

OSHA UPDATE

Get Ready for OSHA Reform

by **Rod Smith** and **Pat Miller**

Congress recently reintroduced legislation which, if enacted, will drastically expand coverage, enhance whistleblower protections and increase civil penalties and criminal sanctions under the Occupational Safety and Health Act. The Protecting America's Workers Act of 2009 (S.1580, H.R. 2067) was introduced by the late Senator Edward Kennedy (D-Mass.) and Representative Lynn Woolsey (D-Calif.) and is awaiting consideration by Senate and House committees. The Act would:

- Expand coverage of the OSH Act to all federal, state and some local workers. Except in certain "state plan" states, public employees are currently exempt from OSHA.
- Expand OSHA's whistleblower protection by codifying an employee's right to make safety complaints or refuse to do hazardous work. When a whistleblower claim is successful, OSHA would have the power to immediately order reinstatement, back pay, compensatory damages and the employee's attorneys' fees and costs.
- Prohibit employers from discouraging employees from reporting work-related injuries or illnesses, or discriminating against employees who do.
- Require employers to pay employees for all time spent participating in or "aiding in" an OSHA inspection.
- Require OSHA to investigate all accidents resulting in the death of an employee or the hospitalization of two or more employees.
- Grant substantial new "Victim's Rights" to employees who sustain a work-related injury or illness subject to an OSHA inspection or to the employee's family members where the employee died or is unable to assert his or her rights. Victims or their representatives would be afforded the right to participate in OSHA's inspection, receive certain information and object to settlement agreements between OSHA and the employer.
- Allow employees and unions to object to and even contest settlements between OSHA and employers that withdraw or modify citations.
- Increase the maximum penalties for "Repeat" or "Willful" violations from \$70,000 to \$120,000. Repeat or willful violations resulting in the death of an employee could be assessed as high as \$250,000. Maximum penalties for Serious and "Other-than-serious" violations would be increased from \$7,000 to \$12,000, with penalties up to \$50,000 for Serious or Other-than-serious violations causing death. OSHA will be required to adjust penalties for inflation every four years.
- Expand OSHA's criminal liability provisions to make willful violations causing death or "serious bodily injury" a felony subject to substantial fines and imprisonment under the U.S. Criminal Code. In addition to corporate employers, "responsible corporate officers" would be individually liable for criminal violations of the OSHA Act.

The Protecting America's Workers Act of 2009 is more onerous than similar legislation introduced last year and is yet another sign of the Obama Administration's intent to take a much tougher stance on

OSHA enforcement (See "[OSHA Back in the Enforcement Business](#)"). Although passage of the proposed legislation is uncertain at this time, there is no question that the Act, if passed, will significantly impact public and private employers. Employers and employer groups are urged to monitor its progress.

[Click here for a copy of the legislation.](#)

Who We Are

Rodney Smith, Pat Miller, and Chuck Newcom are part of Sherman and Howard's Labor & Employment Law Department practicing in the areas of occupational safety and health law. We routinely appear before the federal Occupational Safety and Health Review Commission, the federal Mine Safety and Health Review Commission, and state occupational safety and health boards.

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