



July 20, 2010

The Honorable George Miller
Chair
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

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

Dear Chairman Miller, Ranking Member Kline:

The Coalition for Workplace Safety (CWS) is a group of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. CWS members are united in their desire to support policies that improve workplace safety. Unfortunately, and as we made clear in our letter in advance of the hearing on July 13, the provisions in “H.R. 5663, Miner Safety and Health Act of 2010” that would amend the Occupational Safety and Health Act (OSH Act) will not produce such results, and the CWS, as represented by the signers below, continues to oppose this bill.

This legislation, while primarily addressing issues with mine safety, would result in the most sweeping changes to the OSH Act since its inception. Unfortunately the provisions of this bill are not the right approach to assist both employers and employees in our shared goal of maintaining safe and healthful workplaces.

As we said in our earlier letter, and through the testimony of Jonathan Snare at the hearing, H.R. 5663 is built around the theory that greater penalties and enforcement will yield safer workplaces. The CWS believes that instead of improving workplace safety, this bill will only increase the adversarial nature of the relationship between Occupational Safety and Health Administration (OSHA) and employers, and create more confusion leading to increased litigation and compliance costs.

According to the Bureau of Labor Statistics, from 1994 to 2008 the total recordable case rates for workplaces injuries and illnesses have been cut in half (improved by 53.6 percent), and workplace fatalities are now at their lowest level ever. To assist employers in continuing these efforts to maintain safe workplaces and prevent accidents, OSHA should engage cooperatively with employers and assist them in better understanding their obligations. This bill contains no support or assistance for employers to help them implement better safety programs or understand better their obligations. Such compliance assistance is particularly necessary to help small businesses, who often cannot afford to maintain safety personnel or hire consultants to guide them through complicated OSHA regulations.

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In particular, the CWS is concerned with the following provisions of Title VII of H.R. 5663 that would amend the OSH Act:

Expansion of Whistleblower Rights (Section 701)—This provision 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 the Congress or any federal or state authority, or refused to violate any provision of the OSH Act. Current law (Section 11(c)) already provides employees with protections against such employer actions.

This provision is based on the belief that merely 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. The expansions will result, however, in excessive litigation and legal fees that will drain necessary resources from OSHA and employers. Section 701 simply promotes litigation and increases legal fees on employers, making OSHA's whistleblower system punitive and a pathway to litigation rather than a tool for improving workplace safety.

Furthermore, Section 701 would provide the employee a right to a *de novo* review in federal court if either the Administrative Law Judge, or the administrative review board that hears appeals of such cases, do not issue decisions and orders within 90 days, regardless of whether the complaint has any merits. According to testimony delivered by attorney and whistleblower expert Lloyd Chinn at a hearing held in the Subcommittee on Workforce Protections on April 28, 2010, these deadlines will not be met, thereby giving employees the right to bring their case in a federal court which will result in lengthy, and resource intensive litigation.

Mandatory Abatement and Procedures for Obtaining a Stay (Section 703)—This section would force employers to begin any corrections (abatement) under a 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 section provides a process by which an employer could get a stay of this requirement, the criteria for that are unlikely to be satisfied, and while the employer is seeking this stay they will 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.

Abatement is often a very costly, disruptive, and complicated process. It also represents part of the consequences of receiving a citation. While employers are prepared to correct hazards and make necessary improvements to their workplaces, whether they should have to spend the levels sometimes specified in a citation, and reconfigure their workplaces, or even cease certain operations or using certain machinery depends on whether OSHA has issued a valid citation. Just like any person accused of violating a law, employers have a right to due process before they can be forced to comply with costly and disruptive abatement measures specified by an OSHA inspector unfamiliar with the workplace, and this provision effectively strips employers of that right to due process. While the process provided in this section purports to

protect an employer's due process rights, it relies on the standard associated with seeking a preliminary injunction—a very difficult standard to meet. This represents an unreasonable burden for employers to overcome and is no substitute for current procedure that stays the abatement requirement while an employer exercises their due process rights. In effect, this bill seeks to make the OSHA inspector the judge, and jury.

Nor is this provision necessary. At a hearing in the Subcommittee on Workforce Protections of the House Education and Labor Committee on March 16, OSHA Director of Enforcement (now Deputy Assistant Secretary) Richard Fairfax made clear that OSHA can shut down a workplace “within an hour” if they find an imminent danger that requires such attention.

Increased Civil and Criminal Penalties (Sections 705, 706)—Perhaps the signature provisions of this bill are the increases in civil and criminal penalties, as well as other changes to how OSHA would impose these penalties. The CWS believes that increases in penalties do not yield improvements in workplace safety as penalties are never a proactive approach, they are merely reactive—they only apply after there has been a violation, accident, or fatality. The real impact of increasing civil and criminal penalties will be a significant surge in the number of citations employers choose to challenge as demonstrated by the increases in fines under MSHA, as a result of the MINER Act enacted after the Sago, WV mining tragedy. Since the MINER Act regulations took effect in 2007, the backlog at the Federal Mine Safety and Health Review Commission is 16,000 cases (worth \$195 million), and expected to rise further as the current policy at MSHA is to not engage in settlements. This backlog has impacted safety in the mining industry by absorbing an unprecedented amount of MSHA resources which would otherwise be devoted to field and other activities.

Instead of forcing employers to accept the penalties and proceed to payment, these dramatic increases will shift the cost-benefit equation for challenging and getting legal representation so that there will be greater benefit in pursuing a challenge than there is currently. This is especially true with respect to the expanded criminal penalties that this bill would create.

Beyond the problems associated with the proposed increases, Section 706 (criminal penalties) also makes other objectionable changes. It specifies that the term “employer” also means “any officer or director” without any qualification or suggestion that such an officer or director had any role in the incident in question. This overly broad expansion of the definition for employer is unworkable, but more importantly would likely ensnare company officials that 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 contradicts well established legal principles of whether someone can be charged for something with which they had no connection. This provision 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 section also introduces the new intent level for criminal penalties 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, a virtual “strict liability” standard 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 context would not only seriously degrade the legitimate level of intent currently in place, but it 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 (Section 707)--This section would impose interest penalties on employers, compounded daily, while they challenge a citation—in effect penalizing them for exercising their due process rights. This provision has no redeeming merit, nor can it be said to have any plausible connection to improving workplace safety.

The members of the Coalition for Workplace Safety are committed to seeking and advocating for new ways to continually improve safety in the workplace. Unfortunately, our position as expressed at the July 13 hearing has not changed and we maintain our strong belief that H.R. 5663, as introduced, will not improve safety but will instead create greater cost, litigation and hamper job creation. We urge the committee to not approve this bill.

60 Plus Association	Associated Builders and Contractors –
Academy of General Dentistry	Arkansas Chapter
AK Steel Corporation	Associated Builders and Contractors –
Aluminum Association	Carolinas Chapter
American Apparel & Footwear Association	Associated Builders and Contractors –
American Association of Homes and	Central Michigan Chapter
Services for the Aging	Associated Builders and Contractors –
American Bakers Association	Central Ohio Chapter
American Coke & Coal Chemicals Institute	Associated Builders and Contractors –
American Composites Manufacturers	Chesapeake Shores Chapter
Association	Associated Builders and Contractors –
American Council of Engineering	Delaware Chapter
Companies	Associated Builders and Contractors –
American Foundry Society	Eastern Pennsylvania Chapter
American Hotel & Lodging Association	Associated Builders and Contractors –
American Iron and Steel Institute	Florida East Coast Chapter
American Rental Association	Associated Builders and Contractors –
American Seniors Housing Association	Florida Gulf Coast Chapter
American Supply Association	Associated Builders and Contractors –
American Trucking Associations	Georgia Chapter
Arizona Builder’s Alliance	Associated Builders and Contractors –
Arkansas State Chamber of	Golden Gate Chapter
Commerce/Associated Industries of	Associated Builders and Contractors –
Arkansas	Greater Houston Chapter
Associated Builders and Contractors	Associated Builders and Contractors –
Associated Builders and Contractors –	Hawaii Chapter
Alabama Chapter	Associated Builders and Contractors – Heart
Associated Builders and Contractors –	of America Chapter
Alaska Chapter	Associated Builders and Contractors –
	Illinois Chapter

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Inland Pacific Chapter
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Chapter
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Keystone Chapter
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Maine Chapter
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Metro Washington Chapter
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Tennessee Chapter
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Mississippi Chapter
Associated Builders and Contractors – New
Jersey Chapter
Associated Builders and Contractors – New
Mexico Chapter
Associated Builders and Contractors – New
Orleans/Bayou Chapter
Associated Builders and Contractors – North
Alabama Chapter
Associated Builders and Contractors – North
Florida Chapter
Associated Builders and Contractors – Ohio
Valley Chapter
Associated Builders and Contractors –
Pacific Northwest Chapter
Associated Builders and Contractors –
Pelican Chapter
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Rhode Island Chapter
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Saginaw Valley Chapter
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Southeast Pennsylvania Chapter

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Southeastern Michigan Chapter
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Texas Mid Coast Chapter
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TEXO Chapter
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Virginia Chapter
Associated Builders and Contractors – West
Virginia Chapter
Associated Builders and Contractors –
Western Colorado Chapter
Associated Builders and Contractors –
Western Michigan Chapter
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Western Pennsylvania Chapter
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Western Tennessee Chapter
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Wisconsin Chapter
Associated Builders and Contractors –
Baltimore Metro Chapter
Associated Builders and Contractors of
Michigan
Associated Builders and Contractors–
Oklahoma Chapter
Associated Equipment Distributors
Associated General Contractors
Associated Industries of Florida
Associated Industries of Massachusetts
Associated Industries of Missouri
Association of Washington Business
Automotive Aftermarket Industry
Association
Ball Clay Producers Association
Brick Industry Association
CenTex Chapter IEC
Central Alabama Chapter IEC
Central Indiana IEC
Central Missouri IEC
Central Ohio AEC/IEC
Central Pennsylvania Chapter IEC

Central Washington IEC
Centre County IEC
Corn Refiners Association
East Tennessee IEC
Eastern Washington Chapter, IEC
Electronic Security Association
Food Marketing Institute
Foundry Association of Michigan
Greater Montana IEC
Healthcare Distribution Management
Association
Heating, Air Conditioning & Refrigeration
Distributors International
HR Policy Association
IEC Atlanta Chapter
IEC Chesapeake
IEC Dakotas, Inc.
IEC Dallas Chapter
IEC Florida West Coast
IEC Fort Worth/Tarrant County
IEC Georgia Chapter
IEC Greater St. Louis
IEC Hampton Roads Chapter
IEC NCAEC
IEC New England
IEC of Arkansas
IEC of East Texas
IEC of Greater Cincinnati
IEC of Idaho
IEC of Illinois
IEC of Kansas City
IEC of Northwest Pennsylvania
IEC of Oregon
IEC of Southeast Missouri
IEC of Texoma
IEC of the Bluegrass
IEC of the Texas Panhandle
IEC of Utah
IEC Southern Arizona
IEC Southern Colorado Chapter
IEC Southern Indiana Chapter-Evansville
IEC Texas Gulf Coast Chapter
IEC Western Reserve Chapter
IEC, Inc. El Paso Chapter
IEC, Inc. Lubbock Chapter
IEC, Inc. San Antonio Chapter

IEC, South Florida Chapter, Inc.
IECA Kentucky & S Indiana Chapter
IECA of Arizona
IECA of Nashville
IECA of Southern California, Inc.
IEC-OKC, Inc.
INDA, Association of the Nonwoven
Fabrics Industry
Independent Electrical Contractors, Inc.
Indiana Cast Metals Association
Ohio Cast Metals Association
Pennsylvania Cast Metals Association
National Club Association
Indiana Manufacturers Association
Industrial Minerals Association – North
America
International Diatomite Producers
Association
International Foodservice Distributors
Association
International Franchise Association
International Warehouse Logistics
Association
IPC - Association Connecting Electronics
Industries
Kentucky Association of Manufacturers
Kitchen Cabinet Manufacturers Association
Mason Contractors of America
MEC IEC of Dayton
Mechanical Contractors Association of
America
Mid-Oregon Chapter IEC
Mid-South Chapter IEC
Midwest IEC
Montana Chamber of Commerce
Montana IEC
National Association for Surface Finishing
National Association of Chemical
Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-
Distributors
National Council of Agricultural Employers
National Council of Chain Restaurants
National Council of Textile Organizations

National Electrical Contractors Association
National Electrical Manufacturers
Association
National Industrial Sand Association
National Lumber and Building Material
Dealers Association
National Marine Manufacturers Association
National Oilseed Processors Association
National Ready Mix Concrete Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Solid Wastes Management
Association
National Systems Contractors Association
National Tank Truck Carriers
National Tooling and Machining
Association
National Utility Contractors Association
Nebraska Chamber of Commerce &
Industry
New Jersey IEC
NFIB
North American Die Casting Association
North Carolina Chamber of Commerce
Northern New Mexico IEC
Northern Ohio ECA
Nucor Corporation
NW Washington IEC
Pennsylvania Manufacturers' Association
Plumbing-Heating-Cooling Contractors-
National Association

Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Puget Sound Washington Chapter
Retail Industry Leaders Association
Rio Grande Valley IEC, Inc.
Rocky Mountain Chapter IEC
Secondary Materials and Recycled Textiles
Association
Shipbuilders Council of America
Small Business and Entrepreneurship
Council
Snack Food Association
Society of American Florists
Society of Chemical Manufacturers and
Affiliates
Southern New Mexico IEC
SPI: The Plastics Industry Trade Association
Texas Cast Metals Association
Texas State IEC
Tree Care Industry Association
Tri State IEC
U.S. Chamber of Commerce
United States Steel Corporation
Utah Manufacturers Association
Waste Equipment Technology Association
WECA IEC
Western Colorado IEC
Wichita Chapter IEC
Window and Door Manufacturers
Association
Wisconsin Cast Metals Association
Wisconsin Manufacturers & Commerce