



A PRIVATE RIGHT OF ACTION TO ENFORCE FEDERAL WORKPLACE-SAFETY LAW WOULD BENEFIT LAWYERS, NOT EMPLOYEES

by Eric J. Conn and Mark M. Trapp

The election of Joe Biden portends a significant shift in the regulatory and administrative landscape in Washington DC that likely will reshape the workplace and business environment for American employers. With Democrats in control of both houses of Congress and talk about ending the legislative filibuster, even more consequential is the possibility of sea-shifting federal legislation impacting American workplaces. An example of such legislation is the “private right of action” policy proposal advanced last year by the left-leaning think tank, the Center for Progressive Reform (CPR). If adopted legislatively, a private right of action could upend fifty years of occupational safety and health enforcement.

In its essence, this proposal—which even CPR acknowledges may be a “radical move”—would create a private right of action for workers to sue their employers for alleged violations of the Occupational Safety and Health Act (OSH Act) or its implementing regulations in any case where OSHA chooses to not bring an enforcement action. If enacted, this legislation likely would usher in a flood of new claims of alleged workplace hazards and litigation against employers with little probability of enhancing workplace safety, but every probability of enhancing the cost of doing business. For employers, there is much reason to be apprehensive about this private right of action policy proposal.

A Summary of the CPR Proposed Private Right of Action. While a legislative bill has not yet been drafted or advanced in Congress, CPR’s proposal provides a framework for such legislation and conceptualizes the contours of what a private right of action would look like. Fundamentally, the CPR proposal advocates the creation of a direct litigation path for employees who believe their employers are not in compliance with occupational safety and health regulations, essentially cutting OSHA out of the matter. The proposal would allow employees to stand in the shoes of OSHA, authorizing them to file a lawsuit in either state or federal court against his/her employer for alleged violation of applicable OSHA regulations in situations where OSHA declines to issue a citation after being notified of the alleged violation.

It would work like this: an employee who believes his employer is not in compliance with OSHA standards—for instance, the requirement to install machine guarding around equipment with nip points—can notify OSHA of this concern and indicate in the notice that the employee intends to sue his employer if OSHA does not act. OSHA then has five days to conduct and complete its inspection and must issue a citation within 30 days. If OSHA declines to act or fails to respond to the employee’s notice, the employee can file a lawsuit in state or federal court within 90 days.

The baked-in incentive to bring such suits is significant under CPR’s proposal. If an employee ultimately prevails in his or her suit, 30 percent of the penalty issued by the court would be awarded directly to the employee-plaintiff, the remainder going to OSHA. Beyond this 30 percent “bounty,” and even more enticing, CPR’s proposal advocates that the legislation should provide employees with the potential for civil penalty awards on top of the OSH Act penalties and also the ability to seek injunctive relief.

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CPR's proposal also recommends the inclusion of several other ancillary legislative provisions that seem to be designed to stack the odds against the employer in these lawsuits, including a prohibition preventing employers from removing to federal court a suit filed in state court by an employee (where a plaintiffs' "home town" advantage typically means more than it does in federal court); an elimination of the threshold "amount in controversy" requirements that otherwise would apply; the elimination of the use of mandatory arbitration agreements by employers, and an automatic recovery of attorneys' fees to plaintiffs prevailing in these private actions.

Likely Impacts of Private Right of Action Legislation. While a private right of action would almost inevitably exponentially increase OSHA-related litigation, there is no indication that this expansion would increase workplace safety. In fact, under current law, any employee who believes his or her working conditions are unsafe or present a workplace hazard may file a complaint with OSHA. Except in rare circumstances, OSHA is bound to follow-up and investigate these employee safety and health complaints. Indeed, upon receipt of a notice of an alleged violation, each complaint is evaluated by OSHA to determine whether there is any need for an on-site inspection, and if there are reasonable grounds to believe that such violation or danger exists, OSHA "shall make a special inspection ... as soon as practicable[.]" OSH Act, § 8(f)(1)(g).

Even for those complaints that OSHA determines do not require an immediate on-site inspection, the agency initiates an investigation into the allegations and requests the employer to provide facts, information, and documentation regarding the alleged hazard, often demanding that the employer implement corrective action to address the hazard (even though there has not yet even been an investigation into whether there even is a hazard). If OSHA finds the employer's response insufficient in any way, it will conduct an on-site inspection. Employee complaint-driven inspections and the resulting citations make up the large majority of citations issued every year to employers. The system works.

Beyond this, the OSH Act already provides employees with authority—in appropriately limited circumstances—to force an action against his or her employer for safety and health violations. Section 13(d) of the OSH Act provides a limited statutory remedy for employees to file a lawsuit against their employers where OSHA arbitrarily chooses to not enforce against an employer to protect employees where an *imminent workplace danger* exists. See OSH Act. § 13(d).

Section 13(d) authority is limited to imminent danger situations for good reason. The employer/employee relationship is complicated and multi-faceted. Many aspects of the relationship have nothing to do with health and safety. Providing a direct path to court for safety and health violations for employees when they may have ample reason—even good reason—to complain about various aspects of their employment status, such as wages, benefits, hours, etc. does not seem to be good policy.

Moreover, as knowledgeable as employees may be about their workplaces, OSHA, with the assistance of and guidance from solicitors from the Department of Labor, remains better positioned to make prudent judgments about legal compliance matters and the merits of an enforcement action. Ironically, though, the creation of a purely private cause of action would undermine OSHA's authority to do its job effectively by usurping the agency's authority to conduct a robust investigation. It would *de facto* shorten the agency's window to conduct inspections from six months (the OSH Act statute of limitations) to thirty days, not nearly sufficient time to conduct employee interviews, collect hazard-related documentation and analyze compliance issues. The result would be either that OSHA is in effect replaced by an employee in its enforcement of OSHA regulations because the agency just does not have time to investigate the situation, or, OSHA rushes to judgment and issues a quick citation within 30 days to remain in control. Neither result will keep workplaces safer, and either result will weaken the role of OSHA in protecting American workers.

The automatic attorneys'-fee provision, in conjunction with the 30 percent bounty payment, only serves to exacerbate the problem by creating a major incentive for the development of a plaintiffs' bar that specialize in these types of lawsuits, enticing attorneys to "find a plaintiff," file a claim, even of questionable merit, and then leverage a settlement. Reputational harm alone, even for meritless claims, will be a serious risk for employers in many industries where the safety and health of their workplaces is of paramount importance to their company's success.

Conclusion. For the past 50 years, OSHA has investigated virtually every credible allegation it has received of workplace hazards. CPR's proposal would upend this world, essentially deputizing every individual employee to enforce workplace safety, sidelining the agency with a half century of experience promulgating and then enforcing safety and health standards and regulations. Rather than OSHA, the solicitors of Labor and administrative law judges at the Occupational Safety and Health Review Commission (OSHRC) making first-line decisions about workplace safety enforcement, individual employees and state court judges would have this authority.

The private enforcement of public laws may have its place in other areas, but it has no place in workplace safety. Indeed, in an area where expertise, knowledge, and experience are particularly important, it does no one any good to authorize, incentivize, and facilitate private lawsuits that too easily can be used as bargaining chips to redress employee concerns having nothing to do with safety. Profit-driven private litigation of workplace safety issues will have the effect of usurping OSHA's authority, and should be of great concern to US employers. The OSH Act already provides employees a right to sue their employers in situations of imminent danger where OSHA does not act—this authority is a useful tool to ensure OSHA does its job. Exponentially expanding this authority as proposed by the Center for Progressive Reform will pervert existing employment relationships and make it more difficult for employers and employees to work in concert towards their common mission of keeping American workplaces safe and free from hazards.