The Secretary shall notify the employee by certified mail of the citation and proposed penalty and that the employee has 15 working days within which to notify the Secretary that the employee wishes to contest the citation or penalty. If no notice is filed by the employee within 15 working days, the citation and the penalty, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(d) *CONTESTING OF CITATION.*—If the employee notifies the Secretary that the employee intends to contest the citation or proposed penalty, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code). The Commission shall after the hearing issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after issuance of the order.

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**SEC. 666. CIVIL AND CRIMINAL PENALTIES.**

(a) Willful or repeated violation.—

\* \* \* \* \*

(i) Violation of posting requirements.—

【Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to \$7,000 for each violation.】

*(i) Any employer who violates any of the posting or paperwork requirements, other than fraudulent reporting requirement deficiencies, prescribed under this Act shall not be assessed a civil penalty for such a violation unless the Secretary determines that the employer has violated subsection (a) or (d) with respect to the posting or paperwork requirements.*

*(j) Authority of Commission to assess civil penalties.—*

【The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.】

*(j) The Commission shall have authority to assess all civil penalties under this section. In assessing a penalty under this section for a violation, the Commission shall give due consideration to the appropriateness of the penalty with respect to—*

- (1) the size of an employer;*
- (2) the number of employees exposed to the violation;*
- (3) the likely severity of any injuries directly resulting from the violation;*
- (4) the probability that the violation could result in injury or illness;*
- (5) the good faith of an employer in correcting the violation after the violation has been identified;*
- (6) the history of previous violations by an employer; and*
- (7) whether the violation is the sole result of the failure of an employer to meet a requirement under this Act, or prescribed by regulation, with respect to the posting of notices, the preparation or maintenance of occupational safety and health records, or the preparation, maintenance, or submission of any written information.*

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#### **SEC. 670. TRAINING AND EMPLOYEE EDUCATION.**

*(a) Authority of Secretary of Health and Human Services to conduct education and informational programs; consultations.—*

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*(c) Authority of Secretary of Labor to establish and supervise education and training programs and consult and advise interested parties.—*

*(1) The Secretary, in consultation with the Secretary of Health and Human Services, shall 【(1) provide】 (A) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this chapter, and 【(2) consult】 (B) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.*

*(2)(A) The Secretary shall, through the authority granted under section 7(c) and paragraph (1), enter into cooperative agreements*

with States for the provision of consultation services by such States to employers concerning the provision of safe and healthful working conditions.

(B)(i) Except as provided in clause (ii), the Secretary shall reimburse a State that enters into a cooperative agreement under subparagraph (A) in an amount that equals 90 percent of the costs incurred by the State for the provision of consultation services under such agreement.

(ii) A State shall be reimbursed by the Secretary for 90 percent of the costs incurred by the State for the provision of—

(I) training approved by the Secretary for State personnel operating under a cooperative agreement; and

(II) specified out-of-State travel expenses incurred by such personnel.

(iii) A reimbursement paid to a State under this subparagraph shall be limited to costs incurred by such State for the provision of consultation services under this paragraph and the costs described in clause (ii).

(C) Notwithstanding any other provisions of law, not less than 15 percent of the total amount of funds appropriated for the Occupational Safety and Health Administration for a fiscal year shall be used for education, consultation, and outreach efforts.

\* \* \* \* \*

(d)(1) Not later than 90 days after the date of enactment of this subsection, the Secretary shall establish and carry out a pilot program in 3 States to provide expedited consultation services, with respect to the provision of safe and healthful working conditions, to employers that are small businesses (as the term is defined by the Administrator of the Small Business Administration). The Secretary shall carry out the program for a period not to exceed 2 years.

(2) The Secretary shall provide consultation services under paragraph (1) not later than 4 weeks after the date on which the Secretary receives a request from an employer.

(3) The Secretary may impose a nominal fee to an employer requesting consultation services under paragraph (1). The fee shall be in an amount determined by the Secretary. Employers paying a fee shall receive priority consultation services by the Secretary.

(4) In lieu of issuing a citation under section 9 to an employer for a violation found by the Secretary during a consultation under paragraph (1), the Secretary shall permit the employer to carry out corrective measures to correct the conditions causing the violation. The Secretary shall conduct not more than 2 visits to the workplace of the employer to determine if the employer has carried out the corrective measures. The Secretary shall issue a citation as prescribed under section 5 if, after such visits, the employer has failed to carry out the corrective measures.

(5) Not later than 90 days after the termination of the program under paragraph (1), the Secretary shall prepare and submit a report to the appropriate committees of Congress that contains an evaluation of the implementation of the pilot program.

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**SEC. 684. ALCOHOL AND SUBSTANCE ABUSE TESTING.**

(a) *PROGRAM PURPOSE.*—In order to secure a safe workplace, employers may establish and carry out an alcohol and substance abuse testing program in accordance with subsection (b).

(b) *FEDERAL GUIDELINES.*—

(1) *IN GENERAL.*—An alcohol and substance abuse testing program described in subsection (a) shall meet the following requirements:

(A) *SUBSTANCE ABUSE.*—A substance abuse testing program shall permit the use of an onsite or offsite drug testing.

(B) *ALCOHOL.*—The alcohol testing component of the program shall take the form of alcohol breath analysis and shall conform to any guidelines developed by the Secretary of Transportation for alcohol testing of mass transit employees under the Department of Transportation and Related Agencies Appropriations Act, 1992.

(2) *DEFINITION.*—For purposes of this section the term “alcohol and substance abuse testing program” means any program under which test procedures are used to take and analyze blood, breath, hair, urine, saliva, or other body fluids or materials for the purpose of detecting the presence or absence of alcohol or a drug or its metabolites. In the case of urine testing, the confirmation tests must be performed in accordance with the mandatory guidelines for Federal workplace testing programs published by the Secretary of Health and Human Services on April 11, 1988, at section 11979 of title 53, Code of Federal Regulations (including any amendments to such guidelines). Proper laboratory protocols and procedures shall be used to assure accuracy and fairness and laboratories must be subject to the requirements of subpart B of the mandatory guidelines, State certification, the Clinical Laboratory Improvements Act or the College of American Pathologists.

(c) *TEST REQUIREMENTS.*—This section shall not be construed to prohibit an employer from requiring—

(1) an applicant for employment to submit to and pass an alcohol or substance abuse test before employment by the employer; or

(2) an employee, including managerial personnel, to submit to and pass an alcohol or substance abuse test—

(A) on a for-cause basis or where the employer has reasonable suspicion to believe that such employee is using or is under the influence of alcohol or a controlled substance;

(B) where such test is administered as part of a scheduled medical examination;

(C) in the case of an accident or incident, involving the actual or potential loss of human life, bodily injury, or property damage;

(D) during the participation of an employee in alcohol or substance abuse treatment program, and for a reasonable period of time (not to exceed 5 years) after the conclusion of such program; or

(E) on a random selection basis in work units, locations, or facilities.

(d) *CONSTRUCTION.*—*Nothing in this section shall be construed to require an employer to establish an alcohol and substance abuse testing program for applicants or employees or make employment decisions based on such test results.*

(e) *PREEMPTION.*—*The provisions of this section shall not preempt any provision of State law.*

(f) *INVESTIGATIONS.*—*The Secretary is authorized to conduct testing of employees (including managerial personnel) of an employer for use of alcohol or controlled substances during any investigations of a work-related fatality or serious injury.*

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