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PASSAGE OF HOUSE BILL ADVANCES IMPORTANT OSHA REFORMS

by

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This past spring, the U.S. House of Representatives passed four measures that would substantially help small and medium-sized businesses involved in disputes with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor. The measures, which were placed in HR 2728, would:

- Require the federal courts to defer to interpretations by the independent Occupational Safety and Health Review Commission (“the Review Commission” or “Commission”) rather than by OSHA.
- Expand the Commission to five members from its current three.
- Substantially liberalize the criteria permitting small employers to recover attorneys’ fees and costs incurred in successfully defending against OSHA citations.
- Permit employers who have good cause for failing to timely contest an OSHA citation to seek relief under criteria like that in Federal Rule of Civil Procedure 60.

The bill is now pending before the Senate. This LEGAL BACKGROUNDER describes the substance of these four measures and the reasons why the House passed them.

Deference to the Review Commission, Not OSHA. Section 302 of HR 2728 states: “The conclusions of the Commission with respect to all questions of law that are subject to agency deference under governing court precedent shall be given deference if reasonable.” The proponents of the bill argued that this provision would restore the undisputed intent of Congress in 1970 (when the Occupational Safety and Health Act (OSH Act) was passed), that the Review Commission would decide legal questions “without regard” to OSHA’s views. The House proponents also sought to cure what has been widely perceived to be underlying pathologies in the administration of the OSH Act caused by the deference federal courts have given to OSHA on legal issues.

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Proponents of Section 302 argued that judicial deference to OSHA emasculates the Commission as a check on OSHA's excesses. As the House committee report observes, the deference principle requires that OSHA's interpretation be upheld if the interpretation is merely "reasonable" — even if the Commission believes that the interpretation is wrong. It noted the testimony of a hearing witness that deference "awards OSHA a home run even if the Review Commission and a court think that OSHA has hit only a foul ball."

The House committee also noted testimony that such deference encourages arrogance in OSHA officials and undermines the rulemaking process. The requirement that courts defer to OSHA's interpretation when a standard is ambiguous gives the agency an incentive to draft ambiguous or incomplete standards, and to then fill in the holes through the back door of interpretation in interpretation letters, compliance directives, and briefs. This device permits OSHA to evade congressionally-imposed requirements for OSHA standards, such as proving "feasibility" and "significant risk," and to evade oversight by the Office of Management and Budget under the Paperwork Reduction Act. Deference also drives up the cost of litigation against OSHA, proponents argued, so dramatically that only large employers, who can afford to mount an expensive defense, have any hope of obtaining justice.

Proponents of the bill pointed especially to the legislative history of the OSH Act and observed that the independence of the Commission from OSHA was a key concession to the business community that allowed for the Act to be passed. In 1970, the labor movement wanted all functions under the OSH Act to be placed in the Labor Department, while the business community wanted it split among three agencies. The business community distrusted the independence of any internal appeals board that the Labor Department would create to adjudicate disputes between employers and OSHA. Congress was severely split on the issue, and a veto was threatened by the President. To save the OSH Act, Congress reached a compromise. An independent Review Commission would be established. The legislative history directly addresses whether the Review Commission would defer to OSHA. The author of the compromise, Senator Jacob Javits, specifically assured Congress that adjudication would be conducted by "an autonomous, independent commission which, *without regard to the Secretary*, can find for or against him on the basis of individual complaints." Proponents observed that Section 302 of the House bill would restore this compromise.

Opponents of the bill complained that this provision would overrule the unanimous decision of the Supreme Court in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), which they quoted at length. That decision held that federal courts should defer to OSHA, not the Commission. Proponents of the bill pointed out, however, that in its decision, the Supreme Court failed to consider the critical piece of legislative history — Senator Javits' statement. (The lawyer for CF&I Steel, which was then in bankruptcy, was a sole practitioner with almost no OSHA experience.) The opponents of Section 302 did not directly address this rejoinder but argued instead that OSHA "is much better positioned to interpret [its] regulations than the Commission."

Expansion of the Commission to Five Members. Section 202 of HR 2728 would expand the Review Commission from three to five members, and also impose a requirement that members be qualified by "legal" training, education, or experience.

The proponents of the measure, as well as the House committee report, argued that, with three members, the Commission's membership had been unstable and shifting. They observed that a member's term expires every two years, often leaving the Commission without a quorum. The House committee report quoted testimony that, "For over two-thirds of its existence, the Commission has been so paralyzed by frequent vacancies that it has been unable to do its job. For over half the time since 1982, the Commission has had two or fewer members and, for over a third of that time, it has had only two members. For twenty percent of that time, it lacked even a quorum of two." Proponents noted that there were even times when the Commission had no members at all. They pointed to the contrast furnished by the Federal Mine Safety and Health Review Commission, which has five members and much greater stability.

Opponents argued that the Review Commission lacked the workload to justify five members and argued that the requirement of "legal" training would exclude non-lawyer safety experts from serving on the Commission. Proponents argued that the requirement for legal training, education, or experience was necessitated by the essentially legal work of the Commission, which is reviewed by the courts of appeals.

Expansion of the Right to Attorneys' Fees. Section 402 of the bill would automatically award attorneys' fees and costs to a prevailing employer in OSHA litigation if it has one hundred or fewer employees and a net worth of \$7 million or less — without regard to whether OSHA's position was "substantially justified," the current test under the Equal Access to Justice Act (EAJA).

The provision's House proponents argued that the current litigation system imposes enormous economic pressures upon small employers to settle with OSHA and accept a citation, even if OSHA is in the wrong. Moreover, the current text of the EAJA permits OSHA to avoid paying fees if OSHA's position was "substantially justified." As the House committee wrote, "With a cadre of specialized lawyers backed by the federal treasury, it is far too easy for OSHA to come up with some purported justification for its bringing the case, thus tying the employer up in a second round of litigation as to whether OSHA's actions were 'substantially justified.'" The House report agreed with a witness "that small business owners are placed in an untenable situation, ... particularly ... given the complex body of law surrounding the OSH Act, which includes statutory, regulatory and interpretive law, and interpretive disagreements among OSHA and OSHRC, all of which make it more difficult for a small concern to seek relief under EAJA." In the 23 years between 1981 (when the EAJA became effective) and 2004, businesses filed only 111 EAJA petitions, and recouped costs only 37 times.

Opponents argued that the provision seeks, in OSHA cases alone, "to reverse the American Rule, under which each party to litigation pays its own costs" OSHA would be deterred from bringing cases that it "is not guaranteed to win," and "workers' rights and their health and safety would be severely eroded." Arguing that proponents had failed to show that the EAJA "provides insufficient redress" to prevailing employers, they observed that any fees paid to employers would come out of OSHA's budget, and thus "ultimately come at the expense of agency efforts to deter and remedy violations of the law."

Excusing Late Notices of Contest for Good Cause. Section 102 of HR 2728 would overrule a highly technical reading of the OSH Act by a federal court of appeals. The provision states that the failure of an employer to contest an OSHA citation within the statutory 15 working-day period would not prevent the Commission from affording a hearing on the citation if “such failure results from mistake, inadvertence, surprise, or excusable neglect.” These criteria are essentially the same as those in Federal Rule of Civil Procedure 60(b), which Section 12(g) of the OSH Act applies to Commission proceedings. This “good cause” criterion is essentially the same one that American courts typically use to decide whether to permit relief from a default judgment.

The provision became necessary when the U.S. Court of Appeals for the Second Circuit held that Section 10(a) of the OSH Act, which states that a citation not contested within 15 working days “shall be deemed a final order of the Commission and not subject to review by any court or agency,” deprived the Review Commission of the authority to excuse untimeliness. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002). The decision conflicts with rulings of the Commission and with the *J.I. Hass* decision of the Third Circuit, which that court recently re-affirmed despite *Le Frois*. See *George Harms Constr. Co. v. Chao*, 371 F.3d 156 (3d Cir. 2004), *re-aff’g J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981).

To resolve the matter with certainty, the House voted in effect to codify *Hass*, overrule *Le Frois*, and permit the Commission to have essentially the same authority as any other court in the Nation to allow curing of defaults.

Conclusion. The debates and votes on the House floor show that the issues were considered seriously, and that there was bipartisan support for the measures. The fate of HR 2728 in the Senate is uncertain. No parallel bills have been introduced there, but proponents hope to, among other things, attach the OSHA reform bills to a “must-pass” bill before the current Congress adjourns. Even if the bills do not become law in this Congress, the action of the House will ensure their serious consideration in a future Congress.