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In late April, Democrats in the U.S. House of Representatives introduced H.R. 2067: Protecting America's Workers Act of 2009, or PAWA, to expand the Occupational Safety and Health Act of 1970 and increase the penalties that the Department of Labor may issue for health and safety violations by American employers.

The bill, which has the support of the Democratic majority, threatens to subject American employers - including corporate officers - to severe civil and criminal penalties.

According to congressional testimony by Sen. Ted Kennedy, D- Mass., nearly 5,700 American workers were killed on the job and more than 4 million became ill or are injured in 2007. Kennedy and others point to grim statistics showing that civil and criminal fines and penalties under OSHA are lax.

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With solid majorities in the House and Senate, Democrats reintroduced the PAWA after earlier versions of the same bill stalled in committee during the last three sessions of Congress. PAWA enjoys the support of President Obama, who co-sponsored an earlier version of the bill as a senator, and is likely to pass given the current political climate.

OSHA currently does not cover all American employees. To remedy this gap, which affects at least 8.6 million American workers, the PAWA removes two primary exclusions in OSHA's scope. First, OSHA does not cover all public employees. Second, OSHA contains an exclusion that affects millions of private employees in certain industries by making them subject to safety regulations issued by other federal agencies. The bill essentially removes both exclusions.

New OSHA civil and criminal penalties created by the bill are dramatic. Neither the OSHA civil nor criminal penalties have been adjusted since 1990.

PAWA raises the civil penalties for OSHA violations across the board. It will raise the civil fine for a willful or repeated OSHA violation to \$8,000/\$120,000 (minimum/maximum), and for willful or repeated conduct resulting in a fatality, the civil fine becomes \$50,000/\$250,000. In addition, the maximum civil fine for a serious violation will increase from \$7,000 from \$12,000, and the maximum fine for a serious violation resulting in a fatality will increase from \$20,000 to \$50,000.

Of all the amendments, however, the criminal penalty amendments are the most noteworthy. Currently, the only criminal OSHA provision applies to a willful violation causing a fatality. Even then, that crime is only a Class B misdemeanor with a maximum sentence of six months in prison.

Under the new bill recently introduced, a criminal OSHA violation will be a felony, and the maximum penalty for a willful injury that results in a worker's death will increase from six months to 10 years in prison. Equally notable is the criminalization of willful conduct that causes a serious injury. Currently not a crime, the bill makes such conduct subject to a \$250,000/\$500,000 fine and/or five years in prison under OSHA.

Corporate officers on the hook

In addition, the PAWA expands OSHA's definition of the term "employer." Under the current law, an employer is "a person engaged in a business affecting commerce who has employees." The bill broadens that definition to include "any responsible corporate officer." Just as Sarbanes-Oxley did in the area of accounting, OSHA raises the specter of stiff personal penalties against individual officers whose companies allow workers to suffer workplace injuries and deaths. This sea change to expand and raise OSHA criminal liability cannot be overstated.

Another perceived shortfall in OSHA is that workers face retaliation for speaking out on unsafe or unhealthy working conditions. Under the new bill, an employer will not be allowed to fire or discriminate against an employee who refuses to perform his or her job duties based on "a reasonable apprehension" of serious injury or impairment of health.

If it is determined that an employer has retaliated against an employee, the employee is to be reinstated, given back pay and awarded compensatory damages. The labor secretary may file a civil action in federal court to enforce a worker's claim, and an employer is subject to pay attorney's fees, costs and expenses. Lured by compensatory damages and attorneys' fees, a wave of OSHA whistleblower and retaliation lawsuits is almost certain to arise.

If passed, this bill will expand OSHA coverage to millions of public and private sector employees. While it threatens to impose serious administrative costs, create whistleblower and retaliation claims and lawsuits, and expose employers and their officers to a range of penalties, it also will guarantee safer and healthier working conditions for millions of American workers.

Those American companies who do play by the rules will not suffer a competitive disadvantage by taking the time and expense to afford their workers with proper working environments. No matter how costly or burdensome this bill threatens to make OSHA compliance, it is nevertheless likely that it will soon become law and substantially expand and strengthen OSHA.

Facing this reality, employers can best manage the transition by acting swiftly to ensure they comply with the newly expanded OSHA regime.

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