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109TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 109–47

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION EFFICIENCY ACT OF 2005

APRIL 18, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BOEHNER, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 740]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 740) to amend the Occupational Safety and Health Act of 1970 to provide for greater efficiency at the Occupational Safety and Health Review Commission, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Occupational Safety and Health Review Commission Efficiency Act of 2005".

SEC. 2. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

(a) INCREASE IN NUMBER OF MEMBERS AND CRITERIA FOR MEMBERSHIP.—Section 12 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 661) is amended—

(1) in the second sentence of subsection (a)—

(A) by striking "three members" and inserting "five members"; and

(B) by inserting "legal" before "training";

(2) in the first sentence of subsection (b), by striking "except that" and all that follows through the period and inserting the following: "except that the President may extend the term of a member for no more than 365 consecutive days to allow a continuation in service at the pleasure of the President after the expiration of the term of that member until a successor nominated by the President has been confirmed to serve. Any vacancy caused by the death, resignation, or

removal of a member before the expiration of a term for which a member was appointed shall be filled only for the remainder of such term."; and

(3) in subsection (f), by striking "two members" the first place it appears and inserting "three members".

(b) NEW POSITIONS.—Of the two vacancies for membership on the Occupational Safety and Health Review Commission created by subsection (a)(1)(A), one shall be appointed by the President for a term expiring on April 27, 2008, and the other shall be appointed by the President for a term expiring on April 27, 2010.

(c) EFFECTIVE DATE.—The amendment made by subsection (a)(1)(B) shall apply beginning with the 2 vacancies referred to in subsection (b) and all subsequent appointments to the Commission.

PURPOSE

H.R. 740, the "Occupational Safety and Health Review Commission Efficiency Act of 2005," is intended to improve the efficiency of the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission"), the adjudicative agency specifically created by Congress to hear disputes arising under the Occupational Safety and Health Act of 1970 (the "OSH Act"). Under current law, the Commission presently consists of three members appointed by the President. As testimony before the Subcommittee on Workforce Protections has made clear, too often in the past the Commission has been unable to act because of vacancies in its membership, the lack of a working quorum, or a simple deadlock among its members. To address these concerns, H.R. 740 increases the membership of OSHRC from three to five members, so as to ensure that the Commission is able to function effectively and perform the important review and adjudicatory functions delegated to it by Congress. The bill also provides limited authority for the President to "hold over" an OSHRC member until a replacement is confirmed by the Senate. Finally, recognizing that OSHRC as a practical matter sits as a reviewing "court" of decisions of the Occupational Safety and Health Administration ("OSHA"), H.R. 740 specifies that "legal" training shall be among the criteria assessed by the President for membership on the Commission.

COMMITTEE ACTION

109th Congress

H.R. 740, the "Occupational Safety and Health Review Commission Efficiency Act of 2005," was introduced by Congressman Charlie Norwood on February 10, 2005, and was referred to the Committee on Education and the Workforce and held at full committee. In light of the extensive legislative record developed with respect to substantively identical legislation in the 107th and 108th Congresses, the Committee held no hearings on the bill prior to markup.

On April 13, 2005, the Committee favorably reported the bill to the House of Representatives, as amended by the amendment in the nature of a substitute described herein, by a roll call vote of 27 to 19.

The amendment in the nature of a substitute adopted by the Committee is substantively identical to H.R. 2729 as passed by the House in the 108th Congress.

108th Congress

On April 3, 2003, comprehensive OSHA reform legislation, H.R. 1583, the "Occupational Safety and Health Fairness Act of 2003," was introduced in the House. The Subcommittee on Workforce Protections held a hearing on H.R. 1583 on June 17, 2003.[1] At this hearing, the Subcommittee heard testimony from Mr. Brian Landon of Canton, Pennsylvania, testifying on behalf of the National Federation of Independent Businesses; Mr. John Molovich, Health and Safety Specialist, United Steelworkers of America, of Pittsburgh, Pennsylvania; Mr. Ephraim Cohen, a small business owner from New York; and Arthur Sapper, Esq., an attorney of the law firm McDermott, Will & Emery in Washington, DC, testifying on behalf of the U.S. Chamber of Commerce. Legislation incorporating section 5 of H.R. 1583 was subsequently introduced as H.R. 2729, the "Occupational Safety and Health Review Commission Efficiency Act of 2003" on July 15, 2003.

On July 24, 2003, the Subcommittee on Workforce Protections favorably reported H.R. 2729, without amendment, by voice vote.

On May 5, 2004, the Committee on Education and the Workforce considered H.R. 2729. An amendment by Subcommittee Chairman Norwood in the nature of a substitute was accepted by unanimous consent. The substitute amendment: (a) changed the title of the bill from the "Occupational Safety and Health Review Commission Efficiency Act of 2003" to the "Occupational Safety and Health Review Commission Efficiency Act of 2004;" (b) limited the duration of time for which the President could extend the term of a member of OSHRC to no more than 365 consecutive days; and (c) eliminated a provision in the bill authorizing the Chairman of OSHRC to delegate the work of the full Commission to panels of three Commission members. The Committee ordered H.R. 2729, as thus amended, favorably reported to the House of Representatives by a roll call vote of 24 yeas and 20 nays.

On May 18, 2004, the full House of Representatives passed the measure as amended by a vote of 228–199.[2]

SUMMARY

It is Congress' obligation not only to create mechanisms to adequately enforce the law, but also to ensure that those mechanisms, once implemented, perform efficiently and up to Congressional expectations. H.R. 740 remedies a situation where the mechanisms established by Congress to adjudicate disputes arising under the OSH Act are not performing in an adequate fashion. Accordingly, H.R. 740 prescribes narrowly-crafted remedial action, increasing the membership of OSHRC from three members to five, thereby improving overall performance and ensuring continuity and consistency in practice.

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[1] See Hearing on H.R. 1583, "The Occupational Safety and Health Fairness Act of 2003," before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, Serial No. 108–20 (hereinafter "Hearing on H.R. 1583").

[2] Pursuant to the rule providing for its consideration, H. Res. 645, the bill was deemed amended to address a technical error relating to the bill's provision for an OSHRC quorum upon adoption of the rule. Further to the provisions of H. Res. 645, upon approval of the bill it was enrolled with four other bills (H.R. 2728, H.R. 2730, H.R. 2731, and H.R. 2432) and thus transmitted to the Senate.

COMMITTEE VIEWS

Since its creation in 1970, OSHRC too often has been unable to maintain an effective working quorum, and thus has been unable to perform the important adjudicatory functions delegated to it by Congress. OSHRC remains threatened with this failure to maintain the quorum needed to function. In the Committee's opinion, this problem can only be corrected through the legislative solution contained in H.R. 740.

Background: The Occupational Safety and Health Review Commission

Both the Occupational Safety and Health Administration (OSHA) and OSHRC were created in 1970 under the OSH Act. In drafting the OSH Act, Congress extended new and unprecedented powers to OSHA to ensure a safer and healthier work place for millions of American working men and women. In granting OSHA those extensive powers, however, Congress also put in place a unique check on their unfettered use. This check was intended to be discharged by OSHRC, through the process of an independent review by that Commission of all disputed areas under the OSH Act. As OSHRC describes itself:

> OSHRC is an independent, adjudicatory agency created by [Congress under] the Occupational Safety and Health Act of 1970 (OSH Act). Its sole statutory mandate is to serve as an administrative court providing just and expeditious resolution of disputes involving the Occupational Safety and Health Administration (OSHA), employers charged with violations of federal safety and health standards, and employees and/or their representatives. The review Commission was created by Congress as an agency completely independent of the Department of Labor to ensure that OSHA's enforcement actions are carried out in accordance with the law and that all parties are treated consistent with due process when disputes with OSHA arise.[3]

OSHRC Administrative Law Judges ("ALJs") hear and decide cases in the first instance. The ALJ's decision and order becomes a final order of OSHRC unless, within thirty days of its docketing, unless either party requests (or one of the three Commission members directs) that the decision be reviewed. In its review, OSHRC may affirm, reverse, or modify the ALJ's decision in its final order. Once a final order of the Commission is issued, a party may seek review of OSHRC's decision in the appropriate federal court of appeals.[4]

Under current law, the membership of OSHRC is set at three members who are appointed by the President with the advice and consent of the Senate; one member is designated by the President as Chairperson.[5] Members serve staggered six-year terms, meaning that under current law, a vacancy occurs every two years.[6] Two

[3] See Occupational Safety and Health Review Commission, Fiscal Year 2003 Performance Report to Congress, February 2004.
[4] See 29 U.S.C. § 660(a).
[5] See 29 U.S.C. §661(a).
[6] See 29 U.S.C. §661(b).

members are required to constitute a quorum, and irrespective of the number of sitting members, OSHRC only has authority to take action on the affirmative vote of two members.[7]

The Impact of the Lack of a Working Quorum at OSHRC

In testimony before the Subcommittee on Workforce Protections, one former Deputy General Counsel of OSHRC, Arthur G. Sapper, Esq., noted that several critical and well-documented inefficiencies result from a lack of a working quorum at OSHRC.[8]

The lack of a working quorum means that OSHRC is unable to perform the critical functions it was designated by Congress to perform, rendering the entire regulatory scheme devised by Congress for the resolution of disputes between OSHA and employers nonfunctional. The problems experienced by OSHRC in maintaining the continuous quorum needed to conduct business were summarized in testimony before the Subcommittee on Workforce Protections as follows:

> For over two thirds of its existence, the Commission has been so paralyzed by frequent vacancies that it has been unable to do its job. For over half the time since 1982, the Commission has had two or fewer members and, for over a third of that time, it has had only two members. For twenty percent of that time, it lacked even a quorum of two. Between 1996 and 1999, it had a full complement for only a third of the time. Recently, the Commission had only one member for nine months during fiscal year 2002, from the end of December 2001 until late August 2002.[9]

As the table set forth below demonstrates, the breaks in service that result in a potential loss of a working quorum are not only frequent, but occur almost routinely at the expiration of any member's term. This results in two types of situations where OSHRC is threatened with such a lack of a working quorum.

First, as highlighted below, in too many instances two of three seats on the Commission have been vacant, making it legally impossible for any action to be taken at OSHRC in light of the OSH Act's direction that such action may be taken by the Commission only by the affirmative vote of two members. Second, and more frequently occurring, are situations where there has been one seat vacant for a prolonged period of time. As noted above, because the OSH Act dictates that action may only be taken by the affirmative vote of two members of the Commission, any disagreement on any point renders a two-member OSHRC incapable of taking action, resulting in stalemate. Indeed, the data set forth below confirms that for approximately one-third of its existence, OSHRC had been in a position where it was either legally unable to adjudicate (i.e., only one member sitting), or in a position where any disagreement hindered any affirmative action (i.e., only two members sitting).

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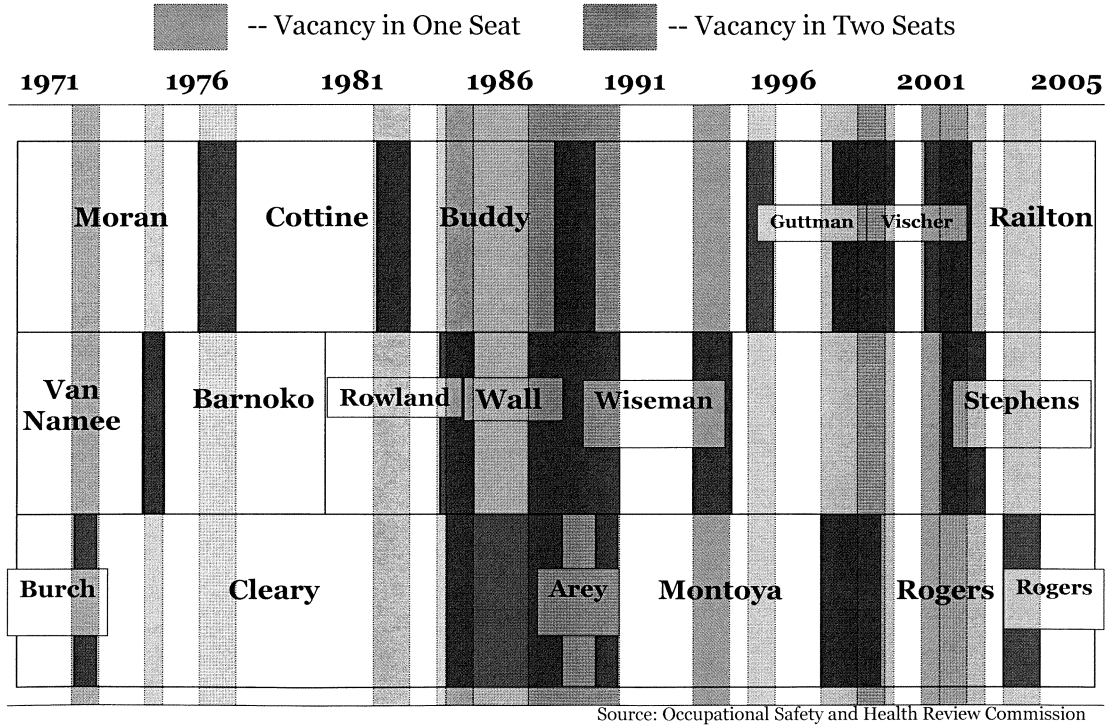
[7] See 29 U.S.C. 661(f); see also generally, Occupational Safety and Health Law, Second Edition, American Bar Association, Section of Labor and Employment Law, at 298–351.

[8] See Testimony of Arthur G. Sapper, Esq., Hearing on H.R. 1583, at 65–67.

[9] Id. at 65.

Working Quorums at OSHRC



Source: Occupational Safety and Health Review Commission

The Committee agrees with the testimony before the Workforce Protections Subcommittee that the breaks in service of OSHRC members and the resulting lack of a functioning quorum have greatly damaged public respect for OSHRC. As summarized in that testimony, a federal agency fully-staffed with government employees but lacking the necessary complement of Commissioners and thus unable to fully and effectively perform the functions for which it was structured is likely to breed public disdain.[10]

Increasing the Membership of OSHRC from Three to Five

To ensure that OSHRC can maintain a viable working quorum and is able to discharge the responsibilities with which it is charged, H.R. 740 increases the membership of the Commission from three members to five.[11] The bill further establishes that three members shall constitute a quorum of the five-member Commission, and that action may be taken only upon the affirmative vote of two Commission members. H.R. 740 draws this solution based on the experience of the federal Mine Safety and Health Review Commission ("MSHRC"), a "sister agency" of OSHRC with adjudicatory authority over the federal Mine Safety and Health Administration ("MSHA").[12] While there are similarities between the mission of MSHA and OSHA, there is one significant difference: the composition of the adjudicative commission tasked with adjudicating disputes between employers and the agency.

In contrast to OSHRC's membership of three, MSHRC has five members. The Committee notes that based on the evidence before it, it appears that MSHRC has not historically experienced the high degree of turbulence in maintaining a working quorum that has plagued OSHRC. Simply stated, despite the fact that there are sometimes vacancies that remain open following the expiration of a term of office on MSHRC, the additional two seats on MSHRC have served to stabilize a necessary working quorum at MSHRC and ensure necessary continuity in its administration of the dispute resolution process. It is the Committee's belief that a five-member OSHRC similarly will experience less turbulence caused by vacancies in its membership. The stability brought to OSHRC by the addition of two members will, in the Committee's opinion, significantly increase its efficiency and its effectiveness.

Finally, the Committee notes that during discussion of potential changes to OSHRC in prior Congresses, the suggestion that members of the Commission be designated by party affiliation or on the basis of union membership or other interest-group affiliation was considered and soundly rejected. It is the Committee's strong opinion that each member of OSHRC should be one who applies the law free from any bias that might come from political or interest-group designation. As would be the case with any other appointment of a judge to the federal bench, the Committee expects the President's appointments, with the advice and consent of the Sen-

[10] See id. at 67.

[11] Subsection 2(b) of H.R. 740 specifies that the terms of office of the two new members of OSHRC created by this measure will be for terms expiring on April 27, 2006 and April 27, 2008. These dates are chosen to insure that each of the five members of OSHRC have terms that end one year apart. Currently, the terms of the three incumbent members expire on April 27, 2005, 2007 and 2009.

[12] OSHRC and MSHRC are viewed as "sister" agencies inasmuch as each was created as an independent commission tasked by Congress to resolve the disputes arising between employers and a government agency in the area of workplace safety and health.

ate, to be based upon an ability to apply the law in an objective and even-handed fashion.

Other Necessary Remedial Actions

Holdover Membership. Since the Committee has identified breaks in the continuity of service as the cause of frequent lacks of a working quorum at OSHRC, and since these breaks in service often coincide with the expiration of a term of service by any member, the Committee proposes in H.R. 740 the addition of a new provision that would permit the President to invite an incumbent member whose term has expired to "hold over" until a replacement can be confirmed by the Senate for service on OSHRC. The Committee believes that this would effectively limit those times in which OSHRC is without a working quorum, while not creating the possibility of abuse in the appointment process through, for example, extended "hold over" appointments. This check on abuse is ensured by inclusion of language limiting the term of any "hold-over" OSHRC member to no more than 365 days.[13]

Legal Training. To improve the efficiency and effectiveness of OSHRC's work, H.R. 740 adds the word "legal" directly before the word "training" at section 12(a) of the OSH Act.[14] Currently, there are three statutory criteria specified in the OSH Act to guide the President in his selection process for choosing members for service on OSHRC: training, education, and experience.[15] As noted earlier, any decision or final order of OSHRC is subject to direct appeal to an appropriate federal court of appeals, making it important that the work product of OSHRC be highly professional and, of necessity, "legal" in nature. In light of this fact, the Committee believes that adding the requirement that the training brought to the position of an OSHRC member be "legal" in nature will help improve OSHRC's work product. While the addition of the requirement that training be legal in character will not prevent the selection of any other qualified individual whose experience and/or education is of a nature to qualify him or her for service on OSHRC, the Committee believes that this change will benefit OSHRC and the parties adjudicating their disputes before it.

Conclusion

It is Congress' obligation to not only create mechanisms to adequately enforce the law, but also to ensure that those mechanisms, once implemented, perform efficiently and up to congressional expectations. H.R. 740 prescribes narrowly-crafted remedial action, increasing the membership of OSHRC from three members to five, and making other necessary changes in the law, thereby improving overall agency performance and ensuring continuity and consistency in practice. H.R. 740 effectively discharges the obligation of Congress through amendments to the OSH Act which will improve the performance of OSHRC and ensure fairness and timely adjudication of disputes among the parties brought before it.

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[13] To date, the use of recess appointments at OSHRC has been the only tool available throughout OSHRC's history that has been able to avoid longer periods where a working quorum was missing. For a complete history of the Commission's membership, chairmanship, and recess appointments, see "Agency Chairmen and Commissioners," available at http://www.oshrc.gov/about/agency-chairmen.html.

[14] See 29 U.S.C. §661(a).

[15] See id.

SECTION-BY-SECTION: H.R. 740

Section 1. Short Title

This act may be cited as the "Occupational Safety and Health Review Commission Efficiency Act of 2005."

Section 2. Occupational Safety and Health Review Commission

This section amends Section 12 of the Occupational Safety and Health Act of 1970 by adding two additional members to the Occupational Safety and Health Review Commission, and specifies that the terms of office of the two newly-appointed members to OSHRC created will be for terms expiring on April 27, 2006 and April 27, 2008. In addition, this section stipulates that all Commissioners be chosen from among persons who by reason of legal training, education or experience are qualified to serve in the position. This section authorizes the President to extend the expiring term of a member of OSHRC until a replacement can be confirmed by the Senate for up to 365 days. Finally, this section provides that the provision setting forth that "legal" training is a criterion for Commission appointment shall be effective with the two new vacancies created under the bill and thereafter.

EXPLANATION OF AMENDMENTS

The amendment in the nature of substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. H.R. 740 amends the Occupational Safety and Health Act (OSH Act) to improve the efficiency of the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission"). Section 215 of the CAA applies certain requirements of the OSH Act, to the legislative branch. The Committee intends to make the provisions of this bill available to legislative branch employees and employers in the same way as it is made available to private sector employees and employers under this legislation.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget & Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. The Committee received a letter regarding unfunded mandates from the Director of the Congressional Budget Office and as such the Committee agrees that the bill does not contain any unfunded mandates. See infra.

ROLLCALL VOTES

COMMITTEE ON EDUCATION AND THE WORKFORCE

ROLL CALL 1 BILL H.R. 740 DATE April 13, 2005

H.R. 740 was ordered favorably reported, as amended, by a vote of 27 - 19

SPONSOR/AMENDMENT Mr. McKeon / motion to report the bill to the House with an amendment and with the recommendation that the bill as amended do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mr. McKEON	X			
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. SOUDER	X			
Mr. NORWOOD	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. TIBERI	X			
Mr. KELLER	X			
Mr. OSBORNE	X			
Mr. WILSON	X			
Mr. PORTER	X			
Mr. KLINE	X			
Mrs. MUSGRAVE	X			
Mr. INGLIS	X			
Ms. McMORRIS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. JINDAL	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mrs. DRAKE	X			
Mr. KUHL	X			
Mr. MILLER				X
Mr. KILDEE		X		
Mr. OWENS		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KIND		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS				X
Ms. McCOLLUM		X		
Mr. DAVIS		X		
Mr. GRIJALVA				X
Mr. VAN HOLLEN		X		
Mr. RYAN		X		
Mr. BISHOP		X		
Mr. BARROW		X		
TOTALS	27	19		3

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 740 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 15, 2005.

Hon. JOHN A. BOEHNER,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 740, the Occupational Safety and Health Review Commission Efficiency Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Tom Bradley.

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 740—Occupational Safety and Health Review Commission Efficiency Act of 2005

Summary: H.R. 740 would amend the Occupational Safety and Health Act to increase the membership of the Occupational Safety and Review Commission (OSHRC) from three to five.

CBO estimates that implementing H.R. 740 would cost $1 million in 2006 and $6 million over the 2006–2010 period, assuming the appropriation of the estimated amounts. H.R. 740 would not affect direct spending or revenues.

H.R. 740 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 740 is shown in the following table. The costs of this legislation fall within budget function 550 (health).

	By fiscal year, in millions of dollars—					
	2005	2006	2007	2008	2009	2010
SPENDING SUBJECT TO APPROPRIATION						
OSHRC Spending Under Current Law:						
Estimated Authorization Level [1]	11	11	12	12	13	13

	By fiscal year, in millions of dollars—					
	2005	2006	2007	2008	2009	2010
Estimated Outlays	11	11	12	12	13	13
Proposed Changes:						
Estimated Authorization Level	0	1	1	1	1	1
Estimated Outlays	0	1	1	1	1	1
OSHRC Spending Under H.R. 740:						
Estimated Authorization Level	11	12	13	13	14	14
Estimated Outlays	11	12	13	13	14	14

[1] The 2005 level is the amount appropriated for that year for the Occupational Safety and Health Review Commission. The amount shown for 2006 through 2010 are baseline projections, that assume annual increases for anticipated inflation.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted in the fall of 2005, that the estimated amounts will be appropriated for each year, and that outlays will follow historical spending patterns for the authorized activities.

H.R. 740 would amend the Occupational Safety and Health Act to increase the membership of OSHRC from three to five. OSHRC is an independent federal agency created to adjudicate contests of citations or penalties resulting from inspection of work places; therefore, OSHRC functions as an administrative court.

According to agency documents, each commissioner is appointed for a six-year term and is aided directly by two professional staff who are responsible for providing assistance and legal counsel on all pending matters. CBO assumes the current staffing practice would be extended under the bill and that OSHA would reconfigure space at headquarters to accommodate the new commissioners and their staff. CBO estimates that implementing H.R. 740 would cost $1 million in 2006 and $6 million over the 2006–2010 period, assuming the appropriation of the estimated amounts.

Intergovernmental and private-sector impact: H.R. 740 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Tom Bradley, Impact on State, Local, and Tribal Governments: Leo Lex and Impact on the Private Sector: Peter Richmond.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause (3)(c) of House Rule XIII, the goal of H.R. 740 is to amend the Occupational Safety and Health Act (OSH Act) to improve the efficiency of the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission"). The Committee expects the Department of Labor to implement the changes to the law in accordance with these stated goals.

CONSTITUTIONAL AUTHORITY STATEMENT

H.R. 740 amends the Occupational Safety and Health Act, and thus falls within the scope of Congressional powers under Article I, section 8, clause 3 of the Constitution of the United States to the same extent as does the OSH Act.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 740. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 12 OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SEC. 12. (a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of [three] *five* members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of *legal* training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years [except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.] *except that the President may extend the term of a member for no more than 365 consecutive days to allow a continuation in service at the pleasure of the President after the expiration of the term of that member until a successor nominated by the President has been confirmed to serve. Any vacancy caused by the death, resignation, or removal of a member before the expiration of a term for which a member was appointed shall be filled only for the remainder of such term.* A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

* * * * * * *

(f) For the purpose of carrying out its functions under this Act, [two] *three* members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

* * * * * * *

MINORITY VIEWS

We oppose H.R. 740. H.R. 740 amends section 12 of the Occupational Safety and Health Act of 1970 (OSH Act) to expand the Occupational Safety and Health Review Commission (OSHRC) from three members to five members. The bill appears to require that Commission members have legal training and provides that the President may extend the term of a member for up to a year or until the Senate has confirmed a successor.

The Commission has functioned with three members since its establishment in 1970. The authors of the OSH Act did not feel there was sufficient work to justify five members and experience does not demonstrate otherwise. The Majority states: "While there are similarities between the mission of MSHA [the Mine Safety and Health Administration] and OSHA [the Occupational Safety and Health Administration], there is one significant difference: the composition of the adjudicative commission tasked with adjudicating disputes between employers and the agency." (See Majority discussion under the subtitle "Increasing the Membership of OSHRC from Three to Five.") It is true that the Mine Safety and Health Review Commission (MSHRC) has five members, while OSHRC only has three. However, it is also true that MSHRC has broader responsibilities, including responsibility for resolving whistleblower complaints, than does OSHRC. The Majority wants to expand the size of OSHRC to make it commensurate with MSHRC, but is unwilling to give OSHRC commensurate duties.

While expanding the Commission from three to five members, H.R. 740 neither permits the creation of sub panels nor changes the statutory definition of a Commission quorum. As initially introduced in the last Congress, this legislation (H.R. 2729 in the 108th Congress) authorized the establishment of sub panels. Concern was expressed, however, that, as introduced, the bill authorized the Review Commission Chairperson to establish sub panels but did not ensure that the creation of sub panels would be random and impartial, as is the case at the National Labor Relations Board or within the Courts of Appeal. Whether it was as a result of that concern is uncertain, but the Manager's amendment adopted in Committee deleted those provisions authorizing sub panels. Then, prior to floor consideration the authors of the legislation increased from two to three the number of members necessary for the Commission to take official action. H.R. 740 as introduced was identical to H.R. 2729 after it was considered on the floor in the last Congress. However, the bill was amended in Committee to reduce the number of members necessary for the Commission to take official action from three back to two. Consequently, as reported by the Committee, H.R. 740 provides that a minority of the Commission may take official action on behalf of the agency without otherwise protecting the

authority of the full Commission to review sub panel decisions. This seems to be a very serious flaw.

To be plain, while we feel no need for the taxpayers to support two new Commissioners, if the Commission is to be expanded, we do not object to the use of sub panels so long as the panels are established in a fair and impartial manner that does not seek to control the outcome of a case and so long as the prerogatives of a majority of the full Commission are protected. Unfortunately, H.R. 740 has yet to meet these very basic precepts.

The addition of the word "legal" as a modifier to training is also problematic, even nonsensical. The OSH Act requires that the President considers the "training, education, and experience" of potential Review Commission nominees. H.R. 740 requires the President to consider the "legal training, education, and experience" of potential nominees. The Majority states that "the requirement that training be legal in character will not prevent the selection of any other qualified individual whose experience and/or education is of a nature to qualify him or her for service on OSHRC." (See Majority discussion under "Committee Views: Other Necessary Remedial Actions.") In other words, the addition of the word "legal" does not restrict the President to only appointing those with legal training. The President may still appoint individuals exclusively on the basis of their experience or education, even if they do not have "legal training." The effect then of adding the word "legal" as a modifier of "training" is only to limit the kind of training that the President may consider. That makes no sense whatsoever. Current law, which does not preclude the President from considering legal training or even legal education among all other types of training or education, seems preferable to H.R. 740 which arbitrarily limits the kinds of training the President may consider. Health and safety experts, who may not have legal training but who may nevertheless be very knowledgeable about the OSH Act and agency and Commission procedures, may be unfairly and unwisely excluded from consideration for positions on the Commission. The Commission and workers' health and safety would suffer from such an arbitrary exclusion of non-lawyer talent and expertise.

GEORGE MILLER.
DANNY K. DAVIS.
ROBERT E. ANDREWS.
CHRIS VAN HOLLEN.
RUSH HOLT.
BETTY MCCOLLUM.
RUBÉN HINOJOSA.
DAVID WU.
MAJOR R. OWENS.
CAROLYN MCCARTHY.
RAÚL M. GRIJALVA.
LYNN WOOLSEY.
RON KIND.
DALE E. KILDEE.
TIM RYAN.
DONALD M. PAYNE.
TIM BISHOP.
JOHN F. TIERNEY.

DENNIS KUCINICH.

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