

Overview of Proposed Changes to the OSHA Act Under the Miner Safety and Health Act of 2010

Procedural Status: The draft of the Miner Safety and Health Act (the “Miner Act”) was prepared by Senators Tom Harkin (D-Iowa) and Patty Murray (D-Wash.). Representatives George Miller (D-Calif) and Lynn Woosley (D-Calif) then contributed to the draft to introduce it in the House of Representatives. After being introduced on July 1, 2010 and being referred to the House Education and Labor Committee, the Committee recently recommended that the Act be considered by the House as a whole. Senators are engaged in bi-partisan talks on the issue and expect to introduce companion legislation in the Fall of 2010.

Summary of Proposed Changes to the OSHA Act: Generally and concerning OSHA specifically, the draft bill will add greater anti-retaliation provisions, enhanced penalties, and broader enforcement tools to the agency. The key components to the proposed Miner Act are as follows:

- a. **Enhanced Penalties:** Congress has increased the OSHA Act’s monetary penalties only once in 40 years despite inflation during this period. In turn, the Miner Act increases both civil and criminal penalties for every type of violation under the OSHA Act and would increase penalties for willful or repeat violations that involve a fatality to as much as \$250,000. Regarding criminal penalties, the Miner Act would amend the criminal provisions to change the burden of proof from willfully to knowingly.
- b. **Whistleblower Protections:** The Miner Act would expand Section 11(c) of the OSHA Act to prevent retaliation against workers for reporting injuries, illnesses or unsafe conditions, or refusing to perform a task that the worker reasonably believes could result in serious injury or illness. The Act would also increase the existing 30 day deadline for filing a Section 11(c) complaint to 180 days. Further, the Miner Act would adopt the “contributing factor” test for determining when illegal retaliation has occurred.
- c. **Family Involvement:** The Miner Act includes a section that would expand the rights of workers and victims’ families. The Act would provide the right of the victim to meet with OSHA to receive copies of the citation at no cost, to be informed of any Notice of Contest, and to appear and make a statement during settlement negotiations before agreement is made to withdraw or modify a citation.
- d. **Abatement While Citations are Contested:** Currently, if an employer challenges an OSHA citation, the employer is not obligated to correct the hazard during the administrative contest period until there has been a final judgment before the Review Commission or subsequent appellate court body. The Miner Act, however, provides OSHA the authority to require abatement during contest subject to a provision where the employer can move to stay the abatement period.

The Proposed Changes Inserted Into the Current OSHA Act

In the following pages, we have tracked the changes to the OSHA Act under the Miner Act based on the proposed bill, with the new changes appearing as redlines to the current statutory language. The current OSHA Act contains the following Sections 9, 10, 11, and 17, which are highlighted in bold and are the ones affected by the proposed bill.

- Section 1 - Introduction
- Section 2 - Congressional Findings and Purpose
- Section 3 - Definitions
- Section 4 - Applicability of This Act
- Section 5 - Duties
- Section 6 - Occupational Safety and Health Standards
- Section 7 - Advisory Committees; Administration
- Section 8 - Inspections, Investigations, and Recordkeeping
- Section 9 - Citations**
- Section 10 - Procedure for Enforcement**
- Section 11 - Judicial Review**
- Section 12 - The Occupational Safety and Health Review Commission
- Section 13 - Procedures to Counteract Imminent Dangers
- Section 14 - Representation in Civil Litigation
- Section 15 - Confidentiality of Trade Secrets
- Section 16 - Variations, Tolerances, and Exemptions
- Section 17 - Penalties**
- Section 18 - State Jurisdiction and State Plans
- Section 19 - Federal Agency Safety Programs and Responsibilities
- Section 20 - Research and Related Activities
- Section 21 - Training and Employee Education
- Section 22 - National Institute for Occupational Safety and Health
- Section 23 - Grants to the States
- Section 24 - Statistics
- Section 25 - Audits
- Section 26 - Annual Report
- Section 27 - National Commission on State Workmen's Compensation Laws
- Section 28 - Economic Assistance to Small Businesses
- Section 29 - Additional Assistant Secretary of Labor
- Section 30 - Additional Positions
- Section 31 - Emergency Locator Beacons
- Section 32 - Separability
- Section 33 - Appropriations
- Section 34 - Effective Date
- Section - Historical Notes

Section 9 and Section 9(a) (29 U.S.C. § 658). Citations.

Section 9:

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations. If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Posting. Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) Time for Issuance. No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Section 9(a):

(a) Rights Before the Secretary- A victim or the representative of a victim, shall be afforded the right, with respect to an inspection or investigation conducted under section 8 to--

(1) meet with the Secretary regarding the inspection or investigation conducted under such section before the Secretary's decision to issue a citation or take no action;

(2) receive, at no cost, a copy of any citation or report, issued as a result of such inspection or investigation, at the same time as the employer receives such citation or report;

(3) be informed of any notice of contest or addition of parties to the proceedings filed under section 10(c); and

(4) be provided notification of the date and time of any proceedings, service of pleadings, and other relevant documents, and an explanation of the rights of the employer, employee and employee representative, and victim to participate in proceedings conducted under section 10(c).

(b) Rights Before the Commission- Upon request, a victim or representative of a victim shall be afforded the right with respect to a work-related bodily injury or death to--

(1) be notified of the time and date of any proceeding before the Commission;

(2) receive pleadings and any decisions relating to the proceedings; and

(3) be provided an opportunity to appear and make a statement in accordance with the rules prescribed by the Commission.

(c) Modification of Citation- Before entering into an agreement to withdraw or modify a citation issued as a result of an inspection or investigation of an incident under section 8, the Secretary shall notify a victim or representative of a victim and provide the victim or representative of a victim with an opportunity to appear and make a statement before the parties conducting settlement negotiations. In lieu of an appearance, the victim or representative of the victim may elect to submit a letter to the Secretary and the parties.

(d) Secretary Procedures- The Secretary shall establish procedures--

(1) to inform victims of their rights under this section; and

(2) for the informal review of any claim of a denial of such a right.

(e) Commission Procedures and Considerations- The Commission shall--

(1) establish procedures relating to the rights of victims to be heard in proceedings before the Commission; and

(2) in rendering any decision, provide due consideration to any statement or information provided by any victim before the Commission.

(f) Family Liaisons- The Secretary shall designate at least 1 employee at each area office of the Occupational Safety and Health Administration to serve as a family liaison to--

(1) keep victims informed of the status of investigations, enforcement actions, and settlement negotiations; and

(2) assist victims in asserting their rights under this section.

(g) Definition- In this section, the term 'victim' means--

(1) an employee, including a former employee, who has sustained a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8; or

(2) a family member (as further defined by the Secretary) of a victim described in paragraph (1), if--

(A) the victim dies as a result of a incident that is the subject of an inspection or investigation conducted under section 8; or

(B) the victim sustains a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, and the victim because of incapacity cannot reasonably exercise the rights under this section.

Section 10 (29 U.S.C. § 659). Enforcement Procedures.

(a) Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice. If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) Notification of employer of failure to correct in allotted time period violation for which citation was issued and proposed assessment of penalty for failure to correct; time for notification of Secretary by employer of contest by employer of notification of failure to correct or proposed assessment; notification or proposed assessment as final order upon failure of employer to notify of contest. If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure. If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

(d) Correction of Serious, Willful, or Repeated Violations Pending Contest and Procedures for a Stay-

(1) PERIOD PERMITTED FOR CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS- For each violation which the Secretary designates as serious, willful, or repeated, the period permitted for the correction of the violation shall begin to run upon receipt of the citation.

(2) FILING OF A MOTION OF CONTEST- The filing of a notice of contest by an employer--

(A) shall not operate as a stay of the period for correction of a violation designated as serious, willful, or repeated; and

(B) may operate as a stay of the period for correction of a violation not designated by the Secretary as serious, willful, or repeated.

(3) CRITERIA AND RULES OF PROCEDURE FOR STAYS-

(A) MOTION FOR A STAY- An employer may file with the Commission a motion to stay a period for the correction of a violation designated as serious, willful, or repeated.

(B) CRITERIA- In determining whether a stay should be issued on the basis of a motion filed under subparagraph (A), the Commission shall consider whether--

(i) the employer has demonstrated a substantial likelihood of success on its contest to the citation;

(ii) the employer will suffer irreparable harm absent a stay; and

(iii) a stay will adversely affect the health and safety of workers.

(C) RULES OF PROCEDURE- The Commission shall develop rules of procedure for conducting a hearing on a motion filed under subparagraph (A) on an expedited basis. At a minimum, such rules shall provide:

(i) That a hearing before an administrative law judge shall occur not later than 15 days following the filing of the motion for a stay (unless extended at the request of the employer), and shall provide for a decision on the motion not later than 15 days following the hearing (unless extended at the request of the employer).

(ii) That a decision of an administrative law judge on a motion for stay is rendered on a timely basis.

(iii) That if a party is aggrieved by a decision issued by an administrative law judge regarding the stay, such party has the right to file an objection with the Commission not later than 5 days after receipt of the administrative law judge's decision. Within 10 days after receipt of the objection, a Commissioner, if a quorum is seated pursuant to section 12(f), shall decide whether to grant review of the objection. If, within 10 days after receipt of

the objection, no decision is made on whether to review the decision of the administrative law judge, the Commission declines to review such decision, or no quorum is seated, the decision of the administrative law judge shall become a final order of the Commission. If the Commission grants review of the objection, the Commission shall issue a decision regarding the stay not later than 30 days after receipt of the objection. If the Commission fails to issue such decision within 30 days, the decision of the administrative law judge shall become a final order of the Commission.

(iv) For notification to employees or representatives of affected employees of requests for such hearings and shall provide affected employees or representatives of affected employees an opportunity to participate as parties to such hearings.

Section 11 (29 U.S.C § 660). Judicial Review.

(a) Filing of petition by persons adversely affected or aggrieved; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and finding of Commission; appropriate relief; finality of judgment. Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code.

(b) Filing of petition by Secretary; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; enforcement of orders; contempt proceedings. The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief.

(1) No person shall ~~discharge or in any manner discriminate against any employee because such discharge or cause to be discharged, or in any manner discriminate against or cause to be discriminated against, any employee because--~~

(A) such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has to this Act;

(B) such employee has testified or is about to testify in any such proceeding or because of the exercise before Congress or in any Federal or State proceeding related to safety or health;

(C) such employee has refused to violate any provision of this Act; or

(D) of the exercise by such employee on behalf of himself or others of any right afforded by this Act including the reporting of any injury, illness, or unsafe condition to the employer, agent of the employer, safety and health committee involved, or employee safety and health representative involved.

~~(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.~~

(2)(A) No person shall discharge, or cause to be discharged, or in any manner discriminate against, or cause to be discriminated against, an employee for refusing to perform the employee's duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees.

(B) For purposes of subparagraph (A), the circumstances causing the employee's good-faith belief that performing such duties would pose a safety or health hazard shall be of such a nature that a reasonable person, under the circumstances confronting the employee, would conclude that there is such a hazard. In order to qualify for protection under this paragraph, the employee, when practicable, shall have communicated or attempted to communicate the safety or health concern to the employer and have not received from the employer a response reasonably calculated to allay such concern.

~~(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.~~

(3) COMPLAINT- Any employee who believes that the employee has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) or (2) may seek relief for such violation

by filing a complaint with the Secretary under paragraph (5).

(4) STATUTE OF LIMITATIONS-

(A) IN GENERAL- An employee may take the action permitted by paragraph (3)(A) not later than 180 days after the later of--

(i) the date on which an alleged violation of paragraph (1) or (2) occurs; or

(ii) the date on which the employee knows or should reasonably have known that such alleged violation occurred.

(B) REPEAT VIOLATION- Except in cases when the employee has been discharged, a violation of paragraph (1) or (2) shall be considered to have occurred on the last date an alleged repeat violation occurred.

(5) INVESTIGATION-

(A) IN GENERAL- An employee may, within the time period required under paragraph (4)(B), file a complaint with the Secretary alleging a violation of paragraph (1) or (2). If the complaint alleges a prima facie case, the Secretary shall conduct an investigation of the allegations in the complaint, which--

(i) shall include--

(I) interviewing the complainant;

(II) providing the respondent an opportunity to--

(aa) submit to the Secretary a written response to the complaint; and

(bb) meet with the Secretary to present statements from witnesses or provide evidence; and

(III) providing the complainant an opportunity to--

(aa) receive any statements or evidence provided to the Secretary;

(bb) meet with the Secretary; and

(cc) rebut any statements or evidence; and

(ii) may include issuing subpoenas for the purposes of such investigation.

(B) DECISION- Not later than 90 days after the filing of the complaint, the Secretary shall--

(i) determine whether reasonable cause exists to believe that a violation of paragraph (1) or (2) has occurred; and

(ii) issue a decision granting or denying relief.

(6) PRELIMINARY ORDER FOLLOWING INVESTIGATION- If, after completion of an investigation under paragraph (5)(A), the Secretary finds reasonable cause to believe that a violation of paragraph (1) or (2) has occurred, the Secretary shall issue a preliminary order providing relief authorized under paragraph (14) at the same time the Secretary issues a decision under paragraph (5)(B). If a de novo hearing is not requested within the time period required under paragraph (7)(A)(i), such preliminary order shall be deemed a final order of the Secretary and is not subject to judicial review.

(7) HEARING-

(A) REQUEST FOR HEARING-

(i) IN GENERAL- A de novo hearing on the record before an administrative law judge may be requested--

(I) by the complainant or respondent within 30 days after receiving notification of a decision granting or denying relief issued under paragraph 5(D) or paragraph (6) respectively;

(II) by the complainant within 30 days after the date the complaint is dismissed without investigation by the Secretary under paragraph (5)(A); or

(III) by the complainant within 120 days after the date of filing the complaint, if the Secretary has not issued a decision under paragraph (5)(B).

(ii) REINSTATEMENT ORDER- The request for a hearing shall not operate to stay any preliminary reinstatement order issued under paragraph (6).

(B) PROCEDURES-

(i) IN GENERAL- A hearing requested under this paragraph shall be conducted expeditiously and in accordance with rules established by the Secretary for hearings conducted by administrative law judges.

(ii) SUBPOENAS; PRODUCTION OF EVIDENCE- In conducting any such hearing, the administrative law judge may issue subpoenas. The respondent or complainant may request the issuance of subpoenas that require the deposition of, or the attendance and testimony of, witnesses and the production of any evidence (including any books, papers, documents, or recordings) relating to the matter under consideration.

(iii) DECISION- The administrative law judge shall issue a decision not later than 90 days after the date on which a hearing was requested under this paragraph and promptly notify,

in writing, the parties and the Secretary of such decision, including the findings of fact and conclusions of law. If the administrative law judge finds that a violation of paragraph (1) or (2) has occurred, the judge shall issue an order for relief under paragraph (14). If review under paragraph (8) is not timely requested, such order shall be deemed a final order of the Secretary that is not subject to judicial review.

(8) ADMINISTRATIVE APPEAL-

(A) IN GENERAL- Not later than 30 days after the date of notification of a decision and order issued by an administrative law judge under paragraph (7), the complainant or respondent may file, with objections, an administrative appeal with an administrative review body designated by the Secretary (referred to in this paragraph as the 'review board').

(B) STANDARD OF REVIEW- In reviewing the decision and order of the administrative law judge, the review board shall affirm the decision and order if it is determined that the factual findings set forth therein are supported by substantial evidence and the decision and order are made in accordance with applicable law.

(C) DECISIONS- If the review board grants an administrative appeal, the review board shall issue a final decision and order affirming or reversing, in whole or in part, the decision under review by not later than 90 days after receipt of the administrative appeal. If it is determined that a violation of paragraph (1) or (2) has occurred, the review board shall issue a final decision and order providing relief authorized under paragraph (14). Such decision and order shall constitute final agency action with respect to the matter appealed.

(9) SETTLEMENT IN THE ADMINISTRATIVE PROCESS-

(A) IN GENERAL- At any time before issuance of a final order, an investigation or proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the parties.

(B) PUBLIC POLICY CONSIDERATIONS- Neither the Secretary, an administrative law judge, nor the review board conducting a hearing under this subsection shall accept a settlement that contains conditions conflicting with the rights protected under this Act or that are contrary to public policy, including a restriction on a complainant's right to future employment with employers other than the specific employers named in a complaint.

(10) INACTION BY THE REVIEW BOARD OR ADMINISTRATIVE LAW JUDGE-

(A) IN GENERAL- The complainant may bring a de novo action described in subparagraph (B) if--

(i) an administrative law judge has not issued a decision and order within the 90-day time period required under paragraph (7)(B)(iii); or

(ii) the review board has not issued a decision and order within the 90-day time period required under paragraph (8)(C).

(B) DE NOVO ACTION- Such de novo action may be brought at law or equity in the United States district court for the district where a violation of paragraph (1) or (2) allegedly occurred or where the complainant resided on the date of such alleged violation. The court shall have jurisdiction over such action without regard to the amount in controversy and to order appropriate relief under paragraph (14). Such action shall, at the request of either party to such action, be tried by the court with a jury.

(11) JUDICIAL REVIEW-

(A) TIMELY APPEAL TO THE COURT OF APPEALS- Any party adversely affected or aggrieved by a final decision and order issued under this subsection may obtain review of such decision and order in the United States Court of Appeals for the circuit where the violation, with respect to which such final decision and order was issued, allegedly occurred or where the complainant resided on the date of such alleged violation. To obtain such review, a party shall file a petition for review not later than 60 days after the final decision and order was issued. Such review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the final decision and order.

(B) LIMITATION ON COLLATERAL ATTACK- An order and decision with respect to which review may be obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(12) ENFORCEMENT OF ORDER- If a respondent fails to comply with an order issued under this subsection, the Secretary or the complainant on whose behalf the order was issued may file a civil action for enforcement in the United States district court for the district in which the violation was found to occur to enforce such order. If both the Secretary and the complainant file such action, the action of the Secretary shall take precedence. The district court shall have jurisdiction to grant all appropriate relief described in paragraph (14).

(13) BURDENS OF PROOF-

(A) CRITERIA FOR DETERMINATION- In making a determination or adjudicating a complaint pursuant to this subsection, the Secretary, administrative law judge, review board, or a court may determine that a violation of paragraph (1) or (2) has occurred only if the complainant demonstrates that any conduct described in paragraph (1) or (2) with respect to the complainant was a contributing factor in the adverse action alleged in the complaint.

(B) PROHIBITION- Notwithstanding subparagraph (A), a decision or order that is favorable to the complainant shall not be issued in any administrative or judicial action pursuant to this subsection if the respondent demonstrates by clear and convincing evidence that the respondent would have taken the same adverse action in the absence of such conduct.

(14) RELIEF-

(A) ORDER FOR RELIEF- If the Secretary, administrative law judge, review board, or a court determines that a violation of paragraph (1) or (2) has occurred, the Secretary or court,

respectively, shall have jurisdiction to order all appropriate relief, including injunctive relief, compensatory and exemplary damages, including--

(i) affirmative action to abate the violation;

(ii) reinstatement without loss of position or seniority, and restoration of the terms, rights, conditions, and privileges associated with the complainant's employment, including opportunities for promotions to positions with equivalent or better compensation for which the complainant is qualified;

(iii) compensatory and consequential damages sufficient to make the complainant whole, (including back pay, prejudgment interest, and other damages); and

(iv) expungement of all warnings, reprimands, or derogatory references that have been placed in paper or electronic records or databases of any type relating to the actions by the complainant that gave rise to the unfavorable personnel action, and, at the complainant's direction, transmission of a copy of the decision on the complaint to any person whom the complainant reasonably believes may have received such unfavorable information.

(B) Attorneys' FEES AND COSTS- If the Secretary or an administrative law judge, review board, or court grants an order for relief under subparagraph (A), the Secretary, administrative law judge, review board, or court, respectively, shall assess, at the request of the employee against the employer--

(i) reasonable attorneys' fees; and

(ii) costs (including expert witness fees) reasonably incurred, as determined by the Secretary, administrative law judge, review board, or court, respectively, in connection with bringing the complaint upon which the order was issued.

(15) PROCEDURAL RIGHTS- The rights and remedies provided for in this subsection may not be waived by any agreement, policy, form, or condition of employment, including by any pre-dispute arbitration agreement or collective bargaining agreement.

(16) SAVINGS- Nothing in this subsection shall be construed to diminish the rights, privileges, or remedies of any employee who exercises rights under any Federal or State law or common law, or under any collective bargaining agreement.

(17) ELECTION OF VENUE-

(A) IN GENERAL- An employee of an employer who is located in a State that has a State plan approved under section 18 may file a complaint alleging a violation of paragraph (1) or (2) by such employer with--

(i) the Secretary under paragraph (5); or

(ii) a State plan administrator in such State.

(B) REFERRALS- If--

(i) the Secretary receives a complaint pursuant to subparagraph (A)(i), the Secretary shall not refer such complaint to a State plan administrator for resolution; or

(ii) a State plan administrator receives a complaint pursuant to subparagraph (A)(ii), the State plan administrator shall not refer such complaint to the Secretary for resolution.

Section 17 (29 U.S.C. § 666). Civil and Criminal Penalties.

(a) Willful or repeated violation. Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than ~~\$70,000~~120,000 for each violation, but not less than ~~\$5,000~~8,000 for each willful violation. In determining whether a violation is repeated, the Secretary shall consider the employer's history of violations under this Act and under State occupational safety and health plans established under section 18. If such a willful or repeated violation caused or contributed to the death of an employee, such civil penalty amounts shall be increased to not more than \$250,000 for each such violation, but not less than \$50,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$25,000 for each such violation.

(b) Citation for serious violation. Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to ~~\$7,000~~12,000 for each such violation.

(c) Citation for violation determined not to be serious. Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to \$7,000 for each violation.

~~(d) Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than \$7,000 for each day during which such failure or violation continues.~~

(d) Failure to correct violation. Any employer who fails to correct a violation designated by the Secretary as serious, willful, or repeated and for which a citation has been issued under section 9(a) within the period permitted for its correction (and a stay has not been issued by the Commission under section 10(d)) may be assessed a civil penalty of not more than \$12,000 for each day during which such failure or violation continues. Any employer who fails to correct any other violation for which a citation has been issued under section 9(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties) may be assessed a civil penalty of not more than \$12,000 for each day during which such failure or violation continues.

(e) Adjustment of fines. Amounts provided under this section for civil penalties shall be adjusted by the Secretary at least once during each 4-year period beginning January 1, 2015, to account for the percentage increase or decrease in the Consumer Price Index for all urban consumers during such period.

~~(ef) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment~~

~~shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both.~~

~~**(f)(1) Willful violation causing death to employee.** Any employer who knowingly violates any standard, rule, or order promulgated under section 6 of this Act, or of any regulation prescribed under this Act, and that violation caused or contributed to the death of any employee, shall, upon conviction, be punished by a fine in accordance with title 18, United States Code, or by imprisonment for not more than 10 years, or both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (i), punishment shall be by a fine in accordance title 18, United States Code, or by imprisonment for not more than 20 years, or by both.~~

~~(2) For the purpose of this subsection, the term 'employer' means, in addition to the definition contained in section 3 of this Act, any officer or director.~~

~~**(fg) Giving advance notice of inspection.** Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a ~~fine of not more than \$1,000 or by imprisonment for not more than six months,~~ fine in accordance with title 18, United States Code, or by imprisonment for not more than 2 years, or by both.~~

~~**(gh) False statements, representations or certification.** Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a ~~fine of not more than \$10,000, or by imprisonment for not more than six months,~~ fine in accordance with title 18, United States Code, or by imprisonment for not more than 5 years, or by both.~~

(i) Omitted

~~**(j)(1) Criminal penalties.** Any employer who knowingly violates any standard, rule, or order promulgated under section 6, or any regulation prescribed under this Act, and that violation causes or contributes to serious bodily harm to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with title 18, United States Code, or by imprisonment for not more than 5 years, or by both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (e), punishment shall be by a fine in accordance with title 18, United States Code, or by imprisonment for not more than 10 years, or by both.~~

~~(2) For the purpose of this subsection, the term 'employer' means, in addition to the definition contained in section 3 of this Act, any officer or director.~~

~~(3) For purposes of this subsection, the term 'serious bodily harm' means bodily injury or illness that involves--~~

~~(A) a substantial risk of death;~~

~~(B) protracted unconsciousness;~~

~~(C) protracted and obvious physical disfigurement; or~~

(D) protracted loss or impairment, either temporary or permanent, of the function of a bodily member, organ, or mental faculty.

(ik) Violation of posting requirements. Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to ~~\$7,000~~12,000 for each violation.

(jl) Authority of Commission to assess civil penalties. The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations including the history of violations under section 11(c).

(km) Determination of serious violation. For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(ln) Procedure for payment of civil penalties. Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office. Pre-final order interest on such penalties shall begin to accrue on the date the party contests a citation issued under this Act, and shall end upon the issuance of the final order. Such pre-final order interest shall be calculated at the current underpayment rate determined by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986, and shall be compounded daily. Post-final order interest shall begin to accrue 30 days after the date a final order of the Commission or the court is issued, and shall be charged at the rate of 8 percent per year.

(o) State or local law enforcement. Nothing in this Act shall preclude a State or local law enforcement agency from conducting criminal prosecutions in accordance with the laws of such State or locality.