

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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July 20, 2010

The Honorable George Miller
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable John Kline
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Miller and Ranking Member Kline:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, strongly opposes H.R. 5663, the "Miner Safety and Health Act of 2010."

This bill would make dramatic changes in how the Mine Safety and Health Administration (MSHA), and the Occupational Safety and Health Administration (OSHA) cite employers for violations, and the levels of civil and criminal penalties they assess against employers. It would also introduce vague new standards for criminal liability and change who would be accountable for these criminal penalties. These proposed changes would increase litigation, discourage settlements, and create disincentives for cooperation between employers, associations and MSHA and OSHA. This legislation would stretch and misdirect the resources of both agencies and impose substantial costs on businesses at a time they can ill afford it, all while doing virtually nothing to prevent workplace accidents and injuries.

Supporters of H.R. 5663 argue that this bill responds to the tragedy at the Upper Big Branch coal mine. However, as there has been no analysis or study released of what caused that incident, any bill based on this claim is premature. Instead, this bill falls back on the misguided theory that more penalties would lead to improved workplace safety.

Chamber members who are subject to either MSHA or OSHA take their workplace safety obligations seriously and believe in pursuing continuous improvements. This bill, however, would not assist these employers in their missions to enhance their workplace safety practices. The legislation contains no provisions that would help a business improve workplace safety or better understand safe work practices and related legal obligations. Such compliance assistance is important for large businesses but is even more critical to help small businesses understand their obligations, which often cannot afford to maintain safety personnel or hire consultants to guide them through complicated OSHA regulations.

The focus on heightened criminal penalties is misplaced. The experience of MSHA since the changes adopted in the regulatory scheme in 2006, and more recent experience with more vigorous enforcement by OSHA, demonstrates that increasing penalties only serves to make the compliance and enforcement process more contentious. The increased numbers of cases being

filed by OSHA are leading now to many more legal contests, because OSHA's citations are often based on factual errors or are legally incorrect.

Furthermore, although MSHA's jurisdiction is considerably narrower than OSHA's, businesses who are performing work at MSHA covered facilities, such as construction contractors, or even delivery services, are subject to MSHA jurisdiction, which would make them vulnerable to the provisions of this bill.

The following provisions are particularly troubling to the Chamber:

Expansion of Whistleblower Rights—In both the MSHA and OSHA contexts, this bill would expand the ability of an employee to bring an action against their employer if they believe they have been inappropriately discharged or discriminated against because they reported an injury or unsafe condition, or participated in a proceeding related to safety and health before Congress or any federal or state authority, or refused to violate any provision of the Mine or Occupational Safety and Health Acts. Employees bringing an action could also seek unlimited compensatory and exemplary damages (which are understood to be the equivalent of punitive damages), with jury trials. Current law already provides employees with protections against such employer actions.

This provision is based on the notion that because the vast majority of current whistleblower complaints do not produce judgments in favor of the complainants, the system must be broken. In reality, the vast majority of complaints brought are not meritorious and no expansions of whistleblower rights are needed, nor will any expansions produce different results. These changes promote litigation and increased legal fees on employers, changing these whistleblower systems to punitive pathways to litigation rather than tools for improving workplace safety.

Mandatory Abatement and Procedures for Obtaining a Stay—This provision would force employers to begin any corrections (abatement) under an OSHA serious, willful, or repeated citation immediately upon receipt of the citation. Current law allows employers to stay this requirement pending the completion of a challenge to the citation if they pursue one. While this provision provides a process by which an employer could obtain a stay, the criteria are unlikely to be satisfied, and while seeking a stay, the employer would be required to be satisfying the abatement provisions set out by the OSHA inspector who may not have a good understanding of the workplace at issue.

Just like any person accused of violating a law, employers have a right to due process. Operators should not be forced to comply with costly and disruptive abatement measures specified by an OSHA inspector unfamiliar with the workplace without due process.

Increased Civil and Criminal Penalties—Perhaps the signature provisions of this bill are the increases in civil and criminal penalties, as well as other changes to how MSHA and OSHA would impose these penalties. Instead of forcing employers to accept the penalties and proceed to payment, these dramatic increases would shift the cost-benefit equation for challenging these citations and retaining legal representation so that there would be greater incentives for employers to challenge citations. This is especially true with respect to the expanded criminal penalties that this bill would create.

Beyond the problems associated with the proposed increases, this bill would also make other objectionable changes. It specifies that the term “employer” also means “any officer or director,” or in the context of mines an “operator” without any qualification or suggestion that such an officer, director, or operator had any role in the incident in question. This overly broad expansion of the definition for employer is unworkable and would likely ensnare company officials who had no involvement in, or knowledge of, the incident giving rise to the citation and criminal penalty. Such a presumption raises serious substantive due process questions and would also create a very strong chilling effect on anyone taking a high level corporate job or seat on a board if they could find themselves facing criminal penalties because of the least responsible employee.

This bill also introduces the new intent level for criminal penalties for both OSHA and MSHA of “knowing” with no explanation or indication of how that new level is to be determined or limited. As used in environmental law, this term has come to be associated with a very low level of intent where the party in question merely has to know that a given activity was taking place, not that there was a violation occurring or that environmental laws were being broken. To apply this in the OSHA or MSHA context would create tremendous confusion and guarantee that each time it was used, it would be challenged in court, leading to massive new levels of litigation.

Pre-Final Order Interest Penalties—This bill would impose interest penalties on employers, compounded daily, while they challenge a citation from either MSHA or OSHA – in effect penalizing them for exercising their due process rights. The Chamber opposes any provision that could penalize an employer for exercising their due process rights.

Other MSHA Specific Provisions—The bill would also mandate that MSHA issue several new standards and regulations using either interim final rules, which would go into effect before comments are submitted, or under extremely tight deadlines that would not permit adequate development and consideration of sound regulatory policy. The Chamber objects to such a rushed regulatory approach.

The bill would also create a new provision affecting only underground coal miners that would prohibit at-will employment after a six month probationary period. Miners who believe they have been discharged other than for cause are given the right to sue the operator in federal court within one year of the discharge. This provision is an extraordinary intrusion and inserts MSHA into decisions that are best reserved for management decision makers or the subject of labor negotiations.

Because this bill would create extensive new penalties under both MSHA and OSHA, hamper employers’ ability to contest these citations, create new standards for criminal liability, and not provide any support or assistance to help employers improve their workplace safety programs, the Chamber urges you to oppose H.R. 5663.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Josten", written in a cursive style.

R. Bruce Josten

Cc: The Members of the House Committee on Education and Labor