

ROBERT C. BYRD MINER SAFETY AND HEALTH ACT OF
2010

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JULY 29, 2010.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. GEORGE MILLER of California, from the Committee on
Education and Labor, submitted the following

R E P O R T

together with

SUPPLEMENTAL AND MINORITY VIEWS

[To accompany H.R. 5663]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 5663) to improve compliance with mine and occupational safety and health laws, empower workers to raise safety concerns, prevent future mine and other workplace tragedies, establish rights of families of victims of workplace accidents, and for other purposes, 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; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Robert C. Byrd Miner Safety and Health Act of 2010”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. References.

TITLE I—ADDITIONAL INSPECTION AND INVESTIGATION AUTHORITY

Sec. 101. Independent accident investigations.

Sec. 102. Subpoena authority and miner rights during inspections and investigations.

Sec. 103. Designation of miner representative.

Sec. 104. Additional amendments relating to inspections and investigations.

TITLE II—ENHANCED ENFORCEMENT AUTHORITY

- Sec. 201. Technical amendment.
- Sec. 202. A pattern of recurring noncompliance or accidents.
- Sec. 203. Injunctive authority.
- Sec. 204. Revocation of approval of plans.
- Sec. 205. Challenging a decision to approve, modify, or revoke a coal or other mine plan.
- Sec. 206. GAO Study on MSHA Mine Plan Approval.

TITLE III—PENALTIES

- Sec. 301. Civil penalties.
- Sec. 302. Civil and criminal liability of officers, directors, and agents.
- Sec. 303. Criminal penalties.
- Sec. 304. Commission review of penalty assessments.
- Sec. 305. Delinquent payments and prejudgment interest.

TITLE IV—WORKER RIGHTS AND PROTECTIONS

- Sec. 401. Protection from retaliation.
- Sec. 402. Protection from loss of pay.
- Sec. 403. Underground coal miner employment standard for mines placed in pattern status.

TITLE V—MODERNIZING HEALTH AND SAFETY STANDARDS

- Sec. 501. Pre-shift review of mine conditions.
- Sec. 502. Rock dust standards.
- Sec. 503. Atmospheric monitoring systems.
- Sec. 504. Technology related to respirable dust.
- Sec. 505. Refresher training on miner rights and responsibilities.
- Sec. 506. Authority to mandate additional training.
- Sec. 507. Certification of personnel.

TITLE VI—ADDITIONAL MINE SAFETY PROVISIONS

- Sec. 601. Definitions.
- Sec. 602. Assistance to States.
- Sec. 603. Black lung medical reports.
- Sec. 604. Rules of application to certain mines.

TITLE VII—AMENDMENTS TO THE OCCUPATIONAL SAFETY AND HEALTH ACT

- Sec. 701. Enhanced protections from retaliation.
- Sec. 702. Victims' rights.
- Sec. 703. Correction of serious, willful, or repeated violations pending contest and procedures for a stay.
- Sec. 704. Conforming amendments.
- Sec. 705. Civil penalties.
- Sec. 706. Criminal penalties.
- Sec. 707. Pre-final order interest.
- Sec. 708. Review of State Occupational Safety and Health Plans.
- Sec. 709. Health Hazard Evaluations by the National Institute for Occupational Safety and Health.
- Sec. 710. Authorization of cooperative agreements by NIOSH Office of Mine Safety and Health.
- Sec. 711. Effective date.

SEC. 2. REFERENCES.

Except in title VII and as otherwise expressly provided, whenever in this Act an amendment is expressed as an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.).

TITLE I—ADDITIONAL INSPECTION AND INVESTIGATION AUTHORITY

SEC. 101. INDEPENDENT ACCIDENT INVESTIGATIONS.

(a) IN GENERAL.—Section 103(b) (30 U.S.C. 813(b)) is amended by striking “(b) For the purpose” and inserting the following:

“(b) ACCIDENT INVESTIGATIONS.—

“(1) IN GENERAL.—For all accident investigations under this Act, the Secretary shall—

“(A) determine why the accident occurred;

“(B) determine whether there were violations of law, mandatory health and safety standards, or other requirements, and if such violations are found, issue citations and penalties, and in cases involving possible criminal actions, the Secretary may refer such matters to the Attorney General; and

“(C) make recommendations to avoid any recurrence.

“(2) INDEPENDENT ACCIDENT INVESTIGATIONS.—

“(A) IN GENERAL.—There shall be, in addition to an accident investigation under paragraph (1), an independent investigation by an independent investigation panel (referred to in this subsection as the ‘Panel’) appointed under subparagraph (B) for—

“(i) any accident involving 3 or more deaths; or

“(ii) any accident that is of such severity or scale for potential or actual harm that, in the opinion of the Secretary of Health and Human Services, the accident merits an independent investigation.

“(B) APPOINTMENT.—

“(i) IN GENERAL.—As soon as practicable after an accident described in subparagraph (A), the Secretary of Health and Human Services shall appoint 5 members for the Panel required under this paragraph from among individuals who have expertise in accident investigations, mine engineering, or mine safety and health that is relevant to the particular investigation.

“(ii) CHAIRPERSON.—The Panel shall include, and be chaired by, a representative from the Office of Mine Safety and Health Research, of the National Institute for Occupational Safety and Health (referred to in this subsection as NIOSH).

“(iii) CONFLICTS OF INTEREST.—Panel members, and staff and consultants assisting the Panel with an investigation, shall be free from conflicts of interest with regard to the investigation, and be subject to the same standards of ethical conduct for persons employed by the Secretary.

“(iv) COMPOSITION.—The Secretary of Health and Human Services shall appoint as members of the Panel—

“(I) 1 operator of a mine or individual representing mine operators, and

“(II) 1 representative of a labor organization that represents miners,

and may not appoint more than 1 of either such individuals as members of the Panel.

“(v) STAFF AND EXPENSES.—The Director of NIOSH shall designate NIOSH staff to facilitate the work of the Panel. The Director may accept as staff personnel on detail from other Federal agencies or re-employ annuitants. The detail of personnel under this paragraph may be on a non-reimbursable basis, and such detail shall be without interruption or loss of civil service status or privilege. The Director of NIOSH shall have the authority to procure on behalf of the Panel such materials, supplies or services, including technical experts, as requested in writing by a majority of the Panel.

“(vi) COMPENSATION AND TRAVEL.—All members of the Panel who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States. Each Panel member who is not an officer or employee of the United States shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of duties of the Panel. The members of the Panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter 1 of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Panel.

“(C) DUTIES.—The Panel shall—

“(i) assess and identify any factors that caused the accident, including deficiencies in safety management systems, regulations, enforcement, industry practices or guidelines, or organizational failures;

“(ii) identify and evaluate any contributing actions or inactions of—

“(I) the operator;

“(II) any contractors or other persons engaged in mining-related functions at the site;

“(III) any State agency with oversight responsibilities;

“(IV) any agency or office within the Department of Labor; or

“(V) any other person or entity (including equipment manufacturers);

“(iii) review the determinations and recommendations by the Secretary under paragraph (1);

“(iv) prepare a report that—

“(I) includes the findings regarding the causal factors described in clauses (i) and (ii);

“(II) identifies any strengths and weaknesses in the Secretary’s investigation; and

“(III) includes recommendations, including interim recommendations where appropriate, to industry, labor organizations, State and Federal agencies, or Congress, regarding policy, regulatory, enforcement, administrative, or other changes, which in the judgment of the Panel, would prevent a recurrence at other mines; and

“(v) publish such findings and recommendations (excluding any portions which the Attorney General requests that the Secretary withhold in relation to a criminal referral) and hold public meetings to inform the mining community and families of affected miners of the Panel’s findings and recommendations.

“(D) HEARINGS; APPLICABILITY OF CERTAIN FEDERAL LAW.—The Panel shall have the authority to conduct public hearings or meetings, but shall not be subject to the Federal Advisory Committee Act. All public hearings of the Panel shall be subject to the requirements under section 552b of title 5, United States Code.

“(E) MEMORANDUM OF UNDERSTANDING.—Not later than 90 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary of Labor and the Secretary of Health and Human Services shall conclude and publically issue a memorandum of understanding that—

“(i) outlines administrative arrangements which will facilitate a coordination of efforts between the Secretary of Labor and the Panel, ensures that the Secretary’s investigation under paragraph (1) is not delayed or otherwise compromised by the activities of the Panel, and establishes a process to resolve any conflicts between such investigations;

“(ii) ensures that Panel members or staff will be able to participate in investigation activities (such as mine inspections and interviews) related to the Secretary of Labor’s investigation and will have full access to documents that are assembled or produced in such investigation, and ensures that the Secretary of Labor will make all of the authority available to such Secretary under this section, including subpoena authority, to obtain information and witnesses which may be requested by such Panel; and

“(iii) establishes such other arrangements as are necessary to implement this paragraph.

“(F) PROCEDURES.—Not later than 90 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary of Health and Human Services shall establish procedures to ensure the consistency and effectiveness of Panel investigations. In establishing such procedures, such Secretary shall consult with independent safety investigation agencies, sectors of the mining industry, representatives of miners, families of miners involved in fatal accidents, State mine safety agencies, and mine rescue organizations. Such procedures shall include—

“(i) authority for the Panel to use evidence, samples, interviews, data, analyses, findings, or other information gathered by the Secretary of Labor, as the Panel determines valid;

“(ii) provisions to ensure confidentiality if requested by any witness, to the extent permitted by law, and prevent conflicts of interest in witness representation; and

“(iii) provisions for preservation of public access to the Panel’s records through the Secretary of Health and Human Services.

“(G) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection such sums as may be necessary.

“(3) POWERS AND PROCESSES.—For the purpose”.

(b) REPORTING REQUIREMENTS.—Section 511(a) (30 U.S.C. 958(a)) is amended by inserting after “501,” the following: “the status of implementation of recommendations from each independent investigation panel under section 103(b) received in the preceding 5 years”.

SEC. 102. SUBPOENA AUTHORITY AND MINER RIGHTS DURING INSPECTIONS AND INVESTIGATIONS.

Section 103(b) (as amended by section 101) (30 U.S.C. 813(b)) is further amended by adding at the end the following:

“(4) ADDITIONAL POWERS.—For purposes of making inspections and investigations, the Secretary or the Secretary’s designee, may sign and issue subpoenas for the attendance and testimony of witnesses and the production of information, including all relevant data, papers, books, documents, and items of physical evidence, and administer oaths. Witnesses summoned shall be paid the same fees that are paid witnesses in the courts of the United States. In carrying out inspections and investigations under this subsection, authorized representa-

tives of the Secretary and attorneys representing the Secretary are authorized to question any individual privately. Under this section, any individual who is willing to speak with or provide a statement to such authorized representatives or attorneys representing the Secretary may do so without the presence, involvement, or knowledge of the operator or the operator's agents or attorneys. The Secretary shall keep the identity of an individual providing such a statement confidential to the extent permitted by law. Nothing in this paragraph prevents any individual from being represented by that individual's personal attorney."

SEC. 103. DESIGNATION OF MINER REPRESENTATIVE.

Section 103(f) (30 U.S.C. 813(f)) is amended by inserting before the last sentence the following: "If any miner is entrapped or otherwise prevented as the result of an accident in such mine from designating such a representative directly, such miner's closest relative may act on behalf of such miner in designating such a representative. If any miner is not currently working in such mine as the result of an accident in such mine, but would be currently working in such mine but for such accident, such miner may designate such a representative. A representative of miners shall have the right to participate in any accident investigation the Secretary initiates pursuant to subsection (b), including the right to participate in investigative interviews and to review all relevant papers, books, documents and records produced in connection with the accident investigation, unless the Secretary in consultation with the Attorney General excludes such representatives from the investigation on the grounds that inclusion would interfere with or adversely impact a criminal investigation that is pending or under consideration."

SEC. 104. ADDITIONAL AMENDMENTS RELATING TO INSPECTIONS AND INVESTIGATIONS.

(a) HOURS OF INSPECTIONS.—Section 103(a) (30 U.S.C. 813(a)) is amended by inserting after the third sentence the following: "Such inspections shall be conducted during the various shifts and days of the week during which miners are normally present in the mine to ensure that the protections of this Act are afforded to all miners working all shifts."

(b) REVIEW OF MINE PATTERN STATUS.—Section 103(a) is further amended by inserting before the last sentence the following: "The Secretary shall, upon request by an operator, review with the appropriate mine officials the Secretary's most recent evaluation for pattern status (as provided in section 104(e)) for that mine during the course of a mine's regular quarterly inspection of an underground mine or a biannual inspection of a surface mine, or, at the discretion of the Secretary, during the pre-inspection conference."

(c) INJURY AND ILLNESS REPORTING.—Section 103(d) (30 U.S.C. 813(d)) is amended by striking the last sentence and inserting the following: "The records to be kept and made available by the operator of the mine shall include man-hours worked and occupational injuries and illnesses with respect to the miners in their employ or under their direction or authority, and shall be maintained separately for each mine and be reported at a frequency determined by the Secretary, but at least annually. Independent contractors (within the meaning of section 3(d)) shall be responsible for reporting accidents, occupational injuries and illnesses, and man-hours worked for each mine with respect to the miners in their employ or under their direction or authority, and shall be reported at a frequency determined by the Secretary, but not less than annually. Reports or records of operators and contractors required and submitted to the Secretary under this subsection shall be signed and certified as accurate and complete by a knowledgeable and responsible person possessing a certification, registration, qualification, or other approval, as provided for under section 118. Knowingly falsifying such records or reports shall be grounds for revoking such certification, registration, qualification, or other approval under the standards established under subsection (b)(1) of such section."

(d) ORDERS FOLLOWING AN ACCIDENT.—Section 103(k) (30 U.S.C. 813(k)) is amended by striking ", when present,"

(e) CONFLICT OF INTEREST IN THE REPRESENTATION OF MINERS.—Section 103(a) (30 U.S.C. 813(a)) is amended by adding at the end the following: "During inspections and investigations under this section, and during any litigation under this Act, no attorney shall represent or purport to represent both the operator of a coal or other mine and any other individual, unless such individual has knowingly and voluntarily waived all actual and reasonably foreseeable conflicts of interest resulting from such representation. The Secretary is authorized to take such actions as the Secretary considers appropriate to ascertain whether such individual has knowingly and voluntarily waived all such conflicts of interest. If the Secretary finds that such an individual cannot be represented adequately by such an attorney due to such conflicts of interest, the Secretary may petition the appropriate United States District Court which shall have jurisdiction to disqualify such attorney as counsel to

such individual in the matter. The Secretary may make such a motion as part of an ongoing related civil action or as a miscellaneous action.”.

TITLE II—ENHANCED ENFORCEMENT AUTHORITY

SEC. 201. TECHNICAL AMENDMENT.

Section 104(d)(1) (30 U.S.C. 814(d)(1)) is amended—

(1) in the first sentence—

(A) by striking “any mandatory health or safety standard” and inserting “any provision of this Act, including any mandatory health or safety standard or regulation promulgated under this Act”; and

(B) by striking “such mandatory health or safety standards” and inserting “such provisions, regulations, or mandatory health or safety standards”; and

(2) in the second sentence, by striking “any mandatory health or safety standard” and inserting “any provision of this Act, including any mandatory health or safety standard or regulation promulgated under this Act.”.

SEC. 202. A PATTERN OF RECURRING NONCOMPLIANCE OR ACCIDENTS.

Section 104(e) (30 U.S.C. 814(e)) is amended to read as follows:

“(e) PATTERN OF RECURRING NONCOMPLIANCE OR ACCIDENTS.—

“(1) PATTERN STATUS.—

“(A) IN GENERAL.—For purposes of this subsection, a coal or other mine shall be placed in pattern status if such mine has, as determined based on the regulations promulgated under paragraph (8)—

“(i) a pattern of—

“(I) citations for significant and substantial violations;

“(II) citations and withdrawal orders issued for unwarrantable failure to comply with mandatory health and safety standards under section 104(d);

“(III) citations for flagrant violations within the meaning of section 110(b);

“(IV) withdrawal orders issued under any other section of this Act (other than orders issued under subsections (j) or (k) of section 103); and

“(V) accidents and injuries; or

“(ii) a pattern consisting of any combination of citations, orders, accidents, or injuries described in subclauses (I) through (V).

“(B) MITIGATING CIRCUMSTANCES.—Notwithstanding subparagraph (A), if the Secretary, after conducting an assessment of a coal or other mine that otherwise qualifies for pattern status, certifies that there are mitigating circumstances wherein the operator has already implemented remedial measures that have reduced risks to the health and safety of miners to the point that such risks are no longer elevated and has taken sufficient measures to ensure such elevated risk will not recur, the Secretary may deem such mine to not be in pattern status under this subsection. The Secretary shall issue any such certification of such mitigating circumstances that would preclude the placement of a mine in pattern status as a written finding, which shall, not later than 10 days after the certification is made, be—

“(i) made available on the public website of the Mine Safety and Health Administration; and

“(ii) transmitted to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.

“(C) FREQUENCY.—Not less frequently than every 6 months, the Secretary shall identify any mines which meet the criteria set forth in paragraph (8).

“(2) ACTIONS FOLLOWING PLACEMENT OF MINE IN PATTERN STATUS.—For any coal or other mine that is in pattern status, the Secretary shall—

“(A) notify the operator of such mine that the mine is being placed in pattern status;

“(B) issue an order requiring such operator to cause all persons to be withdrawn from such mine, except those persons referred to in subsection (c) or authorized by an order of the Secretary issued under this subsection;

“(C) issue a remediation order described in paragraph (3) to such operator within 3 days; and

“(D) require that the number of regular inspections of such mine required under section 103 be increased to 8 per year while the mine is in pattern status.

Notice advising operators that they face potential placement in pattern status shall not be a requirement for issuing a withdrawal order to operators under this subsection.

“(3) REMEDIATION ORDER.—

“(A) IN GENERAL.—A remediation order issued to an operator under paragraph (2)(C) may require the operator to carry out one or more of the following requirements, pursuant to a timetable for commencing and completing such actions or as a condition of miners reentering the mine:

“(i) Provide specified training, including training not otherwise required under this Act.

“(ii) Institute and implement an effective health and safety management program approved by the Secretary, including—

“(I) the employment of safety professionals, certified persons, and adequate numbers of personnel for the mine, as may be required by the Secretary;

“(II) specific inspection, recordkeeping, reporting and other requirements for the mine as the Secretary may establish; and

“(III) other requirements to ensure compliance and to protect the health and safety of miners or prevent accidents or injuries as the Secretary may determine are necessary.

“(iii) Facilitate any effort by the Secretary to communicate directly with miners employed at the mine outside the presence of the mine operators or its agents, for the purpose of obtaining information about mine conditions, health and safety practices, or advising miners of their rights under this Act.

“(B) MODIFICATION OF AND FAILURE TO COMPLY WITH REMEDIATION ORDER.—The Secretary may modify the remediation order, as necessary, to protect the health and safety of miners. If the mine operator fails to fully comply with the remediation order during the time a mine is in pattern status, the Secretary shall reinstate the withdrawal order under paragraph (2)(B).

“(C) EXTENSION OF DEADLINES.—An extension of a deadline under the remediation order may be granted on a temporary basis and only upon a showing that the operator took all feasible measures to comply with the order and only to the extent that the operator’s failure to comply is beyond the control of the operator.

“(4) CONDITIONS FOR LIFTING A WITHDRAWAL ORDER.—A withdrawal order issued under paragraph (2)(B) shall not be lifted until the Secretary verifies that—

“(A) any and all violations or other conditions in the mine identified in the remediation order have been or are being fully abated or corrected as outlined in the remediation order; and

“(B) the operator has completed any other actions under the remediation order that are required for reopening the mine.

“(5) PERFORMANCE EVALUATION.—

“(A) PERFORMANCE BENCHMARKS.—The Secretary shall evaluate the performance of each mine in pattern status every 90 days during which the mine is producing and determine if, for such 90-day period—

“(i) the rate of citations at such mine for significant and substantial violations—

“(I) is in the top performing 35th percentile of such rates, respectively, for all mines of similar size and type; or

“(II) has been reduced by 70 percent from the date on which such mine was placed in pattern status, provided that the rate of such violations is not greater than the mean for all mines of similar size and type;

“(ii) the accident and injury rates at such mine are in the top performing 35th percentile of such rates, respectively, for all mines of similar size and type; and

“(iii) no citations or withdrawal orders for a violation under section 104(d), no withdrawal orders for imminent danger under section 107 (issued in connection with a citation), and no flagrant violations within the meaning of section 110(b), were issued for such mine.

“(B) REISSUANCE OF WITHDRAWAL ORDERS.—If an operator being evaluated fails to achieve the performance benchmarks described in subparagraph (A), the Secretary may reissue a withdrawal order under paragraph

(2)(B) to remedy any recurring conditions that led to pattern status under this subsection, and may modify the remediation order, as necessary, to protect the health and safety of miners.

“(6) TERMINATION OF PATTERN STATUS.—

“(A) PERFORMANCE BENCHMARKS.—The Secretary shall remove a coal or other mine from pattern status if, for a 1-year period during which the mine is producing—

“(i) the rate of citations at such mine for significant and substantial violations—

“(I) is in the top performing 25th percentile of such rates, respectively, for all mines of similar size and type; or

“(II) has been reduced by 80 percent from the date on which such mine was placed in pattern status, provided that the rate of such violations is not greater than the mean for all mines of similar size and type;

“(ii) the accident and injury rates at such mine are in the top performing 25th percentile of such rates, respectively, for all mines of similar size and type; and

“(iii) no citations or withdrawal orders for violations under section 104(d), no withdrawal orders for imminent danger under section 107 (issued in connection with a citation), and no flagrant violations within the meaning of section 110(b), were issued for such mine.

“(B) CONTINUATION OF PATTERN STATUS.—Should the mine operator fail to meet the performance benchmarks described in subparagraph (A), the Secretary shall extend the mine’s placement in pattern status until such benchmarks are achieved.

“(C) CONSTRUCTION.—A withdrawal order issued as the result of a condition that was entirely beyond the operator’s ability to prevent or control shall not preclude the operator from being removed from pattern status, provided the operator did not cause or allow miners to be exposed to the condition in violation of any provision of this Act or a mandatory health or safety standard or regulation promulgated under this Act.

“(7) EXPEDITED REVIEW.—If any order under this subsection is contested, the review of such order shall be conducted on an expedited basis, in accordance with section 105(d).

“(8) REGULATIONS.—

“(A) IN GENERAL.—Not later than 120 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall issue interim final regulations that shall define—

“(i) the threshold benchmarks to trigger pattern status under paragraph (1) and cause a withdrawal order to be issued or reissued; and

“(ii) the performance benchmarks described in paragraphs (5)(A) and (6)(A).

“(B) THRESHOLD BENCHMARKS.—In establishing threshold benchmarks to trigger pattern status for mines with significantly poor compliance that contributes to unsafe or unhealthy conditions, the Secretary—

“(i) shall—

“(I) consider rates of citations and orders described in paragraph (1)(A) and rates of reportable accidents and injuries within the preceding 180-day period; and

“(II) assign appropriate weight to various types of citations, orders, accidents, injuries, or other factors; and

“(ii) may include—

“(I) factors such as mine type, production levels, number of miners, hours worked by miners, number of mechanized mining units (or similar production characteristics), and the presence of a representative of miners at the mine for purposes of collective bargaining;

“(II) the mine’s history of citations, violations, orders, and other enforcement actions, or rates of reportable accidents and injuries, over any period determined relevant by the Secretary; and

“(III) other factors the Secretary may determine appropriate to protect the safety and health of miners.

“(C) FINAL REGULATION.—Not later than 2 years after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall promulgate a final regulation implementing this paragraph.

“(9) PUBLIC DATABASE AND INFORMATION.—The Secretary shall establish and maintain a publically available electronic database containing the data used to determine pattern status for all coal or other mines which shall be updated as

frequently as practicable. Such database shall be searchable and have the capacity to provide comparative data about the health and safety at mines of similar sizes and types. The Secretary shall also make publicly available—

“(A) a list of all mines the Secretary places in pattern status, updated within 7 days of placing an additional mine in pattern status;

“(B) the metrics, including percentile information, used for the purposes of the performance benchmarks and threshold benchmarks described in paragraphs (5), (6), and (8); and

“(C) guidance for the use of such metrics and benchmarks to assist operators in determining the performance their mines under criteria established by the Secretary.

“(10) OPERATOR FEES FOR ADDITIONAL INSPECTIONS.—

“(A) ASSESSMENT AND COLLECTION.—Beginning 120 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall assess and collect fees, in accordance with this paragraph, from each coal or other mine in pattern status for the costs of additional inspections under this subsection. The Secretary shall issue, by rule, a schedule of fees to be assessed against coal or other mines of varying types and sizes, and shall collect and assess amounts under this paragraph based on the schedule.

“(B) USE.—Amounts collected as provided in subparagraph (A) shall only be available to the Secretary for making expenditures to carry out the additional inspections required under paragraph (2)(D).

“(C) AUTHORIZATION OF APPROPRIATIONS.—In addition to any other amounts authorized to be appropriated under this Act, there is authorized to be appropriated to the Assistant Secretary for Mine Safety and Health for each fiscal year in which fees are collected under subparagraph (A) an amount equal to the total amount of fees collected under such subparagraph during that fiscal year. Such amounts are authorized to remain available until expended. If on the first day of a fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect fees (as offsetting collections) under this subsection at the rate in effect during the preceding fiscal year, until 5 days after the date such regular appropriation is enacted.

“(D) COLLECTION AND CREDITING OF FEES.—Fees authorized and collected under this paragraph shall be deposited and credited as offsetting collections to the account providing appropriations to the Mine Safety and Health Administration and shall not be collected for any fiscal year except to the extent and in the amount provided in advance in appropriation Acts.”.

SEC. 203. INJUNCTIVE AUTHORITY.

Section 108(a)(2) (30 U.S.C. 818(a)(2)) is amended by striking “a pattern of violation of” and all that follows and inserting “a course of conduct that in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners, including violations of this Act or of mandatory health and safety standards or regulations under this Act.”.

SEC. 204. REVOCATION OF APPROVAL OF PLANS.

Section 105 (30 U.S.C. 815) is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

“(d) REVOCATION OF APPROVAL OF PLANS.—

“(1) REVOCATION.—If the Secretary finds that any program or plan of an operator, or part thereof, that was approved by the Secretary under this Act is based on inaccurate information or that circumstances that existed when such plan was approved have materially changed and that continued operation of such mine under such plan constitutes a hazard to the safety or health of miners, the Secretary shall revoke the approval of such program or plan.

“(2) WITHDRAWAL ORDERS.—Upon revocation of the approval of a program or plan under subsection (a), the Secretary may immediately issue an order requiring the operator to cause all persons, except those persons referred to in section 104(c), to be withdrawn from such mine or an area of such mine, and to be prohibited from entering such mine or such area, until the operator has submitted and the Secretary has approved a new plan.”.

SEC. 205. CHALLENGING A DECISION TO APPROVE, MODIFY, OR REVOKE A COAL OR OTHER MINE PLAN.

Section 105(e) (as redesignated by section 204(1)) (30 U.S.C. 815(e)) is amended by adding at the end the following: “In any proceeding in which a party challenges the Secretary’s decision to approve, modify, or revoke a coal or other mine plan

under this Act, the Commission and the courts shall affirm the Secretary's decision unless the challenging party establishes that such decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”.

SEC. 206. GAO STUDY ON MSHA MINE PLAN APPROVAL.

Not later than 1 year after the date of enactment of this Act, the Comptroller General shall provide a report to Congress on the timeliness of the Mine Safety and Health Administration's approval of underground coal mines' required plans and plan amendments, including—

- (1) factors that contribute to any delays in the approval of these plans; and
- (2) as appropriate, recommendations for improving timeliness of plan review and for achieving prompt decisions.

TITLE III—PENALTIES

SEC. 301. CIVIL PENALTIES.

(a) **TECHNICAL CORRECTION.**—Section 110(a)(1) (30 U.S.C. 820(a)(1)) is amended by inserting “including any regulation promulgated under this Act,” after “this Act.”.

(b) **INCREASED CIVIL PENALTIES DURING PATTERN STATUS.**—Section 110(b) (30 U.S.C. 820(b)) is amended by adding at the end the following:

“(3) Notwithstanding any other provision of this Act, an operator of a coal or other mine that is in pattern status under section 104(e) and that fails to meet the performance benchmarks set forth by the Secretary under section 104(e)(5)(A) during any performance review of the mine following the first performance review shall be assessed an increased civil penalty for any violation of this Act, including any mandatory health or safety standard or regulation promulgated under this Act. Such increased penalty shall be twice the amount that would otherwise be assessed for the violation under this Act, including the regulations promulgated under this Act, subject to the maximum civil penalty established for the violation under this Act. This paragraph shall apply to violations at such mine that occur during the time period after the operator fails to meet the performance benchmarks in this paragraph, and ending when the Secretary determines at a subsequent performance review that the mine meets the performance benchmarks under section 104(e)(5)(A).”.

(c) **CIVIL PENALTY FOR RETALIATION.**—Section 110(a) (30 U.S.C. 820(a)) is further amended—

- (1) by redesignating paragraph (4) as paragraph (5); and
- (2) by inserting after paragraph (3) the following:

“(4) If any person violates section 105(c), the Secretary shall propose, and the Commission shall assess, a civil penalty of not less than \$10,000 or more than \$100,000 for the first occurrence of such violation, and not less than \$20,000 or more than \$200,000 for any subsequent violation, during any 3-year period.”.

SEC. 302. CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS, AND AGENTS.

Section 110(c) (30 U.S.C. 820(c)) is amended to read as follows:

“(c) **CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS, AND AGENTS.**—Whenever an operator violates a provision of this Act, including any mandatory health or safety standard or regulation promulgated under this Act, or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, any director, officer, or agent of such operator who knowingly authorized, ordered, or carried out such violation, failure, or refusal, or any policy or practice that resulted in such violation, failure, or refusal, shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under this section.”.

SEC. 303. CRIMINAL PENALTIES.

(a) **IN GENERAL.**—Section 110(d) (30 U.S.C. 820(d)) is amended—

- (1) by inserting “(1)” before “Any operator”;
- (2) by striking “willfully” and inserting “knowingly”; and
- (3) by striking “by a fine of not more than” and all that follows and inserting “as follows:

“(A) By a fine of not more than \$250,000, or by imprisonment for not more than 1 year, or both.

“(B) If the conviction is for a violation committed after a previous conviction of such operator for a violation of the same mandatory health or safety standard, by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both.

“(C) If the conviction is for a violation committed after a previous conviction of such operator for a violation of an order, by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both.

“(D) If the operator’s actions knowingly exposed miners to a significant risk of serious injury or illness or death, by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both.

“(E) If the operator knowingly tampered with or disabled a required safety device which exposed miners to a significant risk of serious injury or illness or death, or if the conviction is for a violation described in subparagraph (D) committed after a previous conviction of such operator for a such a violation, by a fine of not more than \$2,000,000, or by imprisonment for not more than 10 years, or both.”.

(b) **CRIMINAL PENALTY FOR RETALIATION.**—Section 110(d) (as amended by subsection (a)) is further amended by adding at the end the following:

“(2) Whoever knowingly takes any action that is directly or indirectly harmful to any person, including action that interferes with the lawful employment or livelihood of any person, because such person has provided an authorized representative of the Secretary, a State or local mine safety or health officer or official, or any other law enforcement officer with any information related to the existence of a health or safety violation or an unhealthful or unsafe condition, policy, or practice under this Act shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.”.

(c) **ADVANCE NOTICE OF INSPECTIONS.**—

(1) **IN GENERAL.**—Section 110(e) (30 U.S.C. 820(e)) is amended to read as follows:

“(e) Unless otherwise authorized by this Act, any person that knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection, shall be fined under title 18, United States Code, imprisoned for not more than 5 years, or both.”.

(2) **POSTING OF ADVANCE NOTICE PENALTIES.**—Section 109 (30 U.S.C. 819) is amended by adding at the end the following:

“(e) **POSTING OF ADVANCE NOTICE PENALTIES.**—Each operator of a coal or other mine shall post, on the bulletin board described in subsection (a) and in a conspicuous place near each staffed entrance onto the mine property, a notice stating, in a form and manner to be prescribed by the Secretary—

“(1) that giving, causing to give, or attempting to give or cause to give advance notice of any inspection to be conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection is unlawful pursuant to section 110(e); and

“(2) the maximum penalties for a violation under such subsection.”.

SEC. 304. COMMISSION REVIEW OF PENALTY ASSESSMENTS.

Section 110(i) (30 U.S.C. 820(i)) is amended by striking “In assessing civil monetary penalties, the Commission shall consider” and inserting the following: “In any review of a citation and proposed penalty assessment contested by an operator, the Commission shall assess not less than the penalty derived by using the same methodology (including any point system) prescribed in regulations under this Act, so as to ensure consistency in operator penalty assessments, except that the Commission may assess a penalty for less than the amount that would result from the utilization of such methodology if the Commission finds that there are extraordinary circumstances. If there is no such methodology prescribed for a citation or there are such extraordinary circumstances, the Commission shall assess the penalty by considering”.

SEC. 305. DELINQUENT PAYMENTS AND PREJUDGMENT INTEREST.

(a) **PRE-FINAL ORDER INTEREST.**—Section 110(j) (30 U.S.C. 820(j)) is amended by striking the second and third sentences and inserting the following: “Pre-final order interest on such penalties shall begin to accrue on the date the operator contests a citation issued under this Act, including any mandatory health or safety standard or regulation promulgated 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 annum.”.

(b) **ENSURING PAYMENT OF PENALTIES.**—

(1) **AMENDMENTS.**—Section 110 (30 U.S.C. 820) is further amended—

(A) by redesignating subsection (l) as subsection (m); and

(B) by inserting after subsection (k) the following:

“(l) **ENSURING PAYMENT OF PENALTIES.**—

“(1) DELINQUENT PAYMENT LETTER.—If the operator of a coal or other mine fails to pay any civil penalty assessment that has become a final order of the Commission or a court within 45 days after such assessment became a final order, the Secretary shall send the operator a letter advising the operator of the consequences under this subsection of such failure to pay. The letter shall also advise the operator of the opportunity to enter into or modify a payment plan with the Secretary based upon a demonstrated inability to pay, the procedure for entering into such plan, and the consequences of not entering into or not complying with such plan.

“(2) WITHDRAWAL ORDERS FOLLOWING FAILURE TO PAY.—If an operator that receives a letter under paragraph (1) has not paid the assessment by the date that is 180 days after such assessment became a final order and has not entered into a payment plan with the Secretary, the Secretary shall issue an order requiring such operator to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, the mine that is covered by the final order described in paragraph (1), until the operator pays such assessment in full (including interest and administrative costs) or enters into a payment plan with the Secretary. If such operator enters into a payment plan with the Secretary and at any time fails to comply with the terms specified in such payment plan, the Secretary shall issue an order requiring such operator to cause all persons, except those referred to in section 104(c), to be withdrawn from the mine that is covered by such final order, and to be prohibited from entering such mine, until the operator rectifies the noncompliance with the payment plan in the manner specified in such payment plan.”

(2) APPLICABILITY AND EFFECTIVE DATE.—The amendments made by paragraph (1) shall apply to all unpaid civil penalty assessments under the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), except that, for any unpaid civil penalty assessment that became a final order of the Commission or a court before the date of enactment of this Act, the time periods under section 110(n) of the Federal Mine Safety and Health Act of 1977 (as amended) (30 U.S.C. 820(n)) shall be calculated as beginning on the date of enactment of this Act instead of on the date of the final order.

TITLE IV—WORKER RIGHTS AND PROTECTIONS

SEC. 401. PROTECTION FROM RETALIATION.

Section 105(c) (30 U.S.C. 815(c)) is amended to read as follows:

“(c) PROTECTION FROM RETALIATION.—

“(1) RETALIATION PROHIBITED.—

“(A) RETALIATION FOR COMPLAINT OR TESTIMONY.—No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner or other employee of an operator, representative of miners, or applicant for employment, because—

“(i) such miner or other employee, representative, or applicant for employment—

“(I) has filed or made a complaint, or is about to file or make a complaint, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine;

“(II) instituted or caused to be instituted, or is about to institute or cause to be instituted, any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such miner or other employee, representative, or applicant for employment on behalf of him or herself or others of any right afforded by this Act, or has reported any injury or illness to an operator or agent;

“(III) has testified or is about to testify before Congress or any Federal or State proceeding related to safety or health in a coal or other mine; or

“(IV) refused to violate any provision of this Act, including any mandatory health and safety standard or regulation; or

“(ii) such miner is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101.

“(B) RETALIATION FOR REFUSAL TO PERFORM DUTIES.—

“(i) IN GENERAL.—No person shall discharge or in any manner discriminate against a miner or other employee of an operator for refusing to perform the miner’s or other employee’s duties if the miner or other employee has a good-faith and reasonable belief that performing such duties would pose a safety or health hazard to the miner or other employee or to any other miner or employee.

“(ii) STANDARD.—For purposes of clause (i), the circumstances causing the miner’s or other 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 miner or other employee, would conclude that there is such a hazard. In order to qualify for protection under this paragraph, the miner or other employee, when practicable, shall have communicated or attempted to communicate the safety or health concern to the operator and have not received from the operator a response reasonably calculated to allay such concern.

“(2) COMPLAINT.—Any miner or other employee or representative of miners or applicant for employment who believes that he or she has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) may file a complaint with the Secretary alleging such discrimination not later than 180 days after the later of—

“(A) the last date on which an alleged violation of paragraph (1) occurs;

or

“(B) the date on which the miner or other employee or representative knows or should reasonably have known that such alleged violation occurred.

“(3) INVESTIGATION AND HEARING.—

“(A) COMMENCEMENT OF INVESTIGATION AND INITIAL DETERMINATION.—Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent, and shall commence an investigation within 15 days of the Secretary’s receipt of the complaint, and, as soon as practicable after commencing such investigation, make the determination required under subparagraph (B) regarding the reinstatement of the miner or other employee.

“(B) REINSTATEMENT.—If the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner or other employee until there has been a final Commission order disposing of the underlying complaint of the miner or other employee. If either the Secretary or the miner or other employee pursues the underlying complaint, such reinstatement shall remain in effect until the Commission has disposed of such complaint on the merits, regardless of whether the Secretary pursues such complaint by filing a complaint under subparagraph (D) or the miner or other employee pursues such complaint by filing an action under paragraph (4). If neither the Secretary nor the miner or other employee pursues the underlying complaint within the periods specified in paragraph (4), such reinstatement shall remain in effect until such time as the Commission may, upon motion of the operator and after providing notice and an opportunity to be heard to the parties, vacate such complaint for failure to prosecute.

“(C) INVESTIGATION.—Such investigation shall include interviewing the complainant and—

“(i) providing the respondent an opportunity to submit to the Secretary a written response to the complaint and to present statements from witnesses or provide evidence; and

“(ii) providing the complainant an opportunity to receive any statements or evidence provided to the Secretary and rebut any statements or evidence.

“(D) ACTION BY THE SECRETARY.—If, upon such investigation, the Secretary determines that the provisions of this subsection have been violated, the Secretary shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner or other employee or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief.

“(E) ACTION OF THE COMMISSION.—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) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary’s proposed order, or directing other appropriate re-

lief. Such order shall become final 30 days after its issuance. The complaining miner or other employee, representative, or applicant for employment may present additional evidence on his or her own behalf during any hearing held pursuant to this paragraph.

“(F) RELIEF.—The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation and prescribe a remedy as the Commission considers appropriate, including—

“(i) the rehiring or reinstatement of the miner or other employee with back pay and interest and without loss of position or seniority, and restoration of the terms, rights, conditions, and privileges associated with the complainant’s employment;

“(ii) any other compensatory and consequential damages sufficient to make the complainant whole, and exemplary damages where appropriate; and

“(iii) 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.

“(4) NOTICE TO AND ACTION OF COMPLAINANT.—

“(A) NOTICE TO COMPLAINANT.—Not later than 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner or other employee, applicant for employment, or representative of miners of his determination whether a violation has occurred.

“(B) ACTION OF COMPLAINANT.—If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days after receiving notice of the Secretary’s determination, to file an action in his or her own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

“(C) HEARING AND DECISION.—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), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant’s charges and, if the charges are sustained, granting such relief as it deems appropriate as described in paragraph (3)(D). Such order shall become final 30 days after its issuance.

“(5) BURDEN OF PROOF.—In adjudicating a complaint pursuant to this subsection, the Commission may determine that a violation of paragraph (1) has occurred only if the complainant demonstrates that any conduct described in paragraph (1) with respect to the complainant was a contributing factor in the adverse action alleged in the complaint. A decision or order that is favorable to the complainant shall not be issued 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.

“(6) ATTORNEYS’ FEES.—Whenever an order is issued sustaining the complainant’s charges under this subsection, a sum equal to the aggregate amount of all costs and expenses, including attorney’s fees, as determined by the Commission to have been reasonably incurred by the complainant for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. The Commission shall determine whether such costs and expenses were reasonably incurred by the complainant without reference to whether the Secretary also participated in the proceeding.

“(7) EXPEDITED PROCEEDINGS; JUDICIAL REVIEW.—Proceedings under this subsection shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this subsection shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)(4).

“(8) 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.

“(9) 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.”

SEC. 402. PROTECTION FROM LOSS OF PAY.

Section 111 (30 U.S.C. 821) is amended to read as follows:

“SEC. 111. ENTITLEMENT OF MINERS.**“(a) PROTECTION FROM LOSS OF PAY.—**

“(1) WITHDRAWAL ORDERS.—If a coal or other mine or area of such mine is closed by an order issued under section 103, 104, 107, 108, or 110, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104, 107 (in connection with a citation), 108, or 110, all miners who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay and in accordance with their regular schedules of pay for the entire period for which they are idled, not to exceed 60 days.

“(2) CLOSURE IN ADVANCE OF ORDER.—If the Secretary finds that such mine or such area of a mine was closed by the operator in anticipation of the issuance of such an order, all miners who are idled by such closure shall be entitled to full compensation by the operator at their regular rates of pay and in accordance with their regular schedules of pay, from the time of such closure until such time as the Secretary authorizes reopening of such mine or such area of the mine, not to exceed 60 days, except where an operator promptly withdraws miners upon discovery of a hazard, and notifies the Secretary where required, and within the prescribed time period.

“(3) REFUSAL TO COMPLY.—Whenever an operator violates or fails or refuses to comply with any order issued under section 103, 104, 107, 108, or 110, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

“(b) ENFORCEMENT.—

“(1) COMMISSION ORDERS.—The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code. Whenever the Commission issues an order sustaining the complaint under this subsection in whole or in part, the Commission shall award the complainant reasonable attorneys’ fees and costs.

“(2) FAILURE TO PAY COMPENSATION DUE.—Consistent with the authority of the Secretary to order miners withdrawn from a mine under this Act, the Secretary shall order a mine that has been subject to a withdrawal order under section 103, 104, 107, 108, or 110, and has reopened, to be closed again if compensation in accordance with the provisions of this section is not paid by the end of the next regularly scheduled payroll period following the lifting of a withdrawal order.

“(c) EXPEDITED REVIEW.—If an order is issued which results in payments to miners under subsection (a), the operators shall have the right to an expedited review before the Commission using timelines and procedures established pursuant to section 316(b)(2)(G)(ii).”

SEC. 403. UNDERGROUND COAL MINER EMPLOYMENT STANDARD FOR MINES PLACED IN PATTERN STATUS.

The Federal Mine Safety and Health Act of 1977 is further amended by adding at the end of title I the following:

“SEC. 117. UNDERGROUND COAL MINER EMPLOYMENT STANDARD FOR MINES PLACED IN PATTERN STATUS.

“(a) IN GENERAL.— For purposes of ensuring miners’ health and safety and miners’ right to raise concerns thereof, when an underground coal mine is placed in pattern status pursuant to section 104(e), and for 3 years after such placement, the operator of such mine may not discharge or constructively discharge a miner who is paid on an hourly basis and employed at such underground coal mine without reasonable job-related grounds based on a failure to satisfactorily perform job duties, including compliance with this Act and with mandatory health and safety standards

or other regulations issued under this Act, or other legitimate business reason, where the miner has completed the employer's probationary period, not to exceed 6 months.

“(b) CAUSE OF ACTION.—A miner aggrieved by a violation of subsection (a) may file a complaint in Federal district court in the district where the mine is located within 1 year of such violation.

“(c) REMEDIES.—In an action under subsection (b), for any prevailing miner the court shall take affirmative action to further the purposes of the Act, which may include reinstatement with backpay and compensatory damages. Reasonable attorneys' fees and costs shall be awarded to any prevailing miner under this section.

“(d) PRE-DISPUTE WAIVER PROHIBITED.—A miner's right to a cause of action under this section may not be waived with respect to disputes that have not arisen as of the time of the waiver.

“(e) CONSTRUCTION.—Nothing in this section shall be construed to limit the availability of rights and remedies of miners under any other State or Federal law or a collective bargaining agreement.”.

TITLE V—MODERNIZING HEALTH AND SAFETY STANDARDS

SEC. 501. PRE-SHIFT REVIEW OF MINE CONDITIONS.

Section 303(d) (30 U.S.C. 863(d)) is amended by adding at the end the following:

“(3)(A) Not later than 30 days after the issuance of the interim final rules promulgated under subparagraph (C), each operator of an underground coal mine shall implement a communication program at the underground coal mine to ensure that each miner is orally briefed on and made aware of, prior to traveling to or arriving at the miner's work area and commencing the miner's assigned tasks—

“(i) any conditions that are hazardous, or that violate a mandatory health or safety standard or a plan approved under this Act, where the miner is expected to work or travel; and

“(ii) the general conditions of that miner's assigned working section or other area where the miner is expected to work or travel.

“(B) Not later than 180 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall promulgate interim final rules implementing the requirements of subparagraph (A). The Secretary shall issue a final rule not later than 2 years after such date.”.

SEC. 502. ROCK DUST STANDARDS.

(a) STANDARDS.—Section 304(d) (30 U.S.C. 864(d)) is amended—

(1) by striking “Where rock” and inserting the following: “ROCK DUST.—

“(1) IN GENERAL.—Where rock”;

(2) by striking “65 per centum” and all that follows and inserting “80 percent. Where methane is present in any ventilating current, the percentage of incombustible content of such combined dusts shall be increased 0.4 percent for each 0.1 percent of methane.”; and

(3) by adding at the end the following:

“(2) METHODS OF MEASUREMENT.—

“(A) IN GENERAL.—Each operator of an underground coal mine shall take accurate and representative samples which shall measure the total incombustible content of combined coal dust, rock dust, and other dust in such mine to ensure that the coal dust is kept below explosive levels through the appropriate application of rock dust.

“(B) DIRECT READING MONITORS.—By the later of June 15, 2011, or the date that is 30 days after the Secretary of Health and Human Services has certified in writing that direct reading monitors are commercially available to measure total incombustible content in samples of combined coal dust, rock dust, and other dust and the Department of Labor has approved such monitors for use in underground coal mines, the Secretary shall require operators to take such dust samples using direct reading monitors.

“(C) REGULATIONS.—The Secretary shall, not later than 180 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, promulgate an interim final rule that prescribes methods for operator sampling of total incombustible content in samples of combined coal dust, rock dust, and other dust using direct reading monitors and includes requirements for locations, methods, and intervals for mandatory operator sampling.

“(D) RECOMMENDATIONS.—Not later than 1 year after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary of Health and Human Services shall, based upon the latest research, recommend to the Secretary of Labor any revisions to the mandatory operator sampling locations, methods, and intervals included in the interim final rule described in subparagraph (B) that may be warranted in light of such research.

“(3) LIMITATION.—Until a final rule is issued by the Secretary under section 502(b)(2) of the Robert C. Byrd Miner Safety and Health Act of 2010, any measurement taken by a direct reading monitor described in paragraph (2) shall not be admissible to establish a violation in an enforcement action under this Act.”.

(b) REPORT AND RULEMAKING AUTHORITY.—

(1) REPORT.—Not later than 2 years after the date of enactment of this Act, the Secretary of Health and Human Services, in consultation with the Secretary of Labor, shall prepare and submit, to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate, a report—

(A) regarding whether any direct reading monitor described in section 304(d)(2)(B) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 864(d)(2)(B)) is sufficiently reliable and accurate for the enforcement of the mandatory health or safety standards by the Secretary of Labor under such Act, and whether additional improvement to such direct reading monitor, or additional verification regarding reliability and accuracy, would be needed for enforcement purposes; and

(B) identifying any limitations or impediments for such use in underground coal mines.

(2) AUTHORITY.—If the Secretary determines that such direct reading monitor is sufficiently reliable and accurate for the enforcement of mandatory health and safety standards under the Federal Mines Safety and Health Act of 1977 following such report or any update thereto, the Secretary shall promulgate a final rule authorizing the use of such direct reading monitor for purposes of compliance and enforcement, in addition to other methods for determining total incombustible content. Such rule shall specify mandatory operator sampling locations, methods, and intervals.

SEC. 503. ATMOSPHERIC MONITORING SYSTEMS.

Section 317 (30 U.S.C. 877) is amended by adding at the end the following:

“(u) ATMOSPHERIC MONITORING SYSTEMS.—

“(1) NIOSH RECOMMENDATIONS.—Not later than 1 year after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Director of the National Institute for Occupational Safety and Health, acting through the Office of Mine Safety and Health Research, in consultation, including through technical working groups, with operators, vendors, State mine safety agencies, the Secretary, and labor representatives of miners, shall issue recommendations to the Secretary regarding—

“(A) how to ensure that atmospheric monitoring systems are utilized in the underground coal mining industry to maximize the health and safety of underground coal miners;

“(B) the implementation of redundant systems, such as the bundle tubing system, that can continuously monitor the mine atmosphere following incidents such as fires, explosions, entrapments, and inundations; and

“(C) other technologies available to conduct continuous atmospheric monitoring.

“(2) ATMOSPHERIC MONITORING SYSTEM REGULATIONS.—Not later than 1 year following the receipt of the recommendations described in paragraph (1), the Secretary shall promulgate regulations requiring that each operator of an underground coal mine install atmospheric monitoring systems, consistent with such recommendations, that—

“(A) protect miners where the miners normally work and travel;

“(B) provide real-time information regarding methane and carbon monoxide levels, and airflow direction, as appropriate, with sensing, annunciating, and recording capabilities; and

“(C) can, to the maximum extent practicable, withstand explosions and fires.”.

SEC. 504. TECHNOLOGY RELATED TO RESPIRABLE DUST.

Section 202(d) (30 U.S.C. 842(d)) is amended—

(1) by striking “of Health, Education, and Welfare”; and

(2) by striking the second sentence and inserting the following: “Not later than 2 years after the date of enactment of the Robert C. Byrd Miner Safety

and Health Act of 2010, the Secretary shall promulgate final regulations that require operators, beginning on the date such regulations are issued, to provide coal miners with the maximum feasible protection from respirable dust, including coal and silica dust, that is achievable through environmental controls, and that meet the applicable standards.”.

SEC. 505. REFRESHER TRAINING ON MINER RIGHTS AND RESPONSIBILITIES.

(a) **IN GENERAL.**—Section 115(a)(3) (30 U.S.C. 825(a)(3)) is amended to read as follows:

“(3) all miners shall receive not less than 9 hours of refresher training not less frequently than once every 12 months, and such training shall include one hour of training on the statutory rights and responsibilities of miners and their representatives under this Act and other applicable Federal and State law, pursuant to a program of instruction developed by the Secretary and delivered by an employee of the Administration or by a trainer approved by the Administration that is a party independent from the operator;”.

(b) **NATIONAL HAZARD REPORTING HOTLINE.**—Section 115 (30 U.S.C. 825) is further amended—

(1) by redesignating subsections (c) through (e) as subsections (d) through (f), respectively; and

(2) by inserting after subsection (b) the following:

“(c) Any health and safety training program of instruction provided under this section shall include distribution to miners of information regarding miners’ rights under the Act, as well as a toll-free hotline telephone number, which the Secretary shall maintain to receive complaints from miners and the public regarding hazardous conditions, discrimination, safety or health violations, or other mine safety or health concerns. Information regarding the hotline shall be provided in a portable, convenient format, such as a durable wallet card, to enable miners to keep the information on their person.”.

(c) **TIMING OF INITIAL STATUTORY RIGHTS TRAINING.**—Notwithstanding section 115 of the Federal Mine Safety and Health Act (as amended by subsection (a)) (30 U.S.C. 825) or the health and safety training program approved under such section, an operator shall ensure that all miners already employed by the operator on the date of enactment of this Act shall receive the one hour of statutory rights and responsibilities training described in section 115(a)(3) of such Act not later than 180 days after such date.

SEC. 506. AUTHORITY TO MANDATE ADDITIONAL TRAINING.

(a) **IN GENERAL.**—Section 115 (30 U.S.C. 825) is further amended by redesignating subsections (e) and (f) (as redesignated) as subsections (f) and (g) and inserting after subsection (d) (as redesignated) the following:

“(e) **AUTHORITY TO MANDATE ADDITIONAL TRAINING.**—

“(1) **IN GENERAL.**—The Secretary is authorized to issue an order requiring that an operator of a coal or other mine provide additional training beyond what is otherwise required by law, and specifying the time within which such training shall be provided, if the Secretary finds that—

“(A)(i) a serious or fatal accident has occurred at such mine; or

“(ii) such mine has experienced accident and injury rates, citations for violations of this Act (including mandatory health or safety standards or regulations promulgated under this Act), citations for significant and substantial violations, or withdrawal orders issued under this Act at a rate above the average for mines of similar size and type; and

“(B) additional training would benefit the health and safety of miners at the mine.

“(2) **WITHDRAWAL ORDER.**—If the operator fails to provide training ordered under paragraph (1) within the specified time, the Secretary shall issue an order requiring such operator to cause all affected persons, except those persons referred to in section 104(c), to be withdrawn, and to be prohibited from entering such mine, until such operator has provided such training.”.

(b) **CONFORMING AMENDMENTS.**—Section 104(g)(2) (30 U.S.C. 814(g)(2)) is amended by striking “under paragraph (1)” both places it appears and inserting “under paragraph (1) or under section 115(e)”.

SEC. 507. CERTIFICATION OF PERSONNEL.

(a) **IN GENERAL.**—Title I is further amended by adding at the end the following:

“SEC. 118. CERTIFICATION OF PERSONNEL.

“(a) **CERTIFICATION REQUIRED.**—Any person who is authorized or designated by the operator of a coal or other mine to perform any duties or provide any training that this Act, including a mandatory health or safety standard or regulation promulgated pursuant to this Act, requires to be performed or provided by a certified, reg-

istered, qualified, or otherwise approved person, shall be permitted to perform such duties or provide such training only if such person has a current certification, registration, qualification, or approval to perform such duties or provide such training consistent with the requirements of this section.

“(b) ESTABLISHMENT OF CERTIFICATION REQUIREMENTS AND PROCEDURES.—

“(1) IN GENERAL.—Not later than 1 year after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall issue mandatory standards to establish—

“(A) requirements for such certification, registration, qualification, or other approval, including the experience, examinations, and references that may be required as appropriate;

“(B) time limits for such certifications and procedures for obtaining and renewing such certification, registration, qualification, or other approval; and

“(C) procedures and criteria for revoking such certification, registration, qualification, or other approval, including procedures that ensure that the Secretary (or a State agency, as applicable) responds to requests for revocation and that the names of individuals whose certification or other approval has been revoked are provided to and maintained by the Secretary, and are made available to appropriate State agencies through an electronic database.

“(2) COORDINATION WITH STATES.—In developing such standards, the Secretary shall consult with States that have miner certification programs to ensure effective coordination with existing State standards and requirements for certification. The standards required under paragraph (1) shall provide that the certification, registration, qualification, or other approval of the State in which the coal or other mine is located satisfies the requirement of subsection (a) if the State’s program of certification, registration, qualification, or other approval is no less stringent than the standards established by the Secretary under paragraph (1).

“(c) OPERATOR FEES FOR CERTIFICATION.—

“(1) ASSESSMENT AND COLLECTION.—Beginning 180 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall assess and collect fees, in accordance with this subsection, from each operator for each person certified under this section. Fees shall be assessed and collected in amounts determined by the Secretary as necessary to fund the certification programs established under this section.

“(2) USE.—Amounts collected as provided in paragraph (1) shall only be available to the Secretary, as provided in paragraph (3), for making expenditures to carry out the certification programs established under this subsection.

“(3) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds authorized to be appropriated under section 114, there is authorized to be appropriated to the Assistant Secretary for Mine Safety and Health for each fiscal year in which fees are collected under paragraph (1) an amount equal to the total amount of fees collected under paragraph (1) during that fiscal year. Such amounts are authorized to remain available until expended. If on the first day of a fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect fees (as offsetting collections) under this subsection at the rate in effect during the preceding fiscal year, until 5 days after the date such regular appropriation is enacted.

“(4) COLLECTING AND CREDITING OF FEES.—Fees authorized and collected under this subsection shall be deposited and credited as offsetting collections to the account providing appropriations to the Mine Safety and Health Administration and shall not be collected for any fiscal year except to the extent and in the amount provided in advance in appropriation Acts.

“(d) CITATION; WITHDRAWAL ORDER.—Any operator who permits a person to perform any of the health or safety related functions described in subsection (a) without a current certification which meets the requirements of this section shall be considered to have committed an unwarrantable failure under section 104(d)(1), and the Secretary shall issue an order requiring that the miner be withdrawn or reassigned to duties that do not require such certification.”

(b) CONFORMING AMENDMENTS.—Section 318 (30 U.S.C. 878) is amended—

(1) by striking subsections (a) and (b);

(2) in subsection (c), by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(3) in subsection (g), by redesignating paragraphs (1) through (4) as subparagraphs (A) through (D), respectively; and

(4) by redesignating subsections (c) through (j) as paragraphs (1) through (8), respectively.

TITLE VI—ADDITIONAL MINE SAFETY PROVISIONS

SEC. 601. DEFINITIONS.

(a) DEFINITION OF OPERATOR.—Section 3(d) is amended to read as follows:

“(d) ‘operator’ means—

“(1) any owner, lessee, or other person that—

“(A) operates or supervises a coal or other mine; or

“(B) controls such mine by making or having the authority to make management or operational decisions that affect, directly or indirectly, the health or safety at such mine; or

“(2) any independent contractor performing services or construction at such mine.”.

(b) DEFINITION OF AGENT.—Section 3(e) (30 U.S.C. 802(e)) is amended by striking “the miners” and inserting “any miner”.

(c) DEFINITION OF MINER.—Section 3(g) (30 U.S.C. 802(g)) is amended by inserting after “or other mine” the following: “, and includes any individual who is not currently working in a coal or other mine but would be currently working in such mine, but for an accident in such mine”.

(d) DEFINITION OF SIGNIFICANT AND SUBSTANTIAL VIOLATIONS.—Section 3 (30 U.S.C. 802) is further amended—

(1) in subsection (m), by striking “and” after the semicolon;

(2) in subsection (n), by striking the period at the end and inserting a semicolon;

(3) in subsection (o), by striking the period at the end and inserting “; and”; and

(4) by adding at the end the following:

“(p) ‘significant and substantial violation’ means a violation of this Act, including any mandatory health or safety standard or regulation promulgated under this Act, that is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard as described in section 104(d).”.

SEC. 602. ASSISTANCE TO STATES.

Section 503 (30 U.S.C. 953(a)) is amended—

(1) in subsection (a)—

(A) in the matter preceding paragraph (1), by striking “, in coordination with the Secretary of Health, Education, and Welfare and the Secretary of the Interior.”;

(B) in paragraph (2), by striking “and” after the semicolon;

(C) in paragraph (3), by striking the period and inserting “; and”; and

(D) by adding at the end the following:

“(4) to assist such State in developing and implementing any certification program for coal or other mines required for compliance with section 118.”; and

(2) in subsection (h), by striking “\$3,000,000 for fiscal year 1970, and \$10,000,000 annually in each succeeding fiscal year” and inserting “\$20,000,000 for each fiscal year”.

SEC. 603. BLACK LUNG MEDICAL REPORTS.

Title IV of the Black Lung Benefits Act (30 U.S.C. 901 et seq.) is amended by adding at the end the following:

“SEC. 435. MEDICAL REPORTS.

“In any claim for benefits for a miner under this title, an operator that requires a miner to submit to a medical examination regarding the miner’s respiratory or pulmonary condition shall, not later than 14 days after the miner has been examined, deliver to the claimant a complete copy of the examining physician’s report. The examining physician’s report shall be in writing and shall set out in detail the examiner’s findings, including any diagnoses and conclusions and the results of any diagnostic imaging techniques and tests that were performed on the miner.”.

SEC. 604. RULES OF APPLICATION TO CERTAIN MINES.

(a) INAPPLICABILITY OF AMENDMENTS TO CERTAIN MINES.—

(1) SPECIAL RULE.—The amendments made by this Act shall not apply to—

(A) surface mines, except for surface facilities or impoundments physically connected to—

(i) underground coal mines; or

(ii) other underground mines which are gassy mines; or

(B) underground mines which are neither coal mines nor gassy mines.

(2) DEFINITION.—For purposes of this section, the term “gassy mine” means a mine, tunnel, or other underground workings in which a flammable mixture has been ignited, or has been found with a permissible flame safety lamp, or has been determined by air analysis to contain 0.25 percent or more (by volume) of methane in any open workings when tested at a point not less than 12 inches from the roof, face of rib.

(b) RULE OF CONSTRUCTION RELATING TO APPLICABILITY OF CERTAIN PROVISIONS TO SURFACE MINES.—Title I is further amended by adding at the end the following:
“SEC. 119. APPLICABILITY OF CERTAIN PROVISIONS TO CERTAIN MINES.

“(a) RULE OF CONSTRUCTION.—With respect to the mines described in subsection (b), this Act as in effect on the date before the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, shall continue to apply to such mines as then in effect.

“(b) APPLICABLE MINES.—

“(1) IN GENERAL.—The mines referred to in subsection (a) are—

“(A) surface mines, except for surface facilities or impoundments physically connected to—

“(i) underground coal mines; or

“(ii) other underground mines which are gassy mines; and

“(B) underground mines which are neither coal mines nor gassy mines.

“(2) DEFINITION.—As used in paragraph (1), the term ‘gassy mine’ means a mine, tunnel, or other underground workings in which a flammable mixture has been ignited, or has been found with a permissible flame safety lamp, or has been determined by air analysis to contain 0.25 percent or more (by volume) of methane in any open workings when tested at a point not less than 12 inches from the roof, face of rib.

“(c) SAVINGS PROVISION.—Nothing in this section shall impact the authority of the Secretary to promulgate or modify regulations pursuant to the authority under any such provisions as in effect on the date before the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, or shall be construed to alter or modify precedent with regards to the Commission or courts.”.

TITLE VII—AMENDMENTS TO THE OCCUPATIONAL SAFETY AND HEALTH ACT

SEC. 701. ENHANCED PROTECTIONS FROM RETALIATION.

(a) EMPLOYEE ACTIONS.—Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c)(1)) is amended—

(1) by striking “discharge” and all that follows through “because such” and inserting the following: “discharge or cause to be discharged, or in any manner discriminate against or cause to be discriminated against, any employee because—

“(A) such”;

(2) by striking “this Act or has” and inserting the following: “this Act;

“(B) such employee has”;

(3) by striking “in any such proceeding or because of the exercise” and inserting the following: “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”; and

(4) by inserting before the period at the end the following: “, 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”.

(b) PROHIBITION OF RETALIATION.—Section 11(c) of such Act (29 U.S.C. 660(c)) is amended by striking paragraph (2) and inserting the following:

“(2) PROHIBITION OF RETALIATION.—(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 haz-

ard. 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.”

(c) PROCEDURE.—Section 11(c) of such Act (29 U.S.C. 660(c)) is amended by striking paragraph (3) and inserting the following:

“(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)(B) 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.”

(d) RELATION TO ENFORCEMENT.—Section 17(j) of such Act (29 U.S.C. 666(j)) is amended by inserting before the period the following: “, including the history of violations under section 11(c)”.

SEC. 702. VICTIMS' RIGHTS.

The Occupational Safety and Health Act of 1970 is amended by inserting after section 9 (29 U.S.C. 658) the following:

“SEC. 9A. VICTIMS' RIGHTS.

“(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 or 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 an 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.”.

SEC. 703. CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS PENDING CONTEST AND PROCEDURES FOR A STAY.

Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 659) is amended by adding at the end the following:

“(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 that receives a citation alleging a violation designated as serious, willful, or repeated and that files a notice of contest to the citation asserting that the time set for abatement of the alleged violation is unreasonable or challenging the existence of the alleged violation may file with the Commission a motion to stay the period for the abatement of the violation.

“(B) CRITERIA.—In determining whether a stay should be issued on the basis of a motion filed under subparagraph (A), the Commission may grant a stay only if the employer has demonstrated—

“(i) a substantial likelihood of success on the areas contested under subparagraph (A); and

“(ii) that a stay will not 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.”.

SEC. 704. CONFORMING AMENDMENTS.

Section 17(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666(d)) is amended to read as follows:

“(d) 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 \$7,000 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 of 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.”.

SEC. 705. CIVIL PENALTIES.

(a) IN GENERAL.—Section 17 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666) is amended—

(1) in subsection (a)—

(A) by striking “\$70,000” and inserting “\$120,000”;

(B) by striking “\$5,000” and inserting “\$8,000”; and

(C) by adding at the end the following: “In determining whether a violation is repeated, the Secretary or the Commission 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.”;

(2) in subsection (b)—

(A) by striking “\$7,000” and inserting “\$12,000”; and

(B) by adding at the end the following: “If such a violation caused or contributed to the death of an employee, such civil penalty amounts shall be increased to not more than \$50,000 for each such violation, but not less than \$20,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$10,000 for each such violation.”;

(3) in subsection (c), by striking “\$7,000” and inserting “\$12,000”;

(4) in subsection (d), as amended, by striking “\$7,000” each place it occurs and inserting “\$12,000”;

(5) by redesignating subsections (e) through (i) as subsections (f) through (j), and subsections (j) through (l) as subsections (l) through (n) respectively; and

(6) in subsection (j) (as so redesignated) by striking “\$7,000” and inserting “\$12,000”.

(b) INFLATION ADJUSTMENT.—Section 17 is further amended by inserting after subsection (d) the following:

“(e) 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.”.

SEC. 706. CRIMINAL PENALTIES.

(a) IN GENERAL.—Section 17 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666) (as amended by section 705) is further amended—

(1) by amending subsection (f) (as redesignated by section 705) to read as follows:

“(f)(1) 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 significantly 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 with 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.”;

(2) by amending subsection (g) (as redesignated by section 705) to read as follows:

“(g) Unless otherwise authorized by this Act, any person that knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection

conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection, shall be fined under title 18, United States Code, imprisoned for not more than 5 years, or both.”.

(3) in subsection (h) (as redesignated by section 705), by striking “fine of not more than \$10,000, or by imprisonment for not more than six months,” and inserting “fine in accordance with title 18, United States Code, or by imprisonment for not more than 5 years.”;

(4) by inserting after subsection (j) (as redesignated by section 705) the following:

“(k)(1) Any employer who knowingly violates any standard, rule, or order promulgated under section 6, or any regulation prescribed under this Act, and that violation caused or significantly contributed 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.”

(b) JURISDICTION FOR PROSECUTION UNDER STATE AND LOCAL CRIMINAL LAWS.—Such section is further amended by adding at the end the following:

“(o) 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.”.

SEC. 707. PRE-FINAL ORDER INTEREST.

Section 17(n) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666) (as redesignated by section 706(a)(4)) (29 U.S.C. 666(n)) is amended by adding at the end the following: “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.”.

SEC. 708. REVIEW OF STATE OCCUPATIONAL SAFETY AND HEALTH PLANS.

Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 668) is amended—

(1) by amending subsection (f) to read as follows:

“(f)(1) The Secretary shall, on the basis of reports submitted by the State agency and the Secretary’s own inspections, make a continuing evaluation of the manner in which each State that has a plan approved under this section is carrying out such plan. Such evaluation shall include an assessment of whether the State continues to meet the requirements of subsection (c) of this section and any other criteria or indices of effectiveness specified by the Secretary in regulations. Whenever the Secretary finds, on the basis of such evaluation, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), the Secretary shall make an initial determination of whether the failure is of such a nature that the plan should be withdrawn or whether the failure is of such a nature that the State should be given the opportunity to remedy the deficiencies, and provide notice of the Secretary’s findings and initial determination.

“(2) If the Secretary makes an initial determination to reassert and exercise concurrent enforcement authority while the State is given an opportunity to remedy the deficiencies, the Secretary shall afford the State an opportunity for a public hearing within 15 days of such request, provided that such request is made not later than 10 days after Secretary’s notice to the State. The Secretary shall review and consider the testimony, evidence, or written comments, and not later than 30 days following such hearing, make a determination to affirm, reverse, or modify the Secretary’s initial determination to reassert and exercise concurrent enforcement au-

thority under sections 8, 9, 10, 13, and 17 with respect to standards promulgated under section 6 and obligations under section 5(a). Following such a determination by the Secretary, or in the event that the State does not request a hearing within the time frame set forth in this paragraph, the Secretary may reassert and exercise such concurrent enforcement authority, while a final determination is pending under paragraph (3) or until the Secretary has determined that the State has remedied the deficiencies as provided under paragraph (4). Such determination shall be published in the Federal Register. The procedures set forth in section 18(g) shall not apply to a determination by the Secretary to reassert and exercise such concurrent enforcement authority.

“(3) If the Secretary makes an initial determination that the plan should be withdrawn, the Secretary shall provide due notice and the opportunity for a hearing. If based on the evaluation, comments, and evidence, the Secretary makes a final determination that there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of the withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

“(4) If the Secretary makes a determination that the State should be provided the opportunity to remedy the deficiencies, the Secretary shall provide the State an opportunity to respond to the Secretary’s findings and the opportunity to remedy such deficiencies within a time period established by the Secretary, not to exceed 1 year. The Secretary may extend and revise the time period to remedy such deficiencies, if the State’s legislature is not in session during this 1 year time period, or if the State demonstrates that it is not feasible to correct the deficiencies in the time period set by the Secretary, and the State has a plan to correct the deficiencies within a reasonable time period. If the Secretary finds that the State agency has failed to remedy such deficiencies within the time period specified by the Secretary and that the State plan continues to fail to comply substantially with a provision of the State plan, the Secretary shall withdraw the State plan as provided for in paragraph (3).”; and

(2) by adding at the end the following new subsection:

“(i) Not later than 18 months after the date of enactment of this subsection, and every 5 years thereafter, the Comptroller General shall complete and issue a review of the effectiveness of State plans to develop and enforce safety and health standards to determine if they are at least as effective as the Federal program and to evaluate whether the Secretary’s oversight of State plans is effective. The Comptroller General’s evaluation shall assess—

“(1) the effectiveness of the Secretary’s oversight of State plans, including the indices of effectiveness used by the Secretary;

“(2) whether the Secretary’s investigations in response to Complaints About State Plan Administration (CASPA) are adequate, whether significant policy issues have been identified by headquarters and corrective actions are fully implemented by each State;

“(3) whether the formula for the distribution of funds described in section 23(g) to State programs is fair and adequate; and

“(4) whether State plans are as effective as the Federal program in preventing occupational injuries, illnesses and deaths, and investigating discrimination complaints, through an evaluation of at least 20 percent of approved State plans, and which shall cover—

“(A) enforcement effectiveness, including handling of fatalities, serious incidents and complaints, compliance with inspection procedures, hazard recognition, verification of abatement, violation classification, citation and penalty issuance, including appropriate use of willful and repeat citations, and employee involvement;

“(B) inspections, the number of programmed health and safety inspections at private and public sector establishments, and whether the State targets the highest hazard private sector work sites and facilities in that State;

“(C) budget and staffing, including whether the State is providing adequate budget resources to hire, train and retain sufficient numbers of qualified staff, including timely filling of vacancies;

“(D) administrative review, including the quality of decisions, consistency with Federal precedence, transparency of proceedings, decisions and records are available to the public, adequacy of State defense, and whether the State appropriately appeals adverse decisions;

“(E) anti discrimination, including whether discrimination complaints are processed in a timely manner, whether supervisors and investigators are properly trained to investigate discrimination complaints, whether a case file review indicates merit cases are properly identified consistent with Federal policy and procedure, whether employees are notified of their rights, and whether there is an effective process for employees to appeal the dismissal of a complaint;

“(F) program administration, including whether the State’s standards and policies are at least as effective as the Federal program and are updated in a timely manner, and whether National Emphasis Programs that are applicable in such States are adopted and implemented in a manner that is at least as effective as the Federal program;

“(G) whether the State plan satisfies the requirements for approval set forth in this section and its implementing regulations; and

“(H) other such factors identified by the Comptroller General, or as requested by the Committee on Education and Labor of the House of Representatives or the Committee on Health, Education, Labor and Pensions of the Senate.”.

SEC. 709. HEALTH HAZARD EVALUATIONS BY THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH.

Section 20(a)(6) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 669(a)(6)) is amended by striking the second sentence and inserting the following: “The Secretary shall determine following a written request by any employer, authorized representative of current or former employees, physician, other Federal agency, or State or local health department, specifying with reasonable particularity the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found or whether any physical agents, equipment, or working condition found or used has potentially hazardous effects; and shall submit such determination both to employers and affected employees as soon as possible.”.

SEC. 710. AUTHORIZATION OF COOPERATIVE AGREEMENTS BY NIOSH OFFICE OF MINE SAFETY AND HEALTH.

Section 22(h)(3) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 671(h)(3)) is amended—

- (1) in subparagraph (B), by striking “and” at the end;
- (2) by redesignating subparagraph (C) as subparagraph (D); and
- (3) by inserting after subparagraph (B) the following:

“(C) enter into cooperative agreements or contracts with international institutions and private entities to improve mine safety and health through the development and evaluation of new interventions; and”.

SEC. 711. EFFECTIVE DATE.

(a) GENERAL RULE.—Except as provided for in subsection (b), this title and the amendments made by this title shall take effect not later than 90 days after the date of the enactment of this Act.

(b) EXCEPTION FOR STATES AND POLITICAL SUBDIVISIONS.—A State that has a State plan approved under section 18 (29 U.S.C. 667) shall amend its State plan to conform with the requirements of this Act and the amendments made by this Act not later than 12 months after the date of the enactment of this Act. The Secretary of Labor may extend the period for a State to make such amendments to its State plan by not more than 12 months, if the State’s legislature is not in session during the 12-month period beginning with the date of the enactment of this Act. Such amendments to the State plan shall take effect not later than 90 days after the adoption of such amendments by such State.

I. PURPOSE

The purpose of H.R. 5663, the Robert C. Byrd Miner Safety and Health Act of 2010, is to strengthen the nation’s mine and occupational safety and health laws in order to toughen enforcement of such laws, improve compliance, and prevent miner and other worker fatalities, injuries, and illnesses.

II. COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY
 OCCUPATIONAL SAFETY AND HEALTH REFORM
 LEGISLATIVE HISTORY

The passage of the Occupational Safety and Health Act of 1970 (OSHA or OSH Act) radically transformed the workplace. The American labor movement had advocated for workplace reforms since the arrival of the Industrial Revolution, but worker health and safety had long been the purview of state regulation. Massachusetts passed the nation's first safety and health legislation in 1877, and by 1890, nine states followed suit.

The OSH Act was passed following spirited debate among labor, government and business. The purpose of the Act was to develop and enforce mandatory federal safety and health standards to protect workers from workplace hazards. In the year the OSH Act was passed, 13,800 workers were killed by workplace hazards in the United States. In 2008, 5,071 fatal work injuries and 3.7 million nonfatal occupational injuries and illnesses were recorded. In the nearly forty years of its existence, the Act has saved hundreds of thousands of lives and millions more of avoided exposure to preventable illnesses and injuries.

The OSH Act has not been significantly amended since its passage with the exception of the 1990 Omnibus Budget Reconciliation Act. The Reconciliation Act increased the maximum penalties for workplace health and safety violations and imposed minimum penalties for willful violations.

110TH CONGRESS (2007–2008)

HEARINGS IN THE HOUSE OF REPRESENTATIVES

Committee on Education and Labor

On March 22, 2007, the Committee on Education and Labor held a hearing entitled “The BP Texas City Disaster and Worker Safety,” which reflected on an explosion in a Texas British Petroleum refinery two years before. The panel included: Admiral Frank “Skip” Bowman, President of the Nuclear Safety Institute and member of the Baker Panel; Red Cavaney, President and CEO of the American Petroleum Institute; Hon. Carolyn W. Merritt, Chair of the U.S. Chemical Safety and Hazard Investigation Board; Kim Nibarger, health and safety specialist at the United Steelworkers International Union; and Eva Rowe, a relative of a BP Texas City disaster victim. At the hearing, the Committee examined what could be done to improve the safety of refineries and chemical facilities and increase OSHA's effectiveness.

On January 14, 2008, the Subcommittee on Workforce Protections of the Committee on Education and Labor held a field hearing in Linden, New Jersey, entitled “Workplace Tragedies: Examining Problems and Solutions.” The Subcommittee heard testimony relating to the deaths of three industrial laundry facility employees in Linden. Witnesses included Rick Engler, Director of the New Jersey Work Environment Council; Eric Frumin, Director of Occupational Safety and Health at UNITE HERE; David J. Socolow, Commissioner of the New Jersey Department of Labor and Workforce

Development; James W. Stanley, President of FDRsafety; and Charles Wowkanech, President of the New Jersey State AFL–CIO.

On June 19, 2008, the Committee on Education and Labor held a hearing entitled “Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses.” The panel included: Baruch Fellner, Esq. of Gibson, Dunn & Crutcher, LLP, on behalf of the U.S. Chamber of Commerce; Robert K. McLellan, M.D., MPH, FACOEM, representing the American College of Occupational and Environmental Medicine; Kenneth D. Rosenman, M.D., FACPM, FACE, and Professor of Medicine at Michigan State University College of Human Medicine; John Ruser, Assistant Commissioner for Safety and Health Statistics of the Bureau of Labor Statistics; A.C. Span, former employee of Bashas’ Distribution Center; and Bob Whitmore, former Chief of the OSHA Division of Recordkeeping, U.S. Department of Labor.

On June 24, 2008, the Committee on Education and Labor held a hearing entitled “Is OSHA Failing to Adequately Enforce Construction Safety Rules?” The panel included: Mark H. Ayers, President of the Building and Construction Trades Department of the AFL–CIO; George Cole, former ironworker; Hon. Edwin G. Foulke, Jr., Assistant Secretary of OSHA, U.S. Department of Labor; Mike Kallmeyer, Senior Vice President for Construction at Denier Electric; and Robert LiMandri, Acting Buildings Commissioner of the City of New York.

HEARINGS IN THE SENATE

Committee on Health, Education, Labor and Pensions

On April 26, 2007, the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Is OSHA Working for Working People?” The panel included: David Michaels, Ph.D., Research Professor and Associate Chairman of the Department of Environmental and Occupational Health, George Washington University; Peg Seminario, Director of Occupational Safety and Health, AFL–CIO; Konnie Compagna, Registered Nurse, Valley Medical Center, Kent, WA; and Thomas Cecich, CIH, CSP, President of TFC and Associates in Apex, NC.

On April 1, 2008, the Subcommittee on Employment and Workplace Safety of the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Serious OSHA Violations: Strategies for Breaking Dangerous Patterns.” The panel included: Eric Frumin, Health and Safety Expert, Change to Win; Doris Morrow, Member, UFCW Local Union 227, Robards, KY; Gerard F. Scannell, Former OSHA Director and Former Chair of the National Safety Council; and Carmen Bianco, Executive Consultant, Behavioral Science Technology, Inc., Ojai, CA.

On April 29, 2008, the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “When a Worker is Killed: Do OSHA Penalties Enhance Workplace Safety?” The panel included: Peg Seminario, Director of Occupational Safety and Health, AFL–CIO; David Uhlmann, Director of the Environmental Law and Policy Program, University of Michigan Law School; Ron Hayes, Director, Fight Project, Fairhope, AL; Donald Coit Smith, Resident, Temple, TX; and George Jenson, III, Owner, Jenson Fire Protection, Inc., Ellicott City, MD.

HEARINGS IN THE HOUSE OF REPRESENTATIVES

Committee on Education and Labor

On April 28, 2009, the Committee on Education and Labor held a hearing entitled “Are OSHA’s Penalties Adequate to Deter Health and Safety Violations?” in response to the introduction by Rep. Lynn Woolsey of H.R. 2067, Protecting America’s Workers Act. The panel included: Becky Foster, mother of Jeremy Foster, a fatally injured employee of a timber company; Lawrence P. Halprin, partner at Keller and Heckman, LLP; Peg Seminario, Director of Safety and Health at the AFL–CIO; and David M. Uhlmann, the Jeffrey F. Liss Professor and Director of the environmental law and policy program at the University of Michigan Law School.

On October 29, 2009, the Committee on Education and Labor held a hearing entitled, “Nevada’s Workplace Health and Safety Enforcement Program: OSHA’s Findings and Recommendations,” after concerns surfaced regarding the enforcement of Nevada’s worker safety laws. The panel included: Jordan Barab, Acting Assistant Secretary for Occupational Safety and Health of the U.S. Department of Labor; Donald E. Jayne, Administrator of the Division of Industrial Relations of the Nevada Department of Business and Industry; Debi Koehler-Fergen, mother of Travis Koehler, a worker who died in a preventable workplace accident; Franklin E. Mirer, Ph.D., CIH, and professor of environmental and occupational health sciences of the Urban Public Health Program of Hunter College, City University of New York; and Hon. Harry Reid, Majority Leader, U.S. Senate.

On March 16, 2010, the Workforce Protections Subcommittee of the Committee on Education and Labor held a hearing entitled, “Protecting America’s Workers Act: Modernizing OSHA Penalties,” where it examined H.R. 2067, introduced by Rep. Lynn Woolsey. The panel included: John Cruden, Acting Assistant Attorney General of the Environment and Natural Resources Division of the Department of Justice; David Michaels, Assistant Secretary of Labor for OSHA; Eric Frumin, Health and Safety Coordinator at Change to Win; and Jonathan Snare; partner at Morgan, Lewis & Bockius LLP, on behalf of the U.S. Chamber of Commerce.

On April 28, 2010, the Workforce Protections Subcommittee of the Committee on Education and Labor held a hearing entitled “Whistleblower and Victim’s Rights Provisions of H.R. 2067, the Protecting America’s Workers Act.” The hearing considered a proposal to strengthen protections for workers who report dangerous working conditions. The panel included: Jordan Barab, Deputy Assistant Secretary of Labor for Occupational Safety and Health; Lloyd B. Chinn, partner at Proskauer Rose LLP; Tonya Ford, niece of Robert Fitch, a worker killed at an Archer Daniels Midland plant; Neal Jorgensen, a whistleblower formerly employed at Plastic Industries; Dr. Celeste Monforton, and Assistant Research Professor at the Department of Environmental and Occupational Health of the George Washington University; Dennis J. Morikawa of Morgan, Lewis & Bockius LLP; and Lynn Rhinehart, General Counsel of the AFL–CIO.

On June 28, 2010, the Workforce Protections Subcommittee of the Committee on Education and Labor held a field hearing entitled “Examining the Tragic Explosion at the Kleen Energy Power Plant in Middletown, Connecticut.” The panel included: Edward Badamo, Fire Chief of the South Fire District of Middletown, CT; Hon. John Bresland, Board Member of the U.S. Chemical Safety and Hazard Investigation Board; Glenn Corbett, Associate Professor and Chair of the Department of Protection Management at John Jay College of Criminal Justice; Hon. Sebastian Giuliano, Mayor of Middletown, CT; Hon. Alan Nevas, Chair of the Governor’s Kleen Energy Systems and Explosion Origin and Cause Panel; and Jodi Thomas, wife of Ron Crabb, a pipefitter who died in the explosion.

HEARINGS IN THE SENATE

Committee on Health, Education, Labor and Pensions

On April 28, 2009, the Subcommittee on Employment and Workplace Safety of the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Introducing Meaningful Incentives for Safe Workplaces and Meaningful Roles for Victims and Their Families.” The panel included: Dr. Celeste Monforton, Ph.D., MPH, Lecturer and Researcher, Project on Scientific Knowledge and Public Policy, George Washington University; Jim Frederick, Assistant Director for Safety and Health, United Steelworkers; Tammy Miser, Founder, United Support Memorial for Workplace Fatalities; and Warren Brown, President, American Society of Safety Engineers.

MINE SAFETY AND HEALTH REFORM

LEGISLATIVE HISTORY

Following the Scotia Mine disaster in 1976, Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine Act), which transferred responsibility for regulation of coal and metal and non metal mines from the Interior Department to the Department of Labor and established the Mine Safety and Health Administration with its own Assistant Secretary to enforce the Mine Act. The Mine Act consolidates federal regulation of the mining industry, covering coal and non coal facilities, that had previously been covered under the Federal Metal and Nonmetallic Mine Act of 1966 and the 1969 Coal Act, however, it maintained different health and safety standards for the two sectors. The Mine Act established the five-member Federal Mine Safety and Health Review Commission to review citations and orders. The Mine Act expanded miners rights and prescribed new enforcement remedies, such as Pattern of Violation.

In the wake of a series of 3 serious mine disasters in 2006, including an explosion at the Sago Mine in West Virginia where 12 men lost their lives, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), P.L. 109-236). This legislation required mine operators to develop emergency response plans, install tracking and communications which will allow miners to communicate and be found after an accident, provide post accident breathable air to trapped miners in the event of an accident, and have two rescue teams not less than an hour away. The legislation established minimum civil penalties for unwarrant-

able failure violations, and established flagrant violations as a new category.

110TH CONGRESS (2007–2008)

HEARINGS IN THE HOUSE OF REPRESENTATIVES

Committee on Education and Labor

On March 28, 2007, the Committee on Education and Labor held a hearing entitled “Protecting the Health and Safety of America’s Mine Workers.” The panel included: Jim Dean, Director of Extension and Outreach of the West Virginia University College of Engineering and Mineral Resources; Deborah Hamner, wife of a deceased miner; Charles Scott Howard, miner; Chuck Knisell, miner; Melissa Lee, wife of a deceased miner; Tony Oppegard, attorney; Cecil Roberts, President of the United Mine Workers of America; and Bruce Watzman, Vice President of Safety and Health at the National Mining Association. At the hearing, the Committee examined the role of MSHA in the enforcement of health and safety standards in mines.

On May 15, 2007, the Subcommittee on Workforce Protections of the Committee on Education and Labor heard testimony relating to “Private Sector Whistleblowers: Are There Sufficient Legal Protections?” in response to reports of the blacklisting of miners who spoke up about workplace safety prior to the Sago mine disaster in March, 2007. Witnesses at the hearing included: Lloyd Chinn, partner, Proskauer Rose LLP; Thomas Devine, Legal Director of the Government Accountability Project; Richard Fairfax, Director of Enforcement at OSHA; Richard E. Moberly, Assistant Professor and Cline Williams Research Chair at the University of Nebraska College of Law; John Simon, truck driver; and Dr. Jeffrey Wigand, former employee of Brown & Williamson.

On May 16, 2007, the Committee on Education and Labor held a hearing on “Evaluating the Effectiveness of MSHA’s Mine Safety and Health Programs.” Witnesses included: Reps. Nick Rahall and Shelley Moore Capito of the Third and Second Districts of Virginia, respectively; Dan Bertoni, Director of the Education, Workforce, and Income Security Team of the Government Accountability Office; Richard Stickler, Assistant Secretary of Mine Safety and Health at the U.S. Department of Labor; Jonathan Snare, Acting Solicitor of Labor of the U.S. Department of Labor; Larry Grayson, Chair of the Department of Mining and Nuclear Engineering of the University of Missouri; and J. Davitt McAteer, Vice President for Sponsored Programs at Wheeling-Jesuit University. At the hearing, the Committee considered whether MSHA responded adequately to mine health and safety hazards.

On July 26, 2007, the Subcommittee on Workforce Protections of the Committee on Education and Labor held a hearing on “H.R. 2768, the S-MINER Act, and H.R. 2769, the Miner Health Enhancement Act of 2007.” The Subcommittee heard testimony from Kevin Strickland, Administrator of Coal Mine Safety and Health at MSHA; Dennis O’Dell, Safety and Health Director of the United Mine Workers of America; James L. Weeks, ScD, CIH, of Potomac, Maryland; and Mike Wright, Director of Health, Safety and Environment at the United Steelworkers.

On October 3, 2007, the Committee on Education and Labor held a hearing entitled “The Perspective of the Families at Crandall Canyon” concerning a tragic explosion at the Crandall Canyon Mine where six miners lost their lives. The Committee heard testimony from Steve Allred, brother of miner Kerry Allred; Wendy Black, wife of miner Dale “Bird” Black; Michael Marasco, son-in-law of miner Kerry Allred; Sheila Phillips, mother of miner Brandon Phillips; Cesar Sanchez, brother of miner Manuel Sanchez; Jon Huntsman, Jr., Governor of the State of Utah; Wayne Holland, International Staff Representative of the United Steelworkers; Cecil Roberts, President of the United Mine Workers of America; and Bruce Watzman, Vice President of Safety, Health, and Human Services at the National Mining Association.

HEARINGS IN THE SENATE

Committee on Appropriations

On February 28, 2007, the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Senate Committee on Appropriations held a hearing entitled, “Improving Mine Safety: One Year After Sago and Alma.” The panel included: Richard E. Stickler, Assistant Secretary, Mine Safety and Health Administration, Department of Labor; Dr. John Howard, Director, National Institute for Occupational Safety and Health, Department of Health and Human Services; Cecil Roberts, President, United Mine Workers of America; Bruce Watzman, Vice President, Safety, Health and Human Resources, National Mining Association; J. Davitt McAteer, Esq., Vice President of Sponsored Programs, Wheeling Jesuit University; and Chris R. Hamilton, Senior Vice President, West Virginia Coal Association.

On September 5, 2007, the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Senate Committee on Appropriations held a hearing entitled, “Utah Mine Disaster and Preventing Future Tragedies.” The panel included: Richard E. Stickler, Assistant Secretary of Labor, Mine Safety and Health Administration, Department of Labor; J. Davitt McAteer, Esq., Vice President of Sponsored Programs, Wheeling Jesuit University; Cecil E. Roberts, President, United Mine Workers of America; and Bruce Watzman, Vice President, Safety, Health and Human Resources, National Mining Association.

Committee on Health, Education, Labor and Pensions

On May 22, 2007, the Subcommittee on Employment and Workplace Safety of the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Promises or Progress: The Miner Act One Year Later.” The panel included: Jeffrey Kohler, Ph.D., Associate Director for Mining, National Institute for Occupational Safety and Health; Dennis O’Dell, Administrator, Department of Health and Safety, United Mine Workers of America; S.L. Bessinger, Ph.D., P.E., Engineering Manager, BHP Billiton, San Juan Coal Company, Waterflow, NM; and Bruce Watzman, Vice President, Safety, Health and Human Resources, National Mining Association.

On October 2, 2007, the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Current Mine Safety

Disasters: Issues and Challenges.” The panel included: Kevin Stricklin, Administrator for Coal Mine Safety and Health, Mine Safety and Health Administration; Jeffrey Kohler, Associate Director for Mine Safety and Health Research; Joseph Osterman, Managing Director, National Transportation Safety Board; Dennis O’Dell, Administrator for Health and Safety, United Mine Workers of America; Robert Ferriter, Director of Mine Safety and Health Program, Colorado School of Mines; and Bruce Watzman, Vice President for Safety and Health, National Mining Association.

On June 19, 2008, the Subcommittee on Employment and Workplace Safety of the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Two Years After the Miner Act: How Safe is Mining Today?” The panel included: Richard E. Stickler, Acting Assistant Secretary of Labor for Mine Safety and Health; Jeffrey Kohler, Ph.D., Associate Director for Mining and Construction, National Institute for Occupational Safety and Health (NIOSH); Dennis O’Dell, Administrator of Occupational Health and Safety, United Mine Workers of America; and Bruce Watzman, Vice President, Safety and Health, National Mining Association.

111TH CONGRESS (2009–2010)

HEARINGS IN THE HOUSE OF REPRESENTATIVES

Committee on Education and Labor

On February 23, 2010, the Committee on Education and Labor held a hearing entitled, “Reducing the Growing Backlog of Contested Mine Safety Cases.” The panel included: Mary Lu Jordan, Chair of the Federal Mine Safety and Health Review Commission; Joe Main, Assistant Secretary of Labor for MSHA, U.S. Department of Labor; Cecil Roberts, President of the United Mine Workers of America; and Bruce Watzman, Senior Vice President of Regulatory Affairs at the National Mining Association.

On May 24, 2010, the Education and Labor Committee held a field hearing in Beckley, West Virginia, concerning the explosion at the Upper Big Branch coal mine that killed twenty-nine workers. The hearing was entitled “The Upper Big Branch Mine Tragedy: Testimony of Family Members,” and the panel included: Hon. Joe Manchin III, Governor of West Virginia; Eddie Cook, uncle of Adam Morgan; Gary Quarles, father of Gary Wayne Quarles; Alice Peters, mother-in-law of Edward “Dean” Jones; Steve Morgan, father of Adam Morgan; Clay Mullins, brother of Rex Mullins; and Stanley “Goose” Stewart, Upper Big Branch miner.

HEARINGS IN THE SENATE

Committee on Appropriations

On May 20, 2010, the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Senate Committee on Appropriations held a hearing entitled “Investing in Mine Safety: Preventing Another Disaster.” The panel included: Mary Lu Jordan, Chair, Federal Mine Safety and Health Review Commission; Cecil Roberts, President, United Mine Workers of America; Don L. Blankenship, Chairman and CEO, Massey Energy Company; John Howard, M.D., Director, National Institute for Oc-

cupational Safety and Health; Joe Main, Assistant Secretary of Labor for Mine Safety and Health; and M. Patricia Smith, Solicitor of Labor.

Committee on Health, Education, Labor and Pensions

On April 27, 2010, the Senate Committee on Health, Education, Labor and Pensions held a hearing entitled “Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces.” The panel included: Joe Main, Assistant Secretary of Labor for Mine Safety and Health; Cecil Roberts, President, United Mine Workers of America; Jeff Harris, Mine Worker, Fraley, WV; Wes Addington, Deputy Director, Appalachian Citizens’ Law Center; Bruce Watzman, Senior Vice President, Regulatory Affairs, National Mining Association; David Michaels, Assistant Secretary of Labor for Occupational Safety and Health; Peg Seminario, Director of Occupational Safety and Health, AFL–CIO; Holly Shaw, Chairperson, Philaposh Tri-state Family Support Group; Dr. Michael Brandt, Board President, American Industrial Hygiene Association; and Kelli Heflin, Coordinator of Regulatory Compliance and Safety Manager, Scott’s Liquid Gold, Denver, CO.

INTRODUCTION AND CONSIDERATION OF THE ROBERT C. BYRD MINER SAFETY AND HEALTH ACT, H.R. 5663

On July 1, 2010, Congressman George Miller (D–CA), along with Congresswoman Lynn Woolsey (D–CA) and Congressman Nick Rahall (D–WV) introduced H.R. 5663, a bill containing major reforms responding to the serious health and safety concerns raised by workers and families of Massey Energy’s Upper Big Branch Mine tragedy that killed 29 miners and other recent workplace tragedies.

Committee on Education and Labor Consideration of H.R. 5663

On July 13, 2010, the Committee on Education and Labor held a hearing on H.R. 5663, the Robert C. Byrd Miner Safety and Health Act. The Committee heard testimony concerning the ability of MSHA to effectively protect miners’ lives, hold mine operators accountable for putting miners in unnecessary danger, and expanding protections to all workers by strengthening OSHA. The hearing was entitled “H.R. 5663, Miner Safety and Health Act of 2010,” and the panel included: Joe Main, Assistant Secretary of Labor for Mine Safety and Health, U.S. Department of Labor; David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor; Patricia Smith, Solicitor of Labor, U.S. Department of Labor; R. Larry Grayson, Professor of Mine Engineering at Penn State University; Lynn Rhinehart, General Counsel of the AFL–CIO; Cecil Roberts, President of the United Mine Workers of America; Jonathan Snare, partner at Morgan Lewis, on behalf of the Coalition for Workplace Safety; Stanley “Goose” Stewart, a West Virginia coal miner; and Bruce Watzman, Senior Vice President for Regulatory Affairs at the National Mining Association.

Committee on Education and Labor Mark-up of H.R. 5663

The Full Committee met on July 21, 2010 to mark up H.R. 5663. The Committee passed by voice vote an amendment in the nature

of a substitute offered by Chairman George Miller (D-CA). There were seven other amendments offered and debated. Of the amendments offered, four passed and three failed.

The Robert C. Byrd Miner Safety and Health Act

By a vote of 30–17, H.R. 5663 was reported favorably to the House with an amendment in the nature of a substitute.

The Miller amendment in the nature of a substitute contains the following modifications to the introduced version of H.R. 5663:

Title I: Slightly narrows the scope of Secretary's subpoena authority from "any function under this Act" to "investigations and inspections;" allows miner representatives to participate in any accident investigation conducted by the Secretary, including the right to participate in interviews, unless the Secretary, in consultation with the Attorney General, concludes that such involvement "would interfere with or adversely impact a criminal investigation that is pending or under investigation;" provides mine operators with the right to have mine inspector review recent evaluation for pattern status during the course of a regular inspection; eliminates the obligation for operators to report the injuries and hours of work for its contractors and instead contractors will be obligated to report hours of work and injuries broken out by each mine where they work.

Title II: Eliminates the statutory definition of an S&S violation as one which has "a reasonable possibility of an injury, illness or death; requires that accidents as well as citations and orders must be counted in any designation of a mine for pattern status; requires MSHA to screen mines for pattern status not less than once every 6 months; expands transparency on methods used to determine pattern status; fee provisions are modified; and GAO will study the timeliness of MSHA mine plan approvals and make recommendations.

Title III: Eliminates the increase in civil penalties for significant and substantial (S&S) violations; adds a new felony provision for instances where the operator's actions knowingly exposed miners to a significant risk of serious injury or illness or death, which is punishable by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both; if the operator is found to have knowingly tampered with or disabled a required safety device which exposed miners to a significant risk of serious injury or illness or death, or if the conviction is for a violation committed after the first conviction, punishment shall be by a fine of not more than \$2,000,000, or by imprisonment for not more than 10 years, or both; modifies the provision on civil and criminal liability of officers, directors and agents, so that liability will apply when an operator's policies or practices "result in" violations, instead of merely "contribute to" a violation; expands criminal penalty for retaliation to cover reporting safety violations to state mine safety agencies, as well as MSHA or law enforcement officials; modifies provision that makes advance notice of an inspection a felony by requiring a showing of intent to impede, interfere with or adversely affect the outcome of an inspection for any person who knowingly gives or causes to give advance notice.

Title IV: Expands protected activity for whistleblowers to cover a miner reporting any injury or illness to an operator; narrowed

payment to miners idled by a MSHA-ordered mine closure: first, for first two shifts, miners are paid for balance of the shift when mine is closed, and four hours pay for subsequent shift; second, limits payments to idled miners to a maximum 60 days; third, operators will not have to pay miner if they closed mine in advance of an MSHA order, if the operator withdrew miners promptly after discovering a hazard and notified MSHA as required, however, if they did not promptly withdraw miners, and waited until MSHA was about to issue a closure order, they must pay miners for up to 60 days; and expedites mine operators due process rights by providing mine operators with an expedited hearing and judgment within 30 days on any order which closes a mine and triggers payments to miners.

Title V: Provides added flexibility to coal mine operators on implementing a mandatory pre-shift review of mine conditions to incoming miners; extends time for MSHA to issue interim rule from 90 days to 180 days, and requires MSHA to issue a final rule in 2 years; prevents MSHA from using measurements of rock dust using these new monitors as a basis for enforcement until the new technology is certified as accurate and reliable for enforcement purposes and MSHA issues a final rule; establishes a consultation process for operators, vendors, states and labor to have input into a NIOSH study on the feasibility of using continuous atmospheric monitoring systems in underground mines; extends time for study from 180 days to one year; clarifies requirement related to technology to control respirable dust, to accommodate concerns that this would mandate reductions beyond that established by MSHA regulations; and modifies fee collection for certifications to ensure it is budget neutral.

Title VI: Provides that reforms to the pattern of violations and the increased civil penalties for mines on pattern of violations will only apply to underground coal mines and other underground mines which are gassy.

Title VII: Reduces the burden of proof on employers to obtain a stay of an OSHA order to abate serious or willful violation that could cause serious bodily injury or death; modifies the nexus required between a violation and bodily harm in the criminal provision by requiring the employer to have knowingly violated a safety standard which "caused or significantly contributed to" the injury or death; expands the list of those individuals who can request that NIOSH conduct a Health Hazard Evaluation (HHE) from only employers and employee representatives to also include representatives of "former workers, physicians, another federal agency, or a state or local health department" and also expands the issues that can be covered in a HHE to cover to include "physical agents, equipment, or working conditions."

AMENDMENTS CONSIDERED IN COMMITTEE

The amendment offered by Representative Kline (R-MN) would have served as a substitute amendment. It would have circumscribed the reforms in the bill such that a number of issues would have gone unaddressed. It did not include any reforms to the Occupational Safety and Health Act and did not address a number of mine safety and health issues, including the need for whistleblower reforms and a variety of improved enforcement authorities

for the agency. The amendment was defeated by a roll call vote of 17–30.

The amendment offered by Representative Shea-Porter (D–NH) would codify the MSHA whistleblower hotline and related informational materials and would require those materials to be distributed as part of the new annual training required under Section 505 of the bill. The amendment was passed by voice vote.

The amendment offered by Representative McMorris Rodgers (R–WA) would have struck Title VII of the bill i.e., the Amendments to the Occupational Safety and Health Act. The amendment was defeated by a roll call vote of 17–30.

The amendment offered by Representative Woolsey (D–CA) would authorize NIOSH to enter into collaborative agreements with international organizations to explore additional means to protect miners. The amendment was passed by voice vote.

The amendment offered by Representative Price (R–GA) would have struck Section 302 and replaced “knowing” with “willful” in regards to employer liability. The amendment was defeated by a roll call vote of 17–30.

The amendment offered by Representative Hare (D–IL) would dissuade the underreporting of accidents and injuries by operators by requiring that accident, injury and illness reports to MSHA must be signed by a “knowledgeable and responsible person possessing a certification as determined by the Secretary or a state certification program,” and also provide a mechanism for accountability with the person signing the report or log by instating that an individual’s certifications can be revoked for knowingly falsifying reports or logs under the bill. The amendment was passed by voice vote.

The amendment offered by Representative Titus (D–NV) would provide OSHA with additional tools to ensure that state plans are in compliance by establishing a formal mechanism for OSHA to identify a problem with a state plan and compel a remedy without beginning the process for withdrawing approval. Additionally, the amendment ensures continued application of health and safety regulations by providing OSHA with concurrent enforcement authority for the duration of the time that a state plan is formally remediating deficiencies or being withdrawn and provide an opportunity for a public hearing after 30 days notice of official federal action. Lastly, the amendment would hold federal OSHA accountable for providing strong oversight and guidance to state plans by establishing a regular GAO study once every five years to look at the effectiveness of state plans and the Secretary of Labor’s oversight of such plans.

III. SUMMARY OF THE BILL

H.R. 5663, as amended with the Miller Amendment in the Nature of a Substitute, amends the Federal Mine Safety and Health Act and the Occupational Safety and Health Act to do the following:

- Make Mines with Serious and Repeated Violations Safe: Criteria for ‘pattern of violations’ sanctions would be revamped for underground coal mines and other ‘gassy’ mines to ensure that operators which chronically and repeatedly violate mine safety standards or have high accident rates improve safety dramatically.

- **Ensure Irresponsible Operators are Held Accountable:** Maximum criminal penalties would be increased for underground coal mines, and a sanction is established for mine operators who knowingly tamper with or disable safety equipment that could kill miners. Operators would be required to pay penalties in a timely manner.

- **Give MSHA Better Enforcement Tools:** MSHA would be given the authority to subpoena documents and testimony. The agency could seek a court order to close a mine when there is a continuing threat to the health and safety of miners. MSHA could require more training of miners in unsafe mines. MSHA will require contractors, in addition to operators, to report accidents and injuries, and hours of work at each mine, and those filing reports would be held responsible for their accuracy.

- **Protect Miners Who Speak out on Unsafe Conditions:** Protections for workers who speak out about unsafe conditions in underground coal and other gassy mines would be strengthened and would guarantee that miners wouldn't lose pay for safety-related closures. In addition, miners would receive protections allowing them to speak freely during investigations.

- **Modernize Safety Requirements in Coal Mines:** Increased rock dusting would be required to prevent coal dust explosions. Pre-shift reviews of hazards and violations in the mine must be communicated to incoming miners to ensure that they are not caught unaware. Protocols for continuous atmospheric monitoring for methane and carbon monoxide will be developed by NIOSH and adopted by MSHA through regulations.

- **Increase MSHA's Accountability:** The bill provides for an independent investigation of the most serious accidents, which includes an assessment of whether there are gaps in MSHA's oversight or regulation. It asks the Government Accountability Office to assess whether there are problems with timeliness of mine plan reviews.

- **Guarantee Basic Protections in All Other Workplaces under OSHA:** To ensure that all workplaces have basic protections, whistleblower protections would be strengthened, criminal and civil penalties would be increased, and hazard abatement would be sped up. In addition, victims of accidents and their family members would be provided greater rights during investigations and enforcement actions. OSHA would be allowed to assert concurrent enforcement jurisdiction in states with OSHA state plans, if the state is failing to maintain protections for workers that is at least as effective as federal OSHA.

IV. STATEMENT AND COMMITTEE VIEWS

This bill provides solutions to four major sets of problems in the area of workplace health and safety:

(1) IMPROVING SAFETY STANDARDS AND PRACTICES TO PREVENT FATALITIES AND INJURIES

The Mine Act and the OSH Act were designed to require employers to take responsibility for the safety and health of their employees. But some employers have found ways to exploit weaknesses in the law or view existing penalties as merely a cost of doing business. Any serious attempt to prevent fatalities and injuries must

start with strengthening employers' incentives to protect workers from safety and health hazards.

(2) IDENTIFYING DANGEROUS PRACTICES AND VIOLATIONS BEFORE FATALITIES AND INJURIES OCCUR

MSHA and OSHA cannot be present at every mine or every workplace at all times and identify every potential safety or health hazard. They must rely, in part, on employees to report dangerous conditions. Workers who report hazards to their employer or the government all too often risk losing their jobs, sacrificing career advancement, or suffering other adverse actions. The incentive structure needs to be reformed so that workers are empowered to identify problems and insist that they be fixed—and to do so free from fear. Both MSHA and OSHA must have the tools they need to obtain information to adequately conduct inspections and protect workers.

(3) IMPROVING RULES AND ADJUDICATIVE PROCEDURES TO COMPEL EMPLOYERS TO REMEDY PROBLEMS

MSHA and OSHA lack the authority they need to cause employers who continually put workers' lives at risk to change their behavior. For example, the well-documented shortcomings of the current pattern of violations process for underground mines show that it is too easy for even the worst offenders to avoid the heightened enforcement regime envisioned by Congress in enacting the Mine Act in 1977. Indeed, no mine has ever been placed in pattern status.

(4) USING CIVIL AND CRIMINAL PENALTIES TO BRING CHRONIC SCOFFLAWS TO JUSTICE

Congress must increase and refine the civil and criminal penalty regime to ensure that employers do not knowingly or persistently put the lives of their workers at risk. These penalties should extend to individuals, including high-level management, who make decisions about the safety of workers, and the penalties must be significant enough to deter employers from putting their workers' safety and health at risk.

Problems and Solutions Addressed by Selected Sections of H.R. 5663

The sections below lay out the problems in health and safety enforcement identified by the bill, including how the bill addresses each problem. The description of the solutions refers to H.R. 5663 as amended in Committee, with the Miller Amendment in the Nature of a Substitute. It should be noted from the outset that the Amendment in the Nature of a Substitute limited the applicability of H.R. 5663 to underground coal mines and underground metal/non-metal mines, which are gassy, as well as any surface mines physically connected to such underground mines. These classes of mines, with their lethal mix of combustible gas or coal dust, enclosed spaces, and myriad ignition sources, are the most dangerous in terms of their potential for breakdowns with catastrophic consequences, like that at Upper Big Branch mine on April 5, 2010.

Thus, the changes in the law proposed below would apply only to such mines.

Title I—Additional Inspection and Investigation Authority

SEC. 101—INDEPENDENT ACCIDENT INVESTIGATIONS

Problem: The Mine Safety and Health Administration (MSHA) conducts investigations of mine accidents, including actions or inactions by the agency's own employees. Unless a state convenes an independent investigative panel, there is no agency which conducts independent review of the root cause and assessment of whether there were regulatory or organizational failures. In other sectors, independent agencies, such as the Chemical Safety Board, conducts root cause investigations for accidents at chemical plants and oil refineries which are covered by the Occupational Safety and Health Administration (OSHA). For major accidents, public confidence is enhanced by an independent assessment of the accident's root cause, a review of MSHA's investigation, an evaluation of whether actions or inaction by MSHA could have been a contributing factor, and independent recommendations to prevent a recurrence.

Solution: H.R. 5663 requires a panel independent of MSHA—appointed by the Secretary of Health and Human Services (HHS) and chaired by staff from the Office of Mine Safety and Health within the National Institute for Occupational Safety and Health (NIOSH)—to conduct an investigation of any mine accident involving 3 or more deaths, or for other accidents that the HHS Secretary deems warranted. Each 5-member panel must include members with expertise in accident investigations, mine engineering, or mine safety and health; and include one individual who represents mine operators and one representative of a labor organization that represents miners. The panel is charged with investigating the root causes and contributing factors of the accident, including acts or omissions by MSHA; identifying the strengths and weaknesses in MSHA's accident investigation; and making recommendations to prevent recurrence. These investigations will be conducted concurrently with MSHA's accident investigations. Within 90 days of enactment, the Secretary of HHS must establish procedures to ensure the consistency and effectiveness of these investigations. Within 90 days of enactment HHS and the Secretary of Labor shall enter into a Memorandum of Understanding to coordinate functions and provide the Panel with access to the Secretary's subpoena powers, as needed.

SEC. 102—SUBPOENA AUTHORITY AND MINER RIGHTS DURING INSPECTIONS AND INVESTIGATIONS

Problem: MSHA lacks general authority to subpoena witnesses or documents under the Federal Mine Safety and Health Act of 1977 (Mine Act). The agency may only issue subpoenas as part of a public hearing related to an accident investigation. When MSHA is able to speak with miners, mine operators have sought to inject themselves into the process—chilling the flow of information.

Solution: H.R. 5663 would authorize MSHA to subpoena documents and testimony in carrying out investigations or inspections. It also clarifies that MSHA (or DOL attorneys) can interview mine employees and other individuals with relevant information pri-

vately without the presence, involvement, or knowledge of the operator, his agent, or attorney, provided that an individual may bring his own attorney to any interview. OSHA already has both of these authorities.¹

SEC. 103—DESIGNATION OF MINER REPRESENTATIVE

Problem: Only a miner can designate someone to be his or her representative under current law. Over the years, many miners have been trapped in mine accidents, such as the 2002 accident at the Quecreek mine in which 9 miners were trapped underground for 77 hours. All of the miners survived, but the miners were trapped incommunicado, so they and their families were left out of the decisions directing their recovery. Similarly, the families of the six miners trapped in the Crandall Canyon mine in Utah after the roof collapsed had little involvement in the decisions made during the rescue operations. Although the miners died (their bodies are still in the mine today), their families deserved to have a say in the rescue and recovery process.

Solution: H.R. 5663 allows the closest relative of a miner who is trapped in an underground mine to designate a representative on behalf of the trapped miner.

SEC. 104—ADDITIONAL AMENDMENTS RELATING TO INSPECTIONS AND INVESTIGATIONS

Problem: In hearings before the Committee, miners testified that MSHA inspectors routinely inspect mines during regular business hours, rarely during late night shifts or on weekends. Mine operators know this, and those who are unscrupulous will take more risks during the hours when they are not likely to be inspected in order to increase production. Witnesses at the July 13, 2010, Committee hearing raised questions about the reliability of the accident and injury reports from operators.² Moreover, reliable accident and injury reporting is needed from both operators and contractors, if MSHA is going to rely upon accident rates as one criteria to trigger pattern status at a mine. MSHA must be physically present at a mine to issue a “control order” under Section 103(k) of the Mine Act, which is needed to protect the lives of miners after an accident. Mine inspectors cannot always be close by a mine site right after an accident, and should be able to phone in a control order until they arrive at the mine site.

Solution: H.R. 5663 requires MSHA to regularly inspect mines during all shifts and days of the week when miners are present; mandates that contractors and operators report accidents, injuries, and man-hours worked at each mine; and requires operators and contractors to have a knowledgeable and certified individual sign reports as accurate and complete, under penalties of revocation of a certification. Section 103(k) of the Mine Act removes the requirement for MSHA to be present when issuing a control order.

¹ OSHA’s subpoena powers and the right to privately interview employees are provided in Section 8(a) and 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a) and 29 U.S.C. 657(b).

² H.R. 5663, the Miner Safety and Health Act: Hearing before the H. Comm on Education and Labor, 111th Cong. (2010) (testimony of Cecil Roberts and testimony of Stanley “Goose” Stewart), <http://edlabor.house.gov/hearings/2010/07/hr-5663-miner-safety-and-health.shtml>.

Title II—Enhanced Enforcement Authority

SEC. 202—A PATTERN OF RECURRING NONCOMPLIANCE OR ACCIDENTS

Problem: In the last decade, over 600 miners have been killed while working in coal and metal/nonmetal mines,³ including 190 underground coal miners.

Twenty-nine (29) miners were killed on April 5, 2010, at the Upper Big Branch Mine (UBB)⁴ operated by Massey Energy in Montcoal, West Virginia in the worst coal mine disaster in America in 40 years. The blast killed miners over a 2-mile area and twisted rail car tracks like pretzels. The death toll is the highest in an American mine since a 1970 explosion killed 38 at Finley Coal Company, in Hyden, KY. In 2009, there were 34 mining deaths in coal and metal/non metal mines, a record low.⁵ Through July 12 of this year, there have been a total of 52 mining deaths.⁶

The blast at Upper Big Branch was preceded by a series of tragedies in 2006 and 2007—an explosion at the ICG-operated Sago mine that trapped 13 miners and killed 12 miners; an explosion at the Darby Mine which killed 5 and injured one; the Crandall Canyon Mine disaster, which killed 9 (including 3 rescuers); and a fire that killed two at the Massey-operated Aracoma Alma coal mine. In 2008, the Aracoma Coal Company, a subsidiary of Massey, agreed to pay \$4.2 million in criminal fines and civil penalties, and to plead guilty to safety violations related to Massey’s inadequate response to the fire.⁷

The UBB Mine Had a History of Repeated and Serious Safety Violations

While the precise cause of the UBB mine explosion is unknown, this mine, and the controlling entity, Massey Energy, have a long history of serious safety and health violations, which involved high degrees of negligence:

- MSHA cited the UBB mine for 515 violations in 2009 and 124 in the first 3 months of 2010, with proposed penalties totaling \$1.1 million. Most of these penalties are being contested by Massey. Over 39% of citations issued at UBB in 2009 were for S&S violations.⁸

- More troubling, MSHA issued 54 “closure” orders at this mine in 2009, including 49 for “unwarrantable failure” to correct violations and one for an “imminent danger.” The mine’s rate for these

³ <http://www.msha.gov/stats/charts/coaldaily.asp>; <http://www.msha.gov/statscenturystats/mnmstats.asp>.

⁴ In addition to UBB, 2 other miners were killed at Massey mines so far this year. The UBB mine produced 1.2 million tons of high-value metallurgical coal (met coal) in 2009. Production had been ramping at this mine, as the demand from China and India for met coal had increased. In the first quarter of 2010, UBB produced 432,000 tons compared with 182,000 tons for the same period in 2009. UBB had approximately 200 mine employees, excluding contractors. Source: Mine Quarterly Production Information, Mine Safety and Health Administration, <http://www.msha.gov/drs/ASP/MineAction70002.asp> (accessed 7/25/2010).

⁵ Stephen Power, “Mine Cited on Safety Issues,” Wall Street Journal, April 7, 2010.

⁶ MSHA, “2010 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal,” last updated 7/12/2010, <http://www.msha.gov/STATS/DAILY/D2010BAR.PDF>.

⁷ Ken Ward, Jr., “Aracoma Assessed Record Fine,” West Virginia Gazette, December 23, 2008.

⁸ Briefing by the Department of Labor, Mine Safety and Health Administration, on Disaster at Massey Energy’s Upper Big Branch Mine-South, April 2010, http://www.msha.gov/PerformanceCoal/DOL-MSHA_president_report.pdf.

kinds of violations is nearly 19 times the national rate, according to MSHA.⁹

- In 2010, MSHA issued 7 closure orders at UBB, including 6 for unwarrantable failure related to improper mine ventilation.¹⁰ For example:

- On January 7, 2010, MSHA found that the mine foreman knew and failed to correct a condition for three weeks which misrouted air so that miners would not have fresh air to escape the mine section in the event of an accident, and could have caused deaths.

- On March 2, 2010, according to MSHA, the mine was not following its ventilation plan to prevent methane build up. The plan required 15,000 cubic feet of air per minute (cfm) flowing through the mine, but MSHA inspectors only found 7,448 cfm.

- In the 12 months prior to the explosion, MSHA found 52 violations related to ventilation standards and controls and 37 related to accumulations of combustible materials. Violations involving mine ventilation and combustible materials increase the likelihood of an explosion.¹¹

- Between 2005 and 2009, there were 1,298 violations and orders issued by MSHA at UBB, and over this time period, MSHA increased its inspection hours from 923 to 1,854 per year.¹²

Mine explosions are preventable, and are usually caused by the combustion of accumulations of methane combined with coal dust.

- Methane gas occurs naturally in coal seams and is liberated when coal is mined. The UBB mine released approximately 1 million cubic feet per day of methane. Sufficient mine ventilation will remove combustible levels of methane. Equipment, such as continuous miners, must have methane detectors which are designed to automatically turn off machinery if methane levels exceed 1%.

- Coal dust is produced by the mining process and is 10 times as explosive as methane. The Mine Act requires rock dusting of the mine floors, roof and walls to prevent coal dust from propagating an explosion. However, existing standards insufficiently mitigate the risks of coal dust explosions.

Current Mine Act Civil Enforcement Scheme

The Mine Act authorizes MSHA to cite and issue fines for violations of the Act or mandatory health or safety standards. A citation usually fixes a time for abatement. If, upon subsequent inspection, the mine fails to abate, MSHA can issue a withdrawal order directing miners to leave the area until the mine abates the violation.

Level of MSHA Enforcement Actions: In 2009, MSHA issued a total of 175,079¹³ citations and orders to all coal and metal/nonmetal mines. During this period, MSHA assessed \$141.2 mil-

⁹*Id.*; MSHA data, "Summary of Citations and Orders issued at Upper Big Branch Mine-South," http://www.msha.gov/PerformanceCoal/Violation_Summary.pdf.

¹⁰MSHA data, "Summary of Citations and Orders issued at Upper Big Branch Mine-South," http://www.msha.gov/PerformanceCoal/Violation_Summary.pdf.

¹¹Department of Labor data, April 2010.

¹²*Id.*

¹³102,660 of the total citations and orders were for coal mines.

lion¹⁴ in fines, and operators contested 66.3% of these monetary penalties.¹⁵

Significant and Substantial Violations. MSHA inspectors can cite a violation as “significant and substantial” (S&S) which “is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard.” S&S violations are a building block for escalated enforcement action under the Mine Act. Approximately 33% of all citations are S&S.¹⁶

In the event that an operator fails to correct an S&S violation of a mandatory health and safety standard, and it is determined that the failure is “unwarrantable,” which is aggravated conduct characterized by more than ordinary negligence, MSHA can issue an “unwarrantable failure” order (under Section 104(d)(1)) directing the mine to immediately withdraw miners from the affected part of the mine until the violation is abated.

Imminent Danger Orders: MSHA has the authority to issue imminent danger orders under Section 107 of the Mine Act to order operators to withdraw miners if the inspector determines “the existence of any condition or practice in a coal or other mine which could be reasonably expected to cause death or serious physical harm” before such condition can be abated.

Pattern of Violations (POV): Congress enacted a remedy to address operators that continually and repeatedly pile up citations for dangerous conditions, following the Scotia Mine Disaster in Letcher County, Kentucky, which killed 23 miners and 3 mine inspectors over a 60 hour period in 1976. This mine, which was the most gassy mine in Eastern Kentucky, had a long and chronic history of safety violations: it had been ordered closed 110 times between 1970 and 1976, including 39 times for imminent danger conditions. This was the most inspected coal mine in Eastern Kentucky, but according to a House Education and Labor Committee staff report, “inspection efforts had little impact on correcting Scotia’s chronic health and safety problems.”¹⁷

A new section 104(e) of the 1977 Mine Act set forth sanctions for any operator that has a “pattern of violations.” The Senate committee report on the legislation explained:

Section [104(e)] provides a new sanction which requires the issuance of a withdrawal order to an operator who has an established pattern of health and safety violations which are of such a nature as could significantly and substantially contribute to the cause and effect of mine health and safety hazards. The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster. . . . That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to

¹⁴ \$103.3 million were for coal mines.

¹⁵ MSHA, “Mine Safety and Health at a Glance,” May 16, 2010, <http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT10.pdf>.

¹⁶ *Id.*

¹⁷ Staff of H. Comm. on Education and Labor, *Scotia Coal Mine Disaster, March 9 and 11, 1976: A Staff Report* (October 15, 1976), p. 26.

address. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.¹⁸

Even though the POV provision "was intended to provide MSHA a powerful tool to deal with mine operators who demonstrated, through significant and substantial health or safety violations, a disregard for the health and safety of miners," MSHA did not implement the POV provision for 30 years—until 2007. MSHA took 13 years to promulgate two pages of procedural regulations, and another 17 years to establish screening guidelines to identify mines with a "potential" POV.

Under this screening guidance issued in 2007, MSHA "looks back" over a 24-month period to assess whether there is an elevated pattern of "final orders" for S&S violations. If the operator's compliance record indicates repeated and elevated S&S violations, then MSHA notifies the operator of a "potential" POV and requests a plan to improve compliance. If an operator reduces its S&S violation rate by at least 30% over a 90-day period, MSHA allows mines to avoid the statutory POV sanction. Otherwise, the operator faces the statutory POV sanction: withdrawal order from the affected area of the mine for each and every future S&S violation until the mine has a 90-day period free from any new S&S violations.

Virtually all mines placed on the potential POV reduced their S&S violations by at least 30% in the 90-day period following receipt of a potential POV notice.¹⁹ In 2009, mines receiving a potential POV letter reduced their S&S violation rate by 72% over this 90-day period.²⁰ After the 90-day review period, many mines, including UBB, allowed safety conditions to sharply deteriorate, suggesting that improvements over such a short period of time were transient and mine operators were gaming the system. Moreover, a 30% reduction in the rate of S&S violations did not mean that the mine had eliminated a pattern of violations, or that its safety performance was above average for the industry.

Final Orders and Backlog at the Review Commission: MSHA's POV regulations require "final orders" to determine whether a mine's compliance history triggers a POV sanction.²¹ "Citations and orders that are under contest, no matter how egregious, are not considered when enforcing" the POV provisions of the Mine Act.²² Due to this requirement, MSHA must wait for the Federal Mine Safety & Health Review Commission (Review Commission) to adjudicate citations or review settlements. The Review Commission currently has a backlog of over 17,000 cases; it now takes an average of 30 months before the Review Commission issues a final order.²³

¹⁸ S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).

¹⁹ Jessica Y. Lilly, "Massey mine faces 'pattern of violations' status," *WV Public Broadcasting*, May 13, 2010.

²⁰ Jean Tarbett Hardiman, "Area mines show code violations," *Herald-Dispatch*, May 1, 2010.

²¹ 30 CFR Part 104.3(b) states: "Only citations and orders . . . that have become final shall be used to identify mines with a potential pattern of violation under this section."

²² *Hearing, supra* note 2 (testimony of Joe Main).

²³ The Review Commission has 14 Administrative Law Judges (ALJs), which was increased in FY 10 from only 10 ALJs in FY 2009. The Review Commission estimates that 32 ALJs are needed to reduce the backlog over an 18 month period. The House and Senate Appropriations

Many mines with degraded safety records can escape POV sanctions by contesting many or all of their S&S citations because they know that, due to the delays at the Review Commission, their past history of S&S violations will never be counted over the 24-month look-back period used by MSHA. Mine operators increased their contests of S&S citations from 13% to 46% between 2006 and 2009, which coincided with MSHA's belated implementation of its POV policy and a new civil penalty policy which raised the size of fines. "[S]ome operators contesting S&S violations may be doing so because it delays the finding of a pattern, adding to the backlog and delaying MSHA from using this enhanced enforcement tool at their mines. As a result there are mines that might be on a potential pattern of violations, but the backlog has prevented their cases from becoming final orders."²⁴

MSHA identified at least 48 mines that were not subjected to a potential POV in August 2009 due to the absence of final orders for S&S violations (assuming the violations were sustained). Massey's UBB mine, which exploded on April 5, was on this list of 48 mines.²⁵

Given the ease with which operators can avoid placement on the POV through a combination of temporary improvements to their compliance record and an aggressive legal posture that challenges each and every S&S violation, MSHA has never placed a single mine on the POV since the provision was enacted in 1977.²⁶ MSHA's Assistant Secretary, Joe Main, has acknowledged that the current "POV provision is an empty vessel" and it is "broken by all accounts including MSHA's."²⁷

Some career MSHA staff believe the current POV sanction—a withdrawal order for each subsequent S&S violation—is so severe that it could force mines to close. Requirements to get off POV—zero S&S violations in a 90 day period—is nearly impossible to achieve for many underground coal mines. This may explain why MSHA was slow to implement, and why mine operators, when threatened with a POV sanction, spare no legal resources.

Case Study: UBB Mine Repeatedly Escaped Pattern of Violations (POV) Sanctions

In December 2007, MSHA notified Massey that the UBB mine had a *potential* "pattern of violations" (POV) because it had 204 S&S citations over the previous 24 months.²⁸ However, MSHA did not impose a POV sanction. Instead, it gave the mine 90 days to reduce its rate of S&S violations by 30%, consistent with agency guidance.

The mine reduced its S&S violations per inspection hour by 44% during the next 90 days. In a March 25, 2008, letter, MSHA's Dis-

Committees are working on options to increase funding for the number of ALJs and the requisite number of DOL staff necessary to reduce the backlog over an 18–24 month period.

²⁴ *Reducing the Growing Backlog of Contested Mine Safety Cases before the H. Comm. on Education and Labor*, 111th Cong. (2010) (testimony of Joseph A. Main).

²⁵ Committee on Education and Labor press release, "Chair Miller Releases List of Dangerous Mines Escaping Tighter Scrutiny," April 14, 2010.

²⁶ As of July 2010, MSHA has only twice attempted to place a mine on full POV status—once with Rockhouse Energy Mining in December 2008 and once with Massey-owned Knox Creek Coal's Tiller No. 1 Mine in June 2010.

²⁷ *Hearing, supra* note 2 (testimony of Joseph A. Main).

²⁸ Briefing by the Department of Labor, Mine Safety and Health Administration, on Disaster at Massey Energy's Upper Big Branch Mine-South, April 2010, http://www.msha.gov/PerformanceCoal/DOL-MSHA_president_report.pdf.

strict Manager wrote that a pattern of violations “does not exist” at the mine, even though the mine continued to have an S&S violation rate higher than the industry average. Despite subpar performance, MSHA’s letter concluded: “congratulations on your achievements.”

After the S&S violation rate dropped in the first few months of 2008, the rate more than doubled the following year. UBB had 495 S&S citations in 2009, a number that would have readily put this mine on a potential POV, except that an error in MSHA’s computer program prevented it from flagging several final orders that would have tipped this mine over the thresholds established in MSHA’s POV guidance.²⁹

Even without this error, this mine should have been placed on a potential POV; however, it escaped this sanction because too many S&S violations in the 24-month look back period were caught up in the Review Commission’s backlog and could not be counted. Massey contested 91% of the dollar amount of its assessments for S&S violations in 2008 and 74% in 2009.³⁰

UBB was not the only Massey-operated mine with a history of repeated violations. Massey mines have been placed on the potential POV status 13 times since MSHA started POV screening in 2007.³¹ This represents 25% of the 53 coal operations sent potential POV notices. In October 2009, 3 of the 10 mines that received potential POV notices were controlled by Massey.³²

Solution: MSHA needs new tools to address serial recidivists to ensure that mine operators implement safety management systems which build a culture of prevention rather than a practice of playing catch-me-if-you-can with regulators or allowing production to trump safety. Key elements of a new system to deal with a pattern of recurring non compliance or accidents (hereinafter, the new system is referred to as “pattern status”) include:

(1) Mines with “significantly poor compliance that results in unsafe or unhealthy conditions” shall be placed in “pattern status” if the mine has a pattern of:

- (i) citations for S&S violations;
- (ii) citations and withdrawal orders caused by an unwarrantable failure to comply with mandatory health and safety standards;
- (iii) withdrawal orders for imminent danger or withdrawal orders under any other section of the Act;
- (iv) citations for flagrant violations; and
- (v) accidents or injuries; or
- (vi) any combination of these citations, orders, accidents and injuries.

(2) History of violations will be based on citations, instead of final orders. The current system of requiring final orders encourages operators to contest their S&S citations as a way to avoid consideration of their past history of noncompliance. Operator’s rights

²⁹*Id.* MSHA contends UBB was the only mine that was not flagged for a potential POV. The Education and Labor Committee asked the DOL Inspector General to review the reasons the computer program failed, and determine if this is the only mine the program failed to flag.

³⁰Source: MSHA data provided to the Committee on Education and Labor.

³¹Briefing by the Department of Labor, Mine Safety and Health Administration, on Disaster at Massey Energy’s Upper Big Branch Mine-South, April 2010, http://www.msha.gov/PerformanceCoal/DOL-MSHA_president_report.pdf.

³²*Id.*

to contest citations related to “pattern status” will be addressed through an expedited review of citations and orders, if such review is sought, once on pattern status. This will ensure that MSHA’s efforts to protect miners are not handcuffed by delays in the adjudicative process.

(3) Mines with a degraded safety record will be placed in pattern status without delays associated with giving notice of a *potential* POV. Instead of advance notice, mine operators (and the public) will be provided access to a data base with each mine’s compliance record and information on how to compare this record relative to benchmarks for placing a mine on pattern status. During regular inspections, MSHA inspectors, upon request from the operator, will review the most recent evaluation for pattern status with the operator. This will provide operators with sufficient transparency about their standing relative to pattern status to avoid having to issue potential pattern status letters.

(4) Once a mine is placed in pattern status, MSHA is required to (1) notify the mine operator that it must withdraw all miners from the mine; and (2) issue a remediation order tailored to the problems at the particular mine within 3 days. The remediation order will spell out the scope of mandatory improvements, such as implementing safety management systems that are effective in sustaining compliance, increased fire bossing, additional training or staffing, and pre-requisites to restoring production such as correcting violations and addressing hazardous conditions.

(5) The mine-wide withdrawal order will be lifted when the Secretary verifies that all violations or conditions have been or are being fully corrected as outlined in the remediation order and the operator has completed requirements in the remedial order, as appropriate, that are prerequisites for reopening the mine.

(6) MSHA will double the number of inspections during pattern status from 4 to 8 per year. These mines will be subject to performance reviews every 90 days, and must sustain improved performance for a full year.³³ Mines in pattern status will pay a fee for these added inspections to cover MSHA’s costs.

(7) Within 90 days, mines placed in pattern status must have zero high negligence violations, such as an unwarrantable failure violation, and no imminent danger orders, and improve compliance so that they meet or exceed the top performing 35th percentile for the rate of accidents and S&S violations by mines of similar size and type. Alternatively, mines can reduce S&S violations by 70% provided that such rate is not greater than the mean for mines of similar size and type. If mines do not achieve or exceed these benchmarks within 90 days, they may be subject to a mine-wide withdrawal order until conditions are corrected that led to pattern status, and/or MSHA may modify the remediation order. Within 180 days, civil penalties will double until these performance benchmarks are subsequently met.

(8) Mines will be removed from pattern status if they have zero withdrawal and imminent danger orders, and improve compliance

³³Hearing, *supra* note 2 (testimony of Larry Grayson). Professor Grayson testified that the “one year remediation process [in H.R. 5663] coupled with quarterly monitoring of performance should inculcate in pattern mines adoption of practices and processes aimed at building a safety culture of prevention, which is necessary to eliminate mine disasters and ultimately all mine fatalities and injuries.”

to meet or exceed the top performing 25th percentile for the rate of S&S violations and accidents at mines of similar size and type. Alternatively, mines can reduce S&S rates by 80%, provided that such rate is not greater than the mean for mines of similar size and type. Mines must sustain this level of performance, on average, for a one year period to get off the pattern status. If the mines do not meet this threshold, the pattern status is extended. The goal is to have sustained improved safety performance at a level that is well above average.

Rulemaking: To address the urgent problem of establishing a credible process to address mines that are endangering miners due to consistently poor compliance, MSHA is directed to issue an interim final rule within 120 days that contains the benchmark criteria to trigger placement of a mine on pattern status and to remove a mine from pattern status.

In developing this rule, MSHA shall calculate and weight the rates of accidents, injuries, citations for S&S violations, citations and orders for unwarrantable failure, imminent danger orders and citations for flagrant violations over the previous 180 days. MSHA's rule may also consider other criteria such as the mines history of violations, citations, orders and rates of accident and injuries outside of the 180 day look back period. To establish a consistent basis for comparison, MSHA may evaluate these safety indicators relative to inspection hours, the number of miners, miner hours worked, the number of mechanized mining units, production levels, and whether the miners are represented for purposes of collective bargaining. The latter factor may disproportionately impact the number of citations actually received by a mine relative to other mines, to the extent that miners at unionized mines tend to accompany MSHA inspectors on inspections and have the added protection of just cause employment under a collective bargaining agreement against retaliation for identifying safety concerns or violations.

Larry Grayson, a professor of mine engineering at the University of Pennsylvania, developed a "safe performance index" which can help identify high risk underground coal mines using rates of citations, S&S violations, unwarrantable failure and imminent danger orders (relative to inspection hours) and accident and injuries weighted by severity.³⁴

Professor Grayson analyzed the 40 operating long wall coal mines in the U.S. using this model for 2009. His model ranked the Upper Big Branch mine as the highest risk of any long wall mines in his analysis by a wide margin, based largely on a high rate of high negligence and imminent danger orders. The analysis found that 25% of the long wall mines had received no orders for high negligence violations or imminent danger. Given the fact that these are high production coal mines, it is clear that a zero rate of unwarrantable failure and imminent danger orders is an achievable target for mines when placed on pattern status. Criteria for placing mines on pattern status in this legislation mirror criteria used in the "safe performance index."

The safe performance index weighted fatalities and injuries equally with violations of safety standards. H.R. 5663 intentionally

³⁴Hearing, *supra* note 2.

refrained from establishing specific weights for the criteria used to trigger pattern status. A prescriptive one-size-fits-all model specified in legislation may cause MSHA to overlook factors that may be relevant. Weighting of criteria should account for criteria that serve as advance warning of high risk mines. In developing its interim and final regulations, the Committee recommends that the Secretary review mine accident reports over the past 30 years, and assess which indicators would have been helpful in predicting the occurrence of accidents or catastrophes. The Secretary should consider the methodology and weighting used in the “safe performance index” as a helpful starting place in developing its threshold criteria and weighting.

MSHA must promulgate a final rule 2 years after the date of enactment, which will give the agency 20 months experience in implementing its interim final regulation, and such experience, coupled with input from the public during rulemaking, can help inform any proposed changes in a final rule.

Not less than once every six months, MSHA must identify mines which meet the criteria to trigger pattern status.

MSHA has the discretion to not place an otherwise qualifying mine in pattern status if it certifies that there are mitigating circumstances wherein the operator has already implemented remedial measures that have reduced risks to the point that such risks are not longer elevated, and has taken sufficient measures to ensure that elevated risk will not recur. To provide transparency, MSHA must publish the written finding that there are mitigating circumstances that would preclude placing the mine on pattern status within 10 days on the web site for MSHA and provide copies to the House Committee on Education and Labor and the Senate HELP Committee.

MSHA may reinstate a withdrawal order if an operator fails to comply with the remediation order while in pattern status. MSHA can modify the remediation order or extend deadlines, but only on a showing by the operator that the operator took all measures to comply with the order and only if it was prevented from doing so by factors outside its control.

During pattern status, MSHA is authorized to communicate with miners (outside the presence of operators) about conditions in the mine, and also to advise them of their rights under the Act. Mine operators can obtain an expedited review from the Review Commission.

MSHA must establish and maintain a publicly available, easily searchable, electronic database with the information the Secretary uses to establish pattern status and disclose mines placed in pattern status within 7 days of such placement, and provide guidance to assist operators and the public in assessing each mine’s performance relative to criteria set forth in regulations.

SEC. 203—INJUNCTIVE AUTHORITY

Problem: The Secretary currently has some authority to seek an injunction against a recalcitrant mine operator under Section 108(a)(2) of the Mine Act. The existing injunctive provision authorizes MSHA to ask a federal court for injunctive relief if it believes that a mine operator was engaged in a “pattern of violations of . . . health or safety standards” that, in MSHA’s judgment, constitutes

a continuing hazard to miner health or safety. However, because of the provision's interaction with the Mine Act's administrative law provisions, this potentially useful authority has never been invoked. The provision presents several difficulties in that it 1) could be construed to require MSHA to establish a "pattern" which, using the existing POV provisions of Section 104(e), has proved difficult for MSHA to apply at all, and 2) limits the basis for a "pattern" to violations of health or safety standards. The flexible tool of an injunction, freed from any confusion associated with administrative law provisions, is needed to allow MSHA to propose and enforce remedial and preventive measures to address the unique circumstances at a particular mine. Such flexibility would allow MSHA to act quickly when problems arise and allow a tailored, reasonable response to unsafe conditions. Such dynamic response could save lives, even when other aspects of the Mine Act do not apply, are not triggered, or are otherwise insufficient. The Secretary should be authorized to seek, and courts should be authorized to grant, appropriate injunctive relief.

Solution: Section 203 of the Act would amend and clarify the Secretary's authority to seek and obtain injunctive relief from a federal court under Section 108(a)(2) of the Mine Act. This revision would allow this relief in cases where the mine operator is a habitual violator of health and safety standards. The bill addresses both difficulties cited above. First, it replaces the term "pattern" with the term "course of conduct," which is clearer, simpler, and more accurate in describing the kind of operator behavior that MSHA's injunctive authority is intended to correct. Second, it specifies that the kind of behavior that will support injunctive relief is not limited to violations of health or safety standards. Any time a mine operator's course of conduct presents a "continuing hazard," the Secretary would be authorized to obtain equitable relief on behalf of miners. This change would make clear that injunctive relief is a separate track that may be invoked in appropriate cases without regard to any administrative proceedings that may or may not be ongoing. The Secretary would have full use of a flexible tool, while the due process rights of mine operators would be fully protected, because the tool would only be invoked through a proceeding in U.S. District Court.

SEC. 204.—REVOCATION OF APPROVAL OF PLANS

Currently, even when MSHA finds that crucial data used to approve a mine plan is inaccurate, or that some post-approval event has significantly altered the assumptions upon which the plan was based, it does not have the authority to require an operator to modify the plan. This authority and flexibility is needed to prevent catastrophes before they occur. For example, four days prior to the roof collapse at the Crandall Canyon mine in 2007 in which six miners and three rescue workers were killed, there was a massive "bounce" (the shifting of the earth above a mine that relieves the pressure produced when a seam of coal is removed).³⁵ Although the bounce significantly altered the conditions at the mine, and may not have been properly reported, even had MSHA known about the

³⁵Mike Gorrell, "Mine Disaster: What Really Happened Inside Crandall Canyon?" *Salt Lake Tribune*, August 1, 2008.

severity of the bounce and its implications for the mine's roof control and other plans, MSHA would not have been able to require the mine to alter its plans.

When MSHA can no longer accept a provision of an approved plan, cannot approve a provision in a new plan, or cannot approve a proposed change to an approved plan, its representatives discuss the identified plan deficiency with the mine operator in an effort to obtain their agreement to voluntarily modify the plan. The bill would not eliminate these communications or other efforts to informally reach agreement on changes to mine plans. However, if a mine operator is unwilling to make modifications that MSHA finds are necessary, current case law requires MSHA to go through a burdensome process involving two formal notices of insufficiency before it can issue a citation for a violation of the Mine Act and begin to rectify the problem.

Solution: This section authorizes the Secretary to revoke mine plans and order miners withdrawn from a mine if the original plan contained inaccurate information, or there have been material changes in circumstances at the mine, and the inaccuracies or changes constitutes a health or safety hazard to miners. It also provides for a more expedient revocation process when the health and safety of miners is at risk due to a plan that is out of compliance with applicable standards or does not address current conditions in a mine. The bill does not eliminate a mine operator's right to contest MSHA's determination that a mine plan should be revoked.

SEC. 205—CHALLENGING A DECISION TO APPROVE, MODIFY, OR REVOKE A COAL OR OTHER MINE PLAN

Problem: Although case law has established the “arbitrary and capricious” standard as the basis for review of MSHA's regulations,³⁶ the Mine Act does not specify what legal standard applies to MSHA decisions to approve, modify, or revoke mine plans. There has been disagreement about what standard of review the Review Commission should apply. In reviewing MSHA's mine plan decisions, the D.C. Circuit Court of Appeals found that MSHA's decision to impose certain requirements in a ventilation plan was subject to the arbitrary and capricious standard. In *Peabody Coal Company v Federal Mine Safety and Health Review Commission*, 111 F.3d 963 (1997),³⁷ the Court upheld MSHA's decision to require ventilation during roof bolting in the mine's plan, and denied the coal company's petition to overturn MSHA's decision because it was not “arbitrary and capricious.”

Solution: H.R. 5663 codifies that the standard of review for MSHA's mine plan decisions is the “arbitrary and capricious” standard, the same standard used to review health and safety standards. This standard gives appropriate deference to MSHA's expertise while preserving mine operators' due process rights.

³⁶ See: *National Mining Association v. Mine Safety and Health Administration and Secretary of Labor*, 116 F.3d 520 (DC Cir. 1997)

³⁷ This D.C. Circuit opinion was not published, but has been included in the record for the July 13, 2010 legislative hearing.

Title III—Penalties

SEC. 301—CIVIL PENALTIES

Penalties for Failure to Improve Performance While on Pattern Status

Problem: Mine operators, whose mines are placed in pattern status because they repeatedly violate safety and health standards and place the lives of miners in jeopardy, must be given strong financial incentives to change their behavior.

Solution: H.R. 5363 requires that operators of mines in pattern status be assessed double penalties for any violations if, after 180 days in pattern status, the mine fails to improve its safety performance to meet the benchmarks established in Section 202 of this legislation.

Penalties for Retaliation Against Miners for Raising Safety Concerns or Exercising Rights under the Act

Problem: Testimony presented by five miners and a family member of a miner at the Committee's May 24, 2010, field hearing in Beckley, West Virginia highlighted the extent to which miners fear they will lose their jobs if they report unsafe conditions in their mines. This was similar to testimony given at the Committee's October 3, 2007, hearing with the families of the miners killed in the Crandall Canyon mine disaster in Utah and the Committee's Forum on Mine Safety held on February 13, 2006. Miners were extremely concerned about mine conditions, but they did not feel empowered enough to act. These concerns have been repeated by various miners, representatives of miners, and others in testimony and correspondence. The culture of ignoring and hiding problems in mines, coupled with the culture of fear driven by the threat of job loss, must be changed. To change this culture, there must be sanctions for retaliation against individuals who report unsafe conditions or exercise their rights in violation of Section 105(c) under the Mine Act.

Solution: Section 301(c) provides that the Secretary shall propose and the Commissions shall assess a civil penalty of not less than \$10,000 and not more than \$100,000 for a violation of the anti-retaliation provisions under in Section 105(c) of the Mine Act. For any subsequent violation of the anti-retaliation provisions, the minimum civil penalty shall be \$20,000 and the maximum not more than \$200,000 during any 3-year period.

SEC. 302—CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS AND AGENTS

Problem: In dealing with the liability of officers, directors, and agents, Section 110(c) of the Mine Act is not written broadly or clearly enough to encompass all types of business arrangements, and it excludes policies under which some mine operators may operate. For example, the current law refers to "corporate operators" but there are other business arrangements, such as limited liability corporations (LLCs), to which some have argued that this provision does not apply. Under the current law, company agents could knowingly institute policies or practices that result in a violation, and then shield themselves from liability by claiming that they did

not actually commit the violation. The existing provisions of section 110(c) already make company agents liable if they did not carry out the violations but knowingly authorized or ordered them.

Solution: The bill replaces the term “corporate operator” with “operator” so that directors, officers, and agents of business entities other than corporations can be found liable for violations of mandatory standards or regulations promulgated under the Mine Act. It also requires these entities to be found liable when such director, officer or agent knowingly violates or fails or refuses to comply with any order issued under the Act or any order in a final decision under the Act. The bill also adds the phrase “policy or practice” to the activities of the director, officer, or agent that could be found to be unlawful. This provision will help protect miners from unscrupulous mine directors, officers, or agents who, even though they may not directly violate a provision of the Act or a mandatory safety or health standard, set in place policies or practices at the mine that result in violations. The new, expanded version of section 110(c) embodies the same concept as the existing provisions—a concept that is crucial to ensuring that operator officials who have the authority to affect miner safety and health exercise that authority in a way that protects the health and safety of miners.

SEC. 303—CRIMINAL PENALTIES

Problem: The current criminal penalties have been insufficient to deter irresponsible mine operators who place production ahead of safety, provide tip offs about mine inspections to alter mine conditions before the inspector arrives, or retaliate against miners who raise safety concerns. Currently, section 110(d) of the Mine Act makes a first instance of a willful violation of a health and safety standard a misdemeanor, regardless of the seriousness of the violation. Because of the insignificance of this penalty, this provision is rarely prosecuted, and the minimal fine a mining company faces pales in comparison to the revenue generated each year. Effective criminal provisions should be weighted to the severity of the potential harm. The current system fails in this regard.

Solution: A new tiered system of criminal penalties for knowing violations would come into play under Section 303(a). This subsection amends Section 110(d) of the Mine Act. First, the intent requirement would change from a “willful” (which has been interpreted to remove the presumption that ignorance of the law is no excuse and in this context is redundant) to a “knowing” violation of a standard. Whether a mine operator meant to harm a miner or not and whether the mine operator knew about the criminal provision or not, if that operator knew it was violating a health or safety standard and did it anyway, the law would be violated.

Keeping with the Committee’s goal of punishing wrongdoers (and only wrongdoers) in proportion to the possibility that their actions or inactions will harm miners, the violators are punished using a multi-tiered system. If the operator knowingly exposed miners to “a significant risk of serious injury or illness or death,” then such violation would be a felony punishable by a fine of up to \$1,000,000, or 5 years imprisonment, or both. For a repeat violation of this provision, the maximum penalty is increased to \$2,000,000, or imprisonment for not more than 10 years, or both.

In addition, if the operator is found to have knowingly tampered with or disabled a required safety device which exposed miners to a significant risk of serious injury or illness or death, or if the conviction is for a violation committed after the first conviction of such operator, the penalty is up to \$2,000,000, or imprisonment for not more than 10 years, or both.

If the operator's violation of a health or safety standard or MSHA order was not so severe as to have exposed miners to "a significant risk of serious injury or illness or death" or to have related to device tampering, then the first conviction of a knowing violation would be a misdemeanor punishable by a fine of up to \$250,000, imprisonment for up to a year, or both. Subsequent violations of the same standard or order, however, would be felonies punishable by a fine of up to \$1,000,000, or imprisonment for not more than 5 years, or both.

Advance Notice of Inspections

Problem: The Committee's May 24, 2010, and July 13, 2010, hearings highlighted a problem the Committee has heard about with startling frequency: too many mines view MSHA inspections as a "catch-us-if-you-can" game. All too often, mine management instructs employees to notify the miners underground when an MSHA inspector arrives at a mine, or even before then, so that the miners can (and do) quickly hide troubling conditions, implement normally neglected safety measures, or otherwise prevent the inspector from getting a true picture of conditions at the mine. Gary Quarles, a miner who is employed at the Parker Peerless Mine operated by Massey and the father a miner killed at UBB, testified on May 24: "When an MSHA inspector comes onto a Massey mine property, the code words go out 'we've got a man on the property.' Those words are radioed from the guard gates and relayed to all working operations in the mine. The mine superintendent and foreman communicate regularly by phone, and there are signals that require the foreman who is underground to answer the phone. That is one way that the message is conveyed that an inspector is on the property. When the word goes out, all effort is made to correct any deficiencies or direct the inspector's attention away from any deficiencies."

Currently, Section 110(e) of the Mine Act prohibits advance notice of an inspection, which is punishable as a misdemeanor, with a fine of \$1,000, or imprisonment of up to 6 months, or both. The Committee understands that the existing criminal provision has been rarely, if ever, invoked.

Solution: Section 303(c) adds a new provision to Section 110 of the Mine Act to make it a felony for anyone to give another person advance notice of an MSHA inspection with the intent to impede, interfere with, or otherwise adversely affect the inspection. This applies to the person who gave notice and to anyone who caused that person to give such notice. This felony would be punishable by up to 5 years imprisonment, or a fine of \$250,000 for an individual,

or \$500,000 for an organization. This intent standard is consistent with other obstruction of justice statutes.³⁸

To help prevent anyone from unwittingly violating this law and to further support a culture of safety, this section also would require mine operators to conspicuously post notices of this new felony provision.

Problem: The culture of retaliation against workers who report safety hazards is pervasive in our most dangerous workplaces. This notion was made abundantly clear in the May 24, 2010 field hearing on the Upper Big Branch mine tragedy in which miners expressed considerable reluctance about bringing safety and health concerns to the attention of MSHA, particularly in non-union mines, because they feared retaliation.

Solution: Section 303(b) would make it a felony for anyone to knowingly retaliate (e.g., fire, demote, refuse to hire) against a person who has reported unsafe conditions or violations to appropriate federal or state government officials or law enforcement officers. Because this new section would criminalize indirect as well as direct harm to miners, a bad actor would also violate the law if such person knowingly harmed a miner's family, such as through black-listing, or other indirect interest in retaliation for a report the miner made. This new crime would be punishable by up to 10 years imprisonment and/or a fine of \$250,000 for an individual, and \$500,000 for an organization.

SEC. 304—COMMISSION REVIEW OF PENALTY ASSESSMENTS

Problem: The Review Commission does not use the same method MSHA uses (applying a standard formula prescribed in regulations) to assess penalties. As a result, in reviewing citations contested by mine operators and the associated penalties, the Review Commission often reduces the penalties proposed by the Secretary and may do so in unpredictable ways. The consequent uncertainty over appellate outcomes provides an incentive for operators to contest most every citation in the hopes of obtaining a more favorable formula for penalty assessment, regardless of the merits of the appeal itself. GAO noted in a 2007 report that, from 1996 to 2006, about 47% of the penalties for citations contested by mine operators were reduced by the Commission, attorneys from the Department of Labor's Solicitor's Office, and MSHA's Conference Litigation Representatives (CLRs).³⁹ On average, the penalties were reduced by about half. Committee staff reviewed several cases in which the Commission significantly reduced MSHA's penalties and found that the penalties were reduced from 44 percent to 75 percent. For example, in a case involving a mine operated by the Georgia Marble Company, the Commission lowered the penalties assessed from \$4,015 to \$1,600—a 60 % reduction—although the MSHA inspector determined that, for one citation, an injury was “reasonably likely” and would result in more than one fatality. In his decision, the ALJ stated that, “Under the Mine Act, the Sec-

³⁸ See: Obstruction of Justice: an Overview of Some of the Federal Statutes that Prohibit Interference with Judicial, Executive, or Legislative Activities, Congressional Research Service (December 27, 2007).

³⁹ GAO, Better Coordination and Oversight by MSHA and Other Federal Agencies Could Improve Safety for Underground Coal Miners, GAO-07-622 (2007), p. 39. Note: MSHA's data did not allow the number and amount of the penalties reduced only by the Commission to be separated from the total data on penalties.

retary’s penalty proposals are not binding on the Commission’s administrative law judges.”

Solution: Require the Commission to use the same methodology to set penalties that the Secretary uses to assess them, except in extraordinary circumstances or where MSHA has no point system or other methodology in regulation for a penalty assessment (such as special assessments). H.R. 5663 does this.

SEC. 305—DELINQUENT PAYMENTS AND PREJUDGMENT INTEREST

Problem: Mine operators currently have an incentive to contest MSHA’s citations because they are not required to pay interest on the penalties assessed until the violations have been adjudicated, and there is a 30 month delay in adjudicating cases on average. Mine operators owe over \$27 million in overdue fines to MSHA, the majority of which are owed by mine operators which are still operating the mine for which fines are overdue.⁴⁰

Solution: H.R. 5663 provides prejudgment interest on contested fines based on IRS’s interest rates. Operators who fail to pay finally-adjudicated penalties within 180 days face a withdrawal order until they pay their overdue fines or make timely payments on a payment plan.

Title IV—Worker Rights and Protections

SEC. 401—PROTECTION FROM RETALIATION

Problem: The culture of retaliation against workers who report safety hazards is pervasive in our most dangerous workplaces. This notion was made abundantly clear in the May 24, 2010 field hearing on the Upper Big Branch mine tragedy in which miners and family members of those killed in the explosion testified that the miners expressed considerable reluctance about bringing safety and health concerns to the attention of mine operators or MSHA because they feared retaliation.⁴¹ Witnesses stated that there was a constant sense of intimidation and retribution if miners raised safety concerns or questioned whether corrections were going to be made. “If you’re going to be that scared of your job [at the mine] there, you need to rethink your career, because that’s the way we do things,” was a common theme. Eddie Cook, the uncle of Adam Morgan, a novice miner who died in the explosion at Upper Big Branch, recounted his nephew’s stories about the practices that were going on at the mine, including “[y]ou don’t have the right to refuse [to do work we think is unsafe]. If you refuse, they tell you to get your bucket and go home . . . If you don’t want to work here; we’ve got people out on the street wanting your jobs. And [your supervisor tells you] if you don’t like the way we run it, you can go home.”⁴² When miners expressed safety concerns and requested transfers, management often denied these requests, and eventually they are fired. “[M]anagement would look for ways to fire us. Maybe not that day or that week, but somewhere down the

⁴⁰“Proposed Legislative Changes to Protect the Safety of All Workers and Prevent Future Disasters.” White Paper prepared by the offices of Rep. George Miller, Rep. Lynn Woolsey, Rep. Nick Rahall, Sen. Harkin, Sen. Murray, Sen. Rockefeller, June 29, 2010. Source: MSHA data.

⁴¹The Upper Big Branch Mine Tragedy: Testimony of Family Members: Hearing before the H. Comm. on Education and Labor, 111th Cong. (2010), <http://edlabor.house.gov/hearings/2010/05/the-upper-big-branch-mine-trag.shtml>.

⁴²Hearing, *supra* note 41 (testimony of Eddie Cook).

line, we'd disappear," said Stanley "Goose" Stewart, who worked at Upper Big Branch and was three hundred feet underground on his way to mine coal the day the explosion occurred.⁴³

Alice Peters, the mother-in-law of Edward "Dean" Jones who was killed in the explosion, shared the story of miners who continued to work in the mine despite knowing it was unsafe. Her son-in-law particularly feared losing his health insurance benefits if he was fired because he had a son who suffers from cystic fibrosis and requires constant medical care. According to Mrs. Peters, "[Massey] knew about his son and that Dean needed to keep his job to make sure his son could get the medical care he needed."⁴⁴ She went on to say that, "On more than one occasion, I called the mine and told them there was an emergency regarding his son that he had to come home in order to get him out of the mine because I feared for his safety."⁴⁵

Miners and relatives of those who died in the UBB explosion provided chilling evidence of how a corporate culture of producing coal over ensuring safety can lead to disaster.

Solution: If the nation's mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. If miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. The bill strengthens the anti-retaliation provisions of the Mine Act by prohibiting any person from discharging or taking adverse action against a miner, other employee, or applicant for employment because that person has (1) complained about any unsafe condition in a mine; (2) instituted any proceeding related to this Act, or testified or is about to testify in any such proceeding, or exercised any right provided by this Act; (3) testified or is about to testify to Congress or any federal or state proceeding related to safety or health in a mine, or has reported an injury or illness to an operator or agent; (4) refused to violate any provision of this Act (including a mandatory health and safety standard, a regulation, an order or a plan); or (5) such miner is the subject to a medical evaluation and potential transfer. In addition, a miner or other employee cannot be retaliated against for refusing to work if the employee has a "good-faith and reasonable belief" that performing his duties would pose a safety or health hazard to himself or any other miner or employer.⁴⁶

This section also extends the statute of limitations for filing a complaint from 60 to 180 days. The legislation clarifies the existing law which requires that within 15 days of receipt of a complaint, the Secretary is required to begin an investigation and make a determination whether or not the complaint was frivolously brought. If the Secretary finds the complaint was not frivolously brought, she shall, on an expedited basis, apply to the Review Commission for an order of immediate reinstatement of the miner. The Secretary must complete the investigation, and if she finds retaliation,

⁴³Hearing, *supra* note 41 (testimony of Stanley "Goose" Stewart).

⁴⁴Hearing, *supra* note 41 (testimony of Alice Peters).

⁴⁵Hearing, *supra* note 41 (testimony of Alice Peters).

⁴⁶The belief must be based on what a "reasonable person" would conclude confronted with the same circumstances. The miner or other employee, when practicable, is required to communicate or attempt to communicate the concern to the operator and have not received a response that allays the concern.

must immediately file a complaint with the Review Commission along with a proposed order for permanent relief. If the Secretary finds that a violation has not occurred, the miner (or applicant) has the option of filing a complaint with the Review Commission.

Under this section, the Review Commission's existing authority to order "make whole" remedies is expanded to provide for exemplary damages.

SEC. 402—PROTECTION FROM LOSS OF PAY

Problem: Under the current Mine Act, operators cited by MSHA for violations that require them to withdraw miners from the entire mine or certain sections of the mine (withdrawal orders issued under section under Sections 103, 104, 107, 108, or 110 of the Mine Act) are required to pay idled miners for the remainder of their shift after the withdrawal order is issued and for 4 hours of pay of their next scheduled shifts. However, if a mine is idled for longer than this period, miners are not paid. This provides a powerful disincentive for miners who want to report safety and health problems at their mines to MSHA from doing so because it can result in loss of pay for them and their coworkers. In addition, mine operators sometimes close mines in anticipation of receiving a withdrawal order from MSHA in order to prevent having to pay idled miners. Such actions by miner operators are not prohibited under current law, and miners idled as a result of such action have no recourse.

Solution: H.R. 5663 retains the existing provision of Section 111 of the Mine Act providing balance of shift pay for the first shift, and not more than 4 hours of pay for the second shift following a MSHA withdrawal order. However, this legislation changes existing law to require operators to pay miners who are idled their full pay for up to 60 days, provided that the miners were idled due to an order issued under Sections 104, 107 (in connection with a citation), 108, or 110. Payments shall be made regardless of the result of any review of such order. This section also authorizes payments to miners who are idled for up to 60 days when the operator closes the mine in anticipation of an MSHA withdrawal order, except in those circumstances when the operator promptly withdraws miners due to a hazard and notifies MSHA, if required, within the prescribed time period. This is intended to ensure that mine operators who try to "game the system" by keeping miners exposed to a hazard until just before MSHA issues a withdrawal order will have to pay miners who are idled. However, if a mine operator promptly withdraws miners rather than continue to expose them to a hazard, notifies MSHA as required, and MSHA subsequently issues an order, the mine operator will not be liable for paying idled miners. The section also provides an expedited proceeding and decision before the Review Commission using the same time frames provided for the review of emergency response plans. If a miner or other employee is not paid, current law provides that he can file a complaint with the Review Commission, which can order payment. This legislation authorizes reasonable attorney fees and costs to be paid to a miner who prevails in whole or in part. Further, this section authorizes the Secretary to close a mine that fails to pay its miners pursuant to this section by the next regular payroll period.

SEC. 403—UNDERGROUND COAL MINER EMPLOYMENT STANDARD FOR MINES PLACED IN PATTERN STATUS

Problem: Currently, miners are employed under an “employment-at-will” doctrine, which means that a mine operator can discharge a worker without providing any reason. Although HR 5663 provides stronger whistleblower protections for miners, even the strongest protections are not by themselves sufficient to ensure employees’ freedom to speak out on health and safety concerns. Whistleblower laws, like other non-discrimination protections, require the employee or government to prove the employer’s motive in an employment action. But proof of another’s motive is no simple matter. Often, the only available evidence is circumstantial, and the “nexus” (cause and effect connection) between an employee’s complaint to MSHA and his subsequent discharge can be easily obscured by time and subterfuge.

At the Committee’s Beckley, West Virginia, field hearing on May 24, 2010, miners expressed skepticism that whistleblower provisions alone were enough to protect them. A whistleblower is not necessarily discharged immediately. Rather, he can be marked for later retaliation.⁴⁷ Months may pass before the unscrupulous employer takes action and nexus is difficult, if not impossible, to establish. But action is taken, and the message to the targeted miner and his colleagues is unmistakable: do not raise safety concerns that could slow coal production, or identify violations that could place a mine on pattern status or extend the duration of pattern status. These concerns could take the form of identifying violations to MSHA inspectors, or reporting an accident or injury that could impact the mine’s accident rates, both of which could lead to higher penalties for mines on pattern status, or the extension of time on pattern status.

This skepticism is difficult to overcome. At best, the promise of a whistleblower statute is that of providing one’s “day in court”—an opportunity to make one’s case—however difficult, and relief in the form of complete reinstatement and back pay may not come for many months or years. In the meantime, the whistleblower is rewarded with unemployment and/or significant uncertainty while the matter is being litigated.

Since whistleblower protections constitute mere exceptions to a general employment-at-will doctrine, the law sends mixed signals to any would-be whistleblowers. On the one hand, they may not be fired for blowing the whistle. On the other hand, they may be fired for no reason whatsoever. The employment-at-will doctrine is not consistent with a policy of encouraging employees to actively press for health and safety compliance, especially when an employer is focused singularly on production in a potentially ultra hazardous workplace.

The most potentially deadly workplaces in the mining industry are underground coal and other underground gassy mines. Explosive dust or gas is prevalent in these mines. Possible ignition sources are plentiful. Casualties can be significant. Here, more than anywhere else, workers need additional rights not only to protect, but to encourage, whistleblowing.

⁴⁷Hearing, *supra* note 41.

Solution: In the most dangerous mines, where whistleblowing and the right to raise safety concerns up the management chain without fear of retaliation is most critical to saving workers' lives, miners should be given the highest level of protection. In these workplaces, the employment-at-will doctrine should not apply. The burden of proof should not be placed on the discharged employee to prove the employer's internal motivation for the discharge or any constructive discharge. Rather, the burden should be shifted to the party which knows its own motivation. The employer should prove that it had just cause—a legitimate business reason—to discharge the employee. By providing this added protection, the law will help assure skeptical miners that they have some modicum of meaningful, enforceable employment rights months or even years after blowing the whistle.

In the new safety regime for these most dangerous mines, H.R. 5663 would provide just-cause employment protection for miners when a mine enters pattern status and for 3 years thereafter. Mines in pattern status have proved themselves the most in need of watchdogs. Miners are the “eyes and ears” of safety enforcement, since MSHA cannot be in the mines at all times. To help MSHA evaluate whether a new culture of safety has truly taken at a mine in pattern status, miners should be given the necessary legal rights to freely blow the whistle and inform the enforcement agency of any ongoing problems. Since an employer's retaliation may lag behind the whistleblower's action to avoid the appearance of impropriety, the period of just-cause protection should be long enough to account for such lags.

The bill's “Employment Standard for Underground Coal Miners” is modeled after a state law, the Montana Wrongful Discharge Act of 1987.⁴⁸ For nearly quarter of a century, this state statute has provided workers in Montana with just cause protection. This law has had no impact on Montana's business climate. A 2008 study released by the American Constitution Society found that, since the law went into effect, Montana has seen no discernible impact on its employment rates.⁴⁹ Jobs have grown there at rates similar to those in neighboring states which have retained employment-at-will.

Title V—Modernizing Health and Safety Standards

SEC. 501—PRE-SHIFT REVIEW OF MINE CONDITIONS

Problem: The Coal Mine Safety and Health Act of 1969 and the Mine Act of 1977 required pre-shift examinations of areas of mines where miners were expected to work or travel to be conducted within 3 hours of the beginning of each shift. Violations that were discovered were to be written in mine records and warning signs placed in the area of the violations. Under the 1969 law, this applied to any “condition which constitutes a violation of a mandatory health or safety standard” or “any condition which is hazardous” to workers. In 1992, the first Bush administration weakened MSHA regulations, requiring mine safety checks to look for violations only if they posed an immediate hazard to miners. In testimony before

⁴⁸ Mont. Code 39–2–904.

⁴⁹ Barry D. Roseman, Just Cause in Montana: Did the Big Sky Fall? Issue Brief, American Constitution Society (September 2, 2008).

the Senate in April 2010, the Assistant Secretary of Labor for Mine Safety and Health stated he plans to issue a new rule reinstating this requirement in order to help prevent hazardous conditions that can threaten miners.⁵⁰ The Committee, however, is concerned this important requirement remains subject to weakening, administration by administration, thus unnecessarily jeopardizing miners' health and safety.

Solution: The bill codifies the requirement for underground coal mine operators to implement communication programs that ensure that, prior to beginning their work, miners are told about any violations, hazardous conditions and the general conditions of sections of the mine where miners are expected to work or travel.

SEC. 502—ROCK DUST STANDARDS

Problem: Currently, underground mines are only required to meet a standard of 80% total incombustible content (the amount of rock dust that needs to be mixed with coal dust in order to prevent explosions) for the return entries of the mine. For intakes and neutral areas of the mine, mines must meet a standard of only 65%. The 65% standard was based on research conducted in the 1920s. With the advent of modern mining machinery, coal dust is much finer today and presents a greater explosive risk. NIOSH has conducted experiments on coal dust from every region of the country and recommended that the law be changed to require 80% total incombustible content.⁵¹ In addition, direct reading monitors that could assess total incombustible content levels of dust in underground mines and provide real time results may soon be commercially available.⁵² Currently, samples have to be sent to a lab and it can take 2 weeks to obtain the results.

Solution: H.R. 5663 increases the standard for the amount of rock dust that needs to be mixed with coal dust in all working areas of underground bituminous coal mines in order to prevent explosions from 65% to 80% in non-return entries. It also requires operators to take accurate samples of dust in active working areas of mines to ensure that dust is kept below explosive levels. And, once the Secretary of Health and Human Services (HHS) has certified that direct reading monitors are commercially available, and MSHA has approved them for use in underground coal mines, sampling will have to be done using direct reading monitors. The Secretaries of Labor and HHS must submit a report to the House and Senate labor committees within 2 years on whether direct reading devices are sufficiently reliable and accurate to be used for enforcement of the rock dust standard. Furthermore, measurements taken by operators or MSHA using the direct reading devices cannot be used in enforcement actions under this Act, until after a finding has been made that such direct reading devices are sufficiently reliable and accurate to be used for enforcement, and a final rule is promulgated setting forth methods for its use.

⁵⁰ Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces before the S. Comm. on Health, Education, Labor and Pensions, 111th Cong. (2010), (testimony of Joseph A. Main).

⁵¹ Cashdollar, Sapko, et al., National Institute for Occupational Safety and Health, Recommendations for a New Rock Dusting Standard to Prevent Coal Dust Explosions in Intake Airways, Report of Investigations 9679 (May 2010)

⁵² Sapko (NIOSH) and Verakis (MSHA), Technical Development of the Coal Dust Explosibility Meter.

SEC. 503—ATMOSPHERIC MONITORING SYSTEMS

Problem: Explosive-resistant and other redundant atmospheric monitoring systems inside mines would improve upon current technology in providing real-time data about atmospheric conditions to mine operators, and would provide a valuable tool for monitoring mine gases to prevent catastrophes like the explosion at Upper Big Branch. Atmospheric monitoring would also provide invaluable information about atmospheric conditions inside a mine to rescue personnel on the surface in a situation where time is of the essence and information is critical in making life-or-death decisions.

Solution: A technical assessment must be conducted and recommendations issued by NIOSH's Office of Mine Safety and Health Research regarding (1) how to ensure that atmospheric monitoring systems (AMS) are utilized in the underground coal mining industry to maximize miners' health and safety; (2) the implementation of redundant systems, such as bundle tubing systems, that can continuously monitor the mine atmosphere following fires, explosions, entrapments, and inundations; and (3) the availability of other technologies to conduct continuous atmospheric monitoring. The technical assessment needs to be developed in consultation with operators, labor representatives, vendors, state mine safety agencies and other experts. Following receipt of these recommendations, the Secretary must promulgate regulations requiring underground coal mine operators to install AMS systems consistent with the NIOSH recommendations that protect miners; provide real-time information; and can, to the maximum extent practicable, withstand explosions and fires.

SEC. 505—REFRESHER TRAINING ON MINER RIGHTS AND RESPONSIBILITIES

Problem: In passing the Mine Act, Congress realized that miners play a crucial role in maintaining a safe and healthy workplace and enforcement of the Act. Because miners know the day-to-day work conditions of the mines as well as or better than anyone, and they are in a unique position to monitor workplace conditions when inspectors are absent. However, MSHA only requires statutory rights training for new miners. This obviously presents a problem because, even if new miners received the most dynamic statutory rights training, such knowledge fades over time. As noted in testimony by an attorney from the Appalachian Law Center before a Senate Committee in April 2010, a large number of miners do not have a thorough understanding of their numerous statutory rights and as a consequence they are unable to exercise such rights.⁵³ Many miners do not know that they can, under the law, voice concerns about workplace health and safety, refuse to perform unsafe work, review and give input to many aspects of an operator's plans for mining, or speak with MSHA inspectors and investigators without retaliation. Many miners also do not realize that they may designate a representative to perform numerous functions under the Mine Act, and that such a representative need not necessarily be affiliated with a labor union. The method in which miners receive this training may also pose a problem. Operators and management

⁵³Hearing, supra note 50 (testimony of Wes Addington).

personnel should not be permitted to provide any of the required training because they have a strong incentive to downplay the expansiveness and importance of these rights, the key role which Congress envisioned miners playing in regulation of the workplace, and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing.

Solution: Section 505, which amends Section 115(a)(3) of the Mine Act, adds an hour of miners' rights training to the yearly refresher training already required by the Mine Act. In addition, miners must receive this training only from MSHA or MSHA approved trainers who are independent of mine operators.

SEC. 506—AUTHORITY TO MANDATE ADDITIONAL TRAINING

Problem: Mine operators that have experienced accidents or have elevated rates of injuries, citations (particularly S&S) or withdrawal orders may need to provide personnel with additional training to help improve safety performance. Similarly, after accident investigations, MSHA often issues alerts to the industry regarding compliance and best practices to prevent similar accidents. This may require added training.

Solution: Authorize MSHA to issue an order requiring that an operator provide additional training if the Secretary finds that additional training would benefit the health and safety of miners at the mine where the mine has experienced accident and injury rates, citations for violations of the Act, citations for significant and substantial violations, or withdrawal orders at a rate above the average for mines of similar size and type. H.R. 5663 does this.

SEC. 507—CERTIFICATION OF PERSONNEL

Problem: The Mine Act does not require MSHA to certify most miners or ensure that states certify mine personnel, other than miners who perform certain tasks specified in the Mine Act, such as miners who perform electrical work, and miners who operate or maintain hoisting and diesel powered equipment. Although most states have certification requirements, they vary substantially. Some states do not require personnel to, once they are certified, update their certifications. The positions certified by the states and the reciprocity provisions that allow miners certified in one state to work in another state also differ substantially. Several states do not have a process for revoking miners' certifications once they have been issued. As a result, the safety and health of miners may be jeopardized by working with personnel who have not been properly trained. Finally, there is no central data base of individuals whose certifications have been revoked. This could allow state that does not have reciprocity to unwittingly provide a certification to individual who had his certification revoked for improper conduct.

Solution: The bill requires MSHA to establish minimum requirements for the certification of miners, including periodic recertification and a process for revoking miners' certifications, and ensure that all state certification programs meet these minimum requirements. If a state does not meet the minimum standards or cover certain mine classifications (e.g., mine superintendants), MSHA's certification processes will apply in that state. In establishing standards, the Secretary must consult with the states that have

miner certification programs to assure effective coordination with existing state standards and requirements for certification. Further, the standards shall provide that a state's program of certification satisfies the standard set forth by the Secretary if it is no less stringent than that set forth under MSHA's standards. The Secretary is also authorized to assess and collect a fee from operators to cover the costs of testing and certifying miners and is required MSHA to establish a database of miners whose certification has been revoked, either by MSHA or a state. This section requires MSHA to set up a data base of individuals whose certifications have been revoked and to provide state certification agencies with access to that information. Section 104 (c) of this legislation (Injury and Illness Reporting) establishes that knowing falsification of accident, illness and injury reports to MSHA is grounds for revocation of a certification.

Title VI—Additional Mine Safety Provisions

SEC. 601—DEFINITIONS

Problem: Currently, entities that do not directly operate the mine but control managerial decisions for the mine may not be subject to the civil and criminal enforcement provisions of the Mine Act.

Solution: H.R. 5663 expands the definition of the term "operator" to include those who directly or indirectly "control" management decisions which impact health and safety at a mine.

SEC. 602—ASSISTANCE TO STATES

Problem: Authorized funding levels for funding to state mine safety agencies by MSHA has remained static at \$10 million per year since 1971. States will need assistance in upgrading their mine certification programs.

Solution: Increase authorization for funding to \$20 million per year, and authorize MSHA to provide grants to states to improve their certification programs to comply with the new certification requirements.

SEC. 603—BLACK LUNG MEDICAL REPORTS

Problem: When a coal operator requires a miner who has filed a claim for black lung benefits to submit to a medical exam, there is no requirement for the operator to provide the doctor's medical reports to the claimant, unless the claimant specifically requests those documents. Regulations governing the black lung program state, at 29 CFR 18.19(c)(4), that "A report of examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure." Rule 35(b) goes on to say that "The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report. . ." However, the Committee is aware of cases where *pro se* claimants did not know of their right to request a copy of their medical examination records. In these cases, the claimants only received partial information, which excluded relevant medical findings that supported the merits of their claims and misled the claimants. Thus, it is imperative that claimants receive full and complete medical reports without having to request them or make a discovery request.

Solution: If a miner is required to submit to a medical exam, he should receive a complete copy of the results of that exam in a timely manner without having to ask for one or make a discovery request. H.R. 5633 adds this requirement to the Mine Act.

Title VII—Amendments to the Occupational Safety and Health Act

Introduction

In 1970, Congress enacted the Occupational Safety and Health Act (OSH Act) and declared its purpose “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”⁵⁴ For the last 40 years, this legislative milestone has helped saved the lives of more than 410,000 workers, and the number of yearly workplace fatalities has dropped from 13,800 in 1970 to 5,214 in 2008.⁵⁵ However, with an average of 14 workers a day being killed in workplace accidents, workers are still at risk.⁵⁶ These numbers do not include the 50,000 to 60,000 deaths that occur from occupational diseases each year.⁵⁷

This continuing risk to workers is underscored by a string of multi-facility workplace accidents in the first months of 2010 that killed 52 workers. In February, 6 workers were killed at the Kleen Energy Plant in Middletown, Connecticut in a natural gas explosion. On April 2, a blast at the Tesoro Oil Refinery in Anacortes, Washington caused the deaths of 7 workers who were engulfed in a “firewall.” On April 5, 29 miners were killed in a massive explosion at the Upper Big Branch mine in Montcoal, Virginia, and on April 20, 11 workers were lost following an explosion on the Transocean Deepwater Horizon Drilling rig leased by BP in the Gulf of Mexico.

Workplace injury and illness rates among private sector employees have also declined from 10.9 per 100 workers in 1972 to 3.9 per 100 workers in 2008.⁵⁸ However, a minimum of 4.6 million workers (3.7 million private sector and 938,000 state and local government workers) a year, or about 13,000 a day, are injured or become ill on the job.⁵⁹ Sadly, these are only the reported cases, and according to several studies performed in recent years, actual injuries and illnesses are far greater.⁶⁰ One such study published in 2004 found that the occupational injury and illness statistics published by the U.S. Bureau of Labor Statistics (BLS) are underestimated by as much as 69%.⁶¹ In addition, the AFL–CIO in its annual *Death on the Job: The Toll of Neglect* report estimates that in 2008, there were actually 11.1 million workplace injuries and illnesses in private industries.⁶²

In the 111th Congress, Congress has paid particular attention to the underreporting of illnesses and injuries, and in June 2008, this Committee held an oversight hearing to explore the causes and im-

⁵⁴ 29 U.S.C. 651(b).

⁵⁵ AFL–CIO, *Death on the Job: The Toll of Neglect*, 6, 34 (19th ed. 2010). These fatality statistics are based on data from the National Safety Council Accident Facts (1971–1991) and from the Bureau of Labor Statistics, Census of Fatal Occupational Injuries (1992–2008).

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.* at 47.

⁵⁹ *Id.* at 8.

⁶⁰ *Id.* at 10–11.

⁶¹ J. Paul Leigh et al., An Estimate of the U.S. Government’s Undercount of Nonfatal Occupational Injuries, 46 *J. Occupational & Envtl. Med.* 10 (January 2004).

⁶² AFL–CIO, *supra* note 55 at 59.

fact of underreporting.⁶³ One of the witnesses—Dr. John Ruser, the Assistant Commissioner for Safety, Health and Working Conditions at the Bureau of Labor Statistics—acknowledged that the employer survey BLS uses to determine annual illnesses and injuries has limitations and does not capture the full extent of illnesses and injuries.⁶⁴ The survey does not count long latent occupational illnesses like cancer; workers outside of the survey scope, including the self-employed, workers in small farms and households; and illnesses and injuries that are not reported.⁶⁵

In conjunction with the hearing, the Committee released a report entitled *Hidden Tragedy: The Underreporting of Illnesses and Injuries*⁶⁶ outlining the enormity of the problem. In addition, in October 2009, the Government Accountability Office (GAO) released a report substantiating that underreporting of illnesses and injuries exists and outlining the disincentives to reporting.⁶⁷ It found that employees may not report an injury or illness because they fear losing their jobs or jeopardizing rewards based on having low injury and illness rates. On the employer side, there is underreporting to avoid workers' compensation costs or in order to win contract bids. Through a survey of occupational health professionals, including physicians, GAO discovered that many workers were under significant pressure not to report illnesses and injuries. More than one-third of the health professionals surveyed had been asked by employers or workers not to provide necessary medical treatment so their injuries would not be reported.⁶⁸

Experts say that the overwhelming majority of these fatalities and on-the-job injuries and illnesses, which are tragedies for workers and to their families, are preventable. They also impose enormous financial burdens on employers. In 2007, employers paid over \$85 billion in direct workers' compensation costs.⁶⁹ However, these direct costs would have been even higher if all of these workers with injuries requiring medical care or lost work time actually sought these benefits.⁷⁰

Data from Liberty Mutual's Workplace Safety Index indicate that employers pay between \$156 and \$312 billion in both direct and indirect costs when workers are injured. Direct costs include medical and loss wage payments; indirect costs include overtime, training and loss of productivity. These numbers are understated as well because they are based on BLS data (which relies on reported injuries) and include only the most serious injuries.⁷¹

⁶³ *Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses: Hearing Before the H. Comm. on Education and Labor, 110th Cong. (2008)*, <http://edlabor.house.gov/hearings/full-committee>. The Senate Labor, HHS Appropriations Subcommittee also reviewed this issue and included funding for this issue in its FY09 bill.

⁶⁴ Hearing, *supra* note 63 (testimony of John Ruser).

⁶⁵ *Id.*

⁶⁶ Staff of H. Comm. on Education and Labor, *Report on Underreporting of Workplace Injuries and Illnesses*, 110th Congress, (June 2008). <http://edlabor.house.gov/publications/20080619WorkplaceInjuriesReport.pdf>.

⁶⁷ GAO, *Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data* GAO-10-10, (2009). <http://www.gao.gov/new.items/d1010.pdf>.

⁶⁸ *Id.*

⁶⁹ National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage and Costs*, 2007, 2, 27 (2010).

⁷⁰ *Id.* at 31-33. Studies have found that only 52 to 60% of injured and ill workers receive workers' compensation benefits.

⁷¹ AFL-CIO, *supra* note 55, at 13. In addition, for 2008, the National Safety Council reported that the economic cost of deaths and disabling injuries was \$183 billion. National Safety Council

OSHA is responsible for protecting the safety and health of over 100 million workers at 7.5 million private sector workplaces and 200,000 construction sites. The agency also covers 2.8 million Federal employees.⁷² Nationally, there are approximately 2,200 Federal and State inspectors,⁷³ one for every 60,000 workers.⁷⁴

With a \$559 million budget in FY 2010, (a \$46 million increase compared with FY 2009), OSHA expects to inspect 41,700 worksites in 2010. With this level of resources, federal OSHA only has the capacity to inspect each American workplace in its jurisdiction once every 137 years.⁷⁵

According to the AFL–CIO, in 7 states, (Arkansas, Delaware, Florida, Georgia, Louisiana, South Dakota and Texas), it would take 150 or more years for federal OSHA to inspect each worksite. And in 18 states, it would take between 100 and 149 years to inspect each site.⁷⁶

Inspections are more frequent in the 27 states that have their own state plans, but are still insufficient.⁷⁷ State inspectors are expected to inspect 63,800, an increase of 2,800.

Due to the large number of workplace it covers and constraints on the number of inspectors, OSHA is limited in its ability to significantly reduce fatalities, injuries and illnesses. Updated legal tools are necessary to deal with the safety and health problems confronting American workers.

SEC. 701—ENHANCED PROTECTIONS FROM RETALIATION

Problem: Since OSHA’s ability to reach every workplace is severely restricted, it is critical that workers be its “eyes and ears” by reporting unsafe conditions, illnesses and injuries and other violations of the OSH Act to their employers and OSHA. However, providing healthy and safe workplaces depends on the willingness of workers to come forward, and if they are afraid they will lose their jobs, they are much less likely to do so.⁷⁸

When the OSH Act was originally passed in 1970, Congress recognized that workers must be protected from retaliation and created section 660(c) (commonly known as 11(c)) for that purpose. It provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

Protected activity includes filing a complaint with OSHA or another agency relating to workplace safety and health; raising work-

cil, Summary from Injury Facts (2010 ed.), http://www.nsc.org/news_resources/injury_and_death_statistics/Pages/InjuryDeathStatistics.aspx.

⁷² U.S. Department of Labor, FY 2011 Budget in Brief 58, <http://www.dol.gov/dol/budget/2011/PDF/bib.pdf>

⁷³ In FY 2009, there were 1,300 state inspectors and 885 federal inspectors. See AFL–CIO, *supra* note 2, at 13.

⁷⁴ Hearing, *supra* note 2 (testimony of David Michaels).

⁷⁵ AFL–CIO, *supra* note 55, at 13.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Hearing, *supra*, note 2 (testimony of Lynn Rhinehart).

place safety or health concerns to an employer; participating in an OSHA inspection; filing a notice of contest with respect to abatement of safety or health hazards; participating in a judicial proceeding challenging a safety and health standard; and, in some cases, refusing to work in a unsafe and unhealthy workplace.⁷⁹

Protections under 11(c) apply to all forms of retaliation, including reprimands, suspension, pay changes, discharges, or refusals to hire.⁸⁰ While successful complainants are entitled to “all appropriate relief,” including reinstatement, back pay, and exemplary or punitive damages—sometimes interpreted to include double back pay—⁸¹ the OSH Act does not provide for preliminary relief, including preliminary reinstatement, pending the final disposition of a case.

The Section 11 (c) program is administered by OSHA’s Whistleblower Protection Program (WPP), which also has the responsibility for investigating complaints under 17 other federal whistleblower statutes.⁸² Section 11(c) whistleblower cases account for a majority of the complaints filed under the WPP program, and in 2009, 1,280, or 59%, out of the 2,161 cases filed were 11(c) cases.

Section 11(c) dates back to the original enactment of the OSH Act in 1970 and is the oldest of the whistleblower statutes administered by WPP. It lacks the protections afforded to whistleblowers under modern whistleblower laws enacted since 1970.⁸³ In addition, 11(c) imposes numerous hurdles that result in meritorious claims being unfairly dismissed. For example, unlike such laws as the Federal Railroad Safety Act and the Consumer Product Safety Improvement Act, where complainants have up to 180 days, 11(c) complainants have just 30 days from the day of the discrimination to file a complaint. Deputy Assistant Secretary for OSHA Jordan Barab, testifying before the Subcommittee on Workforce Protec-

⁷⁹Occupational Safety and Health Law 590–95 (Randy Rabinowitz ed., 2nd ed., 2002). With regard to the refusal to work, *see also* 29 C.F.R. 1977.12(b)(2), which provides that: “If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.”

⁸⁰*Id.* at 591–592.

⁸¹*Id.* at 600–601. Also *see: Reich v Cambridgeport Air Systems*, 26 F.3d 1187 (1st Cir.1994), which found that the OSHA Act’s provision for “all appropriate relief” allows for the award of exemplary damages.

⁸²These statutes include: Surface Transportation Assistance Act, 49 U.S.C. 31105; Asbestos Hazard Emergency Response Act, 15 U.S.C. 2651; International Safe Container Act, 46 App. U.S.C. 1506; Safe Drinking Water Act, 42 U.S.C. 300(j)–9(i); Federal Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9610; Energy Reorganization Act, 42 U.S.C. 5851; Wendell Ford Aviation Investment and Reform Act (AIR21), 49 U.S.C. 42121; Corporate Criminal and Fraud Accountability Act (SOX), 18 U.S.C. 1514a; Pipeline Safety Improvement Act, 42 U.S.C. 60129; Federal Rail Safety Act, 49 U.S.C. 20109; National Transit Systems Security Act, 6 U.S.C.1142; Consumer Product Safety Improvement Act, 15 U.S.C. 2087; and Patient Protection and Affordable Care Act, PL 111–148.

⁸³Whistleblower and Victim’s Rights Provisions of H.R. 2067, the Protecting America’s Workers Act: Hearing before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor, 111th Cong. (2010) (testimony of Jordan Barab). He testified: “Section 11(c) was innovative and forward looking in 1970, but 40 years later it is clearly antiquated and in dire need of substantial improvement. . . . There is no reason that workers speaking up about threats to their safety and health should enjoy less protection than workers speaking up about securities fraud or transportation hazards.” *See also*, GAO, Workplace Safety and Health: Enhancing OSHA’s Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data, *supra* note 67.

tions on April 28, 2010, described a textile worker who was fired for reporting to his employer that he had become ill from smoke exposure during the production process. OSHA dismissed his case because he filed his claim 62 days after being terminated.⁸⁴ Many workers do not learn that the protected activity motivated the personnel action until much later than the 30 day filing period. Further, they often do not learn of their legal rights until after the filing deadline has expired.

Moreover, unlike many other whistleblower statutes, claimants under 11(c) have a minimal review process and lack any right to a hearing before an impartial body. Within 90 days after a complaint is filed, the Secretary of Labor is obliged to “notify the complainant of his determination.” According to OSHA’s Whistleblower Investigations Manual,⁸⁵ an OSHA regional office is responsible for conducting the investigation.⁸⁶ Each OSHA Regional Administrator (RA) has the authority to make determinations and approve settlement agreements.⁸⁷ While 11(c) provides that this determination must be made within 90 days, OSHA usually takes longer, and in 2009, averaged 151 days.⁸⁸ If an RA finds that a case has “merit” and cannot settle it between the parties, it refers it to the Solicitor of Labor (SOL). In 2009, RAs referred 2% or 24 cases to SOL.⁸⁹

Even fewer cases referred to the SOL are actually litigated. Between October 1, 1995, and October 1, 2009, less than 7% of the referred merit cases were filed in court. The specific reasons for this vary from case to case, but given the demands on the SOL, it is clear that it is interested in taking only those cases that have a high likelihood of success. In addition, because the prosecutor bears a high a burden of proof in 11(c) cases,⁹⁰ the SOL is reluctant to litigate them.

⁸⁴Hearing, *supra* note 83 (testimony of Jordan Barab).

⁸⁵Occupational Safety and Health Agency, Whistleblower Investigations Manual, Directive No. DIS0-0.9 (August 22, 2003), http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf.

⁸⁶Section 11(c) is not ceded to states under Section 18 of the OSH Act. Complaints filed in states in which federal OSHA enforces the OSH Act are investigated by federal OSHA; those filed in state-plan states are investigated by the state. Even though federal OSHA has concurrent jurisdiction with state plans, the policy in federal OSHA when it receives an 11(c) complaint involving an employer in a state plan state, is to refer such complaint back to the state.

⁸⁷If the RA finds that a case has “merit,” it is referred to the Department of Labor’s Office of the Solicitor (SOL). If the RA finds that the case has no merit, the only recourse the complainant has is to appeal the matter to OSHA headquarters for an informal review. Attorneys from the SOL and OSHA then review the case and decide whether to return it to the RA for additional investigation, recommend that the RA refer the case for litigation, or deny the appeal. Such decisions, including a decision to deny an appeal, are final and cannot be reviewed by a court.

⁸⁸In addition, a January 2009 report by the U.S. Government Accountability Office found that OSHA’s program lacks internal controls, including conducting independent audits of the program to ensure that the various Regional Administrators consistently apply its policies and procedures. See GAO, Workplace Safety and Health: Enhancing OSHA’s Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data, *supra* note 67.

⁸⁹In 2009, federal OSHA dismissed 60% (729) of 1,205 cases it completed that year. Sixteen percent (188 cases) were withdrawn, 22% (264 cases) were settled, and 2% (24 cases) were found to have merit. Of the 999 cases complete by state-plan states that same year, 66% (662 cases) were dismissed, 15% (15 cases) were withdrawn, 14% (136 cases) were settled, and 5% (50) were found to have merit.

⁹⁰In 11(c) cases, the prosecutor must establish by a preponderance of the evidence that: (1) the complainant engaged in a protected activity; (2) the employer had knowledge of the protected activity at the time the discriminatory action took place; and (3) the discriminatory activity was taken because of the employee’s protected activity. Oftentimes, the employer will offer a non-discriminatory reason for its adverse action. To prove that articulated reason is not the real reason for the action, the burden shifts back to the prosecutor to show that the reason given is merely a pretext. See Rabinowitz, *supra* at note 59, citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361 (8th Cir. 1994).

The SOL has sole discretion whether or not to litigate a case, and it cannot be compelled by a court to prosecute a merit case.⁹¹ Under the OSH Act, workers with meritorious claims have no right to file their own private actions in court or to seek review of the SOL's decision not to pursue a case in court.

The case of Neal Jorgensen, an 11(c) whistleblower, who testified before the Workforce Protections Subcommittee on April 28, 2010, illustrates the extreme limitations of 11(c). Mr. Jorgensen worked as a laborer for Plastic Industries in Preston, Idaho from October 7, 2003 to April 27, 2004. His employer is engaged in plastic fabrication, extrusion and recycling, and Mr. Jorgensen worked in the plastic recycling unit, where he cleaned plastic and baled plastic and cardboard for recycling. During his employ, Mr. Jorgensen became concerned about safety at the plant. He worked with balers that were not up to code and band saws without machine guards.

On April 19, 2004, Mr. Jorgensen filed a complaint with OSHA's Boise Area office. The next day OSHA conducted an on-site visit and cited the company for two serious violations (a bandsaw had no machine guard and a baler's safety feature had been overridden) and five other than serious violations. OSHA initially assessed a fine against the company of \$2,550, which was later reduced to \$1,500. Seven days later on April 27, 2004, the company terminated Mr. Jorgensen alleging that he was a poor performer.

Mr. Jorgensen filed an 11(c) complaint within the 30 day statute of limitations. The case was investigated, and the investigator determined that the employer's stated reason for firing him was a pretext, and that he was actually fired for filing the complaint with OSHA. The employer refused to settle, and on December 4, 2004, the investigator referred the case to SOL for prosecution. In a memorandum dated March 18, 2005, the SOL declined the case stating:

Given the facts of this case, we believe we have an approximate 25% chance of success. There are two U.S. District Court judges in Idaho, one of whom is routinely well disposed towards the government's cases, and the other who can go either way. These circumstances compel us to recommend that this matter not go forward with litigation.

Under 11(c) Mr. Jorgensen had no ability to seek judicial review of the Solicitor's decision and was left without recourse to pursue the case on his own. He had found a new job but was unable to recover his lost wages of nearly \$3,000. As he testified to the Subcommittee:

I thought I did the right thing, but the system did not work for me. The OSHA law did not provide the protections I needed and the only lesson the owner of the company learned is that he can treat his employees any way he likes, and then lie about it, and nothing will happen to him. Nothing. Would I recommend that someone file a whistleblower complaint with OSHA? Absolutely not, the way the law is written.⁹²

⁹¹See *Roger Wood v. Department of Labor and Elaine Chao*, 275 F.3d 107 (D.C. Cir. 2001).

⁹²Hearing, supra note 83 (testimony of Neal Jorgensen).

OSHA Deputy Assistant Secretary Jordan Barab testified before the Committee that Mr. Jorgensen's case of the Department opting not to pursue a meritorious claim "is not an isolated case. There are many, many cases of those."⁹³ According to Mr. Barab: "We're operating in a dysfunctional system. It just doesn't work."

As these cases point out, section 11(c)'s whistleblower provisions, where workers have no ultimate private right of action, are inadequate to protect workers from retaliation, and they provide workers with little confidence to come forward to file complaints about health and safety. There is near universal agreement among workplace safety and health experts that 11(c) is seriously deficient.⁹⁴

Some state courts have found that Section 11(c)'s protections are inadequate. For example, in *Flenker v. Willamette Industries*,⁹⁵ the Kansas Supreme Court found that Section 11(c) did not preclude a complainant from pursuing a state claim for common law discharge under Kansas' public policy exception to the at-will employee doctrine. The court stated:

Section 11(c) does not provide an adequate remedy for the following reasons: (1) remedy under this section is only applicable if the Secretary [of Labor] so elects; (2) pursuit of such remedy must be made within 30 days; and (3) this section does not allow for pursuit of a private claim if the Secretary declines to proceed (unlike other federal whistleblower laws such as the Energy Reorganization Act).⁹⁶

Section 11(c) currently does not provide for preliminary reinstatement, and employees, who may wait years for OSHA to determine whether their case has merit, can suffer severe financial hardship. Public policy to encourage workers to raise safety and health concerns to their employers or the government, should not require these workers to have to bear the burden of illegal employer conduct when their retaliation claim is deemed by the Labor Department to have merit. In contrast to the OSH Act, the Mine Act authorizes the Review Commission to order temporary reinstatement where a miner's claim has been found not to be frivolous. David Michaels, the Assistant Secretary for OSHA, was asked by Representative Kildee at the Committee's legislative hearing on July 13, 2010, on H.R. 5663 what elements in the legislation would help OSHA leverage its limited resources. Along with penalties, Dr. Michaels cited the whistleblower protections in the bill as very important:

Workers are the eyes and ears of OSHA. They have more on the line in terms of safety than any of us. They are the ones whose arms and lungs are in danger, so they have to feel free to raise issues of safety. And if they don't have adequate whistleblower protection, and frankly, under the current OSHA [they don't], then they can't raise problems without the fear of losing their jobs, and they

⁹³ *Id.* (testimony of Jordan Barab).

⁹⁴ Hearing, *supra* note 83 (testimony of Lynn Rhinehart).

⁹⁵ 967 P. 2d 295 (1998).

⁹⁶ See *Kulch v. Structural Fibers, Inc.*, 667 N.E. 2d 308 (1997), where in a dissent in a case before the Ohio Supreme Court Justice Cook made it clear in dictum that 11(c) provided an insufficient remedy for a whistleblower, and *Shawcross v. Pyro Products Inc.*, 916 S.W. 342 (1995), where a court found that the 11(c) provision of OSHA did not provide an adequate remedy.

can't call OSHA without fear of losing their jobs. So that alone will have a great impact.⁹⁷

Solution: Section 701 expands the scope of statutorily protected activities by covering an employee's refusal to work when he reasonably believes that performing such duties would result in a serious injury to or impairment of health to himself or other employees. The scope of protected activity also covers reporting of illnesses, injuries or unsafe conditions to employers, and 701 provides for this, essentially codifying regulations promulgated by OSHA.⁹⁸ Section 701 provides that an employee who testifies before Congress in a matter related to safety and health, or who refuses to violate any provision of the OSHA Act, is protected from discrimination or retaliation under Section 11(c).

Section 701 extends the statute of limitations for filing a complaint of discrimination from 30 days to 180 days—the same statute of limitations applicable to other modern whistleblower laws such as the Consumer Product Safety Improvement Act.

Section 701 requires the Secretary of Labor to investigate all 11(c) cases if it finds that the complaint alleges a prima facie case. It gives the Secretary the authority to issue subpoenas in connection with the investigation, and it places time limits on the Secretary's investigation of charges of discrimination by requiring that her initial determination about whether there is reasonable cause to believe that a violation has occurred be made within 90 days after the filing of a complaint. If the Secretary issues a decision in favor of the complainant, she must issue an order, which includes preliminary reinstatement or other appropriate relief, including compensatory damages, attorney's fees, and as appropriate, exemplary damages.

Section 701 sets out an administrative procedure with the opportunity for a hearing on the record, and review by a review board. Within 30 days of the Secretary's determination to grant or deny relief, or to dismiss a case without investigation (or within 120 days if the Secretary fails to issue a decision), a complainant may request a *de novo* hearing on the record before an administrative law judge (ALJ). The ALJ, who is empowered to issue subpoenas in order to conduct a hearing, must issue its decision (along with an order and any appropriate relief) within 90 days. A complainant or a respondent then has 30 days from the ALJ's decision to file an appeal with an administrative review board designated by the Secretary to review the case to determine if the ALJ's factual findings are supported by substantial evidence and whether its order was made in accordance with the law. This decision is required to be issued within 90 days after the review board's receipt of the appeal and may be reviewed by the Court of Appeals. If either the ALJ or review board fails to make its determination in a timely manner, then the complainant has the right to file for a *de novo* proceeding on his case in federal district court. Section 701 permits an employee, whose employer is located in a state-plan state, to file a complaint—at his option—with either the Secretary or a state plan administrator; however, the Secretary may not refer a complaint filed with federal OSHA back to the state plan state.

⁹⁷Hearing, *supra* note 2 (testimony of David Michaels).

⁹⁸29 C.F.R. 1977.9(c).

The whistleblower provisions in Section 701 of H.R. 5663 do not break new ground but merely mirror modern whistleblower statutes, such as the Consumer Product Safety Improvement Act of 2008 and the recently passed Patient Protection and Affordable Care Act. Section 701 establishes a meaningful administrative procedure for review of cases, including a right to a hearing before an administrative law judge, appeal to an administrative review board, and judicial review. In addition, the bill contains mandatory deadlines within which DOL, administrative law judges, and the appeals board must act with regards to complaints and appeals.

Settlement agreements reached between the parties in the administrative review process cases must comport with the letter and spirit of the OSH Act and in conformity with good public policy. As a result, section 701 provides that no settlement can be accepted by the Secretary, ALJ, or review board if it conflicts with the rights protected under the OSH Act or is contrary to public policy. This includes any restrictions on the complainant's right to future employment with another employer or on their rights to free speech with regard to matters pertaining to their employment, such as the right to testify in any proceeding involving the employer.

A complainant alleging discrimination has the burden of proving that protected activity was a "contributing factor" to the adverse action. The employer can overcome this by demonstrating by clear and convincing evidence that the employer would have taken the same adverse action in the absence of such conduct. The "contributing factor" test has been a feature of whistleblower statutes since 1989.⁹⁹

A contributing factor is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision. To establish that protected activity was a contributing factor in the decision to take an adverse action, a complainant may rely on established means of proof such as timing, disparate treatment, and animus. However, the traditional Title VII requirement that the complainant prove that the employer's proffered reason is pretext is irrelevant in this framework, since in any retaliation there may be multiple factors, only one of which need be complainant's protected activity. Thus, a complainant may demonstrate by a preponderance of the evidence that the employer's reason, while true, is only one of the reasons for its action, so long as another factor is the complainant's protected activity.

Moreover, once the complainant proves that his protected activity was a contributing factor, a decision and order favorable to the complainant must be issued, unless the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. Clear and convincing evidence is that which demonstrates that it is highly probable that the affirmative defense is true.

Several professional health and safety organizations, including the American Public Health Association, ORC Worldwide, and the American Industrial Hygiene Association support these updated whistleblower provisions.

⁹⁹Hearing, *supra* note 2 (testimony of David Michaels).

SEC. 702—VICTIMS' RIGHTS

Problem: OSHA is required to investigate all fatalities and any accident resulting in the hospitalization of three or more employees.¹⁰⁰ Victims and family members who suffer grievous losses can provide very useful information and ideas during the investigatory stage and into the enforcement process.¹⁰¹ However, the OSH Act is currently silent with regard to the rights of victims and their families. OSHA has guidance that instructs field staff to keep victims and their families informed about investigations of fatalities and incidents involving serious injuries or illnesses.¹⁰² However, as a matter of practice, OSHA only keeps victims and family members informed on a sporadic basis, and in general does not provide families with any meaningful input into the process. As Assistant Secretary Michaels testified at the Committee's July 13, 2010, legislative hearing on H.R. 5663: "No one is more affected by a workplace tragedy than workers and their families."¹⁰³ Victims and their families should be granted some basic rights to access information during OSHA's investigatory and enforcement process.

Solution: Section 702 amends section 658 of the OSH Act by giving a seriously injured worker or family member the right to: meet with OSHA prior to the issuance of a citation; receive copies of a citation at no cost; be informed of any notice of contest and receive pleadings regarding appeals before the Occupational Safety and Health Review Commission (OSHRC); and, make a statement in the presence of the parties (or provide a written statement to the parties) before any agreement to withdraw or modify a citation is finalized. Under section 702, a family member would be provided the opportunity to appear and make a statement before the Review Commission, but would not be conferred formal "party status". Before making its decision, the OSHRC would be required to provide due consideration of the statement or any other information provided by the victim or a family member. It is the intent that such statement or information should be provided the same weight as provided to a party that was granted permission to participate as an *amicus curae*. Section 702 provides for the designation of at least one employee in each area office to serve as a family liaison to keep victims and family members informed of the status of investigations, enforcement actions and settlement negotiations, and to assist them in asserting their rights under this section.

SEC. 703—CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS PENDING CONTEST AND PROCEDURES FOR A STAY

Problem: Section 9(a) of the OSH Act requires that each citation "fix a reasonable time for the abatement of the violation," but it provides little incentive for prompt abatement because the abatement period does not begin to run until after litigation before the OSHRC has concluded. Thus, an employer that challenges an

¹⁰⁰ 29 C.F.R. 1960.29(b).

¹⁰¹ *Hearing, supra* note 83 (testimony of Celeste Monforton).

¹⁰² Directorate of Enforcement Programs, OSHA, *Fatality/Catastrophe Investigation Procedure*, Directive No. CPL 02-00-137 (April 14, 2005). In addition, under the Directive, the Area Director must send a standard information letter to the employee's emergency contact or next of kin and keep them up to date on the investigation, including providing them with a copy of all citations, settlement agreements, and decisions of the Occupational Safety and Health Review Commission (OSHRC) as soon as they are available.

¹⁰³ *Hearing, supra* note 2 (testimony of David Michaels).

OSHA citation can delay correction of cited violations for “months or years after the hazard has been identified.”¹⁰⁴ When hazards are not corrected because of lengthy contest proceedings, there are real consequences for workers. OSHA recently conducted an analysis and found that between FY1999 and FY2009, there were 33 contested cases that had a subsequent fatality at the same site prior to the issuance of a final order.¹⁰⁵

Oregon, which has its own OSHA state-plan, requires employers to abate violations during the contest period for serious violations. This provision, which was adopted in 1977, has been in place for over 30 years and has never been challenged in court. In addition, Oregon’s OSHA program has no record of any employer having sought a formal stay of abatement even though Oregon provides employers the right to petition for one. Moreover, according to Michael Wood, the administrator of the Oregon OSHA state-plan, one of the many advantages of requiring abatement during contest is that in settlement negotiations, there is no pressure to settle in order to achieve corrections of hazards in a timely manner. As such, Oregon consistently has a relatively high rate of retaining penalties originally issued.

The overwhelming majority of employers abates violations in a timely manner and do not contest their OSHA citations. In fact, in 2009, only 7.1% of inspections with citations were contested by employers.¹⁰⁶

There is precedent for requiring prompt abatement. Under the Mine Act, employers are required to abate hazards identified by MSHA within a reasonable abatement period. Unless the operator obtains temporary relief, the operator must abate the violation while litigation is ongoing. As far back as 1992, and based on MSHA’s experience, GAO suggested that Congress require protection of workers while employer contests are pending.¹⁰⁷

Solution: Section 703 would amend the OSHA Act to require that the employer abate all serious, willful or repeat violations within the period designated by the Secretary and that an employer’s contest to the OSHRC shall not operate to postpone the requirement to correct the violation. However, the existing provisions of the OSHA Act, which permit the employer to toll the requirement to abate violations that are not serious, willful or repeated, would remain unchanged.

Section 703 provides due process by permitting an employer to immediately apply to the OSHRC for a stay of the abatement if it is contesting the violation or if it believes that the time set for abatement is unreasonable. At a proceeding on the stay, which must be held on an expedited basis, the employer must show both that it has a substantial likelihood of success on the underlying violation and that a stay will not adversely affect the health and safety of workers. OSHRC is required to develop rules for conducting a hearing on an expedited basis, but outlines the minimum requirements for the process: the hearing must be held within 15 days following the application and a decision must be provided by an ALJ

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Hearing, supra* note 2 (testimony of Lynn Rhinehart).

¹⁰⁷ GAO, *Occupational Safety and Health: Options to Improve Hazard Abatement Procedures in the Workplace*, HRD-92-105 (1992).

within 15 days after the hearing (unless the employer seeks an extension). The employer is entitled to appeal the ALJ's decision by filing an objection with the Commission within 5 days of the receipt of the decision. The Commission, so long as a quorum is present, must decide whether to grant review within 10 days, and if it does must issue a decision within 30 days after the receipt of an objection.

If no decision has been made on whether to grant review, or the Commission declines the review, or after granting review, it does not make a decision on a timely basis, the ALJ's decision becomes the final order of the Commission.

The Committee understands that there is a hypothetical possibility that requiring abatement of a serious violation during contest may force a few employers who could ultimately prevail in their challenge to a citation to spend money to correct problems that are not ultimately sustained by the OSHRC. However, based on Oregon's experience, this concern appears remote, if not entirely misplaced. The expedited stay proceeding provided in section 704 is available to those employers who believe that the time set by OSHA for abatement is unreasonable and should be extended. An employer can petition for modification of the abatement period in Oregon as well. The bill ensures both due process rights to challenge a citation and the timely correction of serious hazards that could cause serious bodily injury or death.

SEC. 705 AND 706—CIVIL AND CRIMINAL PENALTIES

Problem: Civil penalties for workplace safety and health violations under the OSH Act are inadequate and often considered the cost of doing business. The average penalty for assessed serious violations of the OSH Act is less than \$1,000. In 2009, the median penalty assessment for all OSHA investigations involving a fatality was \$6,750; after negotiations, the penalty was reduced to \$5,000.¹⁰⁸ Even for a willful violation that causes the death of a worker, the median penalty in 2009 was \$29,400 less than one half of the statutory maximum.¹⁰⁹ In addition, these penalties, which have not been increased in 20 years, are not adjusted to account for inflation, which reduces their real dollar value by nearly 40%. Except for the IRS, OSHA is the only federal enforcement agency that is not covered by the Federal Civil Penalties Inflation Adjustment Act of 1990, which mandates that agencies re-calculate their penalties once every 4 years to account for inflation. At the Committee's July 13, 2010, legislative hearing Assistant Secretary Michaels pointed out since OSHA can visit only a limited number of workplaces, adequate civil (and criminal) penalties can make employers "think again" about ignoring health and safety standards.¹¹⁰

He also pointed out how woefully inadequate these penalties are as compared to other laws:

The Department of Agriculture is authorized to impose a fine of up to \$140,000 on milk processors for willful violations of the Fluid Milk Promotion Act, which include re-

¹⁰⁸ *Hearing, supra* note 2 (testimony of Lynn Rhinehart).

¹⁰⁹ AFL-CIO, *supra* note 55, at 16.

¹¹⁰ *Hearing, supra* note 2 (testimony of David Michaels).

fusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to \$325,000 when a performer curses on air. The Environmental Protection Agency can impose a penalty of \$270,000 for violations of the Clean Air Act and a penalty of \$1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job—even when the death is caused by a willful violation of an OSHA requirement—is \$70,000.¹¹¹

Assistant Secretary Michaels also related the story of Jeff Davis who was killed while working at an oil refinery in Delaware in 2001. At the refinery, a tank full of sulfuric acid exploded, and the body of Jeff Davis “literally dissolved in the acid.” OSHA’s penalty was \$175,000. Yet, in the same incident, the EPA found thousands of dead fish and crabs and assessed the employer with a \$10 million fine for violations of the Clean Water Act.

This Committee has also examined the limitations that OSHA has with regard to enforcement against multi-state employers with poor safety and health records at more than one of its establishments.¹¹² On March 6, 2007, Mr. Torres-Gomez, a 46-year old Cintas washroom employee, died in an accident at Cintas’ Tulsa, Oklahoma, plant when he was caught by a large robotic conveyor used to transfer uniforms from washers to dryers, and died inside the dryer as it operated for 20 minutes at 300 degrees.

Cintas is the largest uniform supplier in North America, with more than 400 facilities employing more than 34,000 people. About two years before the Tulsa incident, on July 7, 2005, OSHA alerted employers, workers and inspectors about the need for special protection from robotic laundry shuttle equipment like the one used at the Tulsa plant. And one month later, on August 8, 2005, at the request of Cintas employees concerned about this hazard, OSHA inspectors investigated the company’s Central Islip, NY, facility and cited the company for the very violations which the bulletin addressed. Cintas installed commercially-available guarding technology at Islip but failed to address the same deadly hazard in its Tulsa plant.

The Committee discovered that failures to address safety hazards on a company-wide basis was a common problem, and that OSHA’s “Enhanced Enforcement Program” (EEP),¹¹³ which was adopted for this very purpose, was wholly inadequate.¹¹⁴ While the EEP program looked good on paper, it was too limited. First, it left OSHA with too much discretion on whether to follow the policy or not, resulting in inconsistency in its use by area offices. Moreover, OSHA’s own data from 2003 to 2008 showed that while the Agency

¹¹¹ *Id.*

¹¹² *Improving Workplace Safety: Strengthening OSHA Enforcement of Multi-Site Employers: Hearing Before the Subcomm. on Workforce Protection of the H. Comm. on Education and Labor, 110th Cong. (2008).* <http://edlabor.house.gov/hearings/2008/04/improving-workplace-safety-str.shtml>.

¹¹³ OSHA News Release, March 11, 2003.

¹¹⁴ *Hearing, supra* note 112 (testimony of Randy Rabinowitz). Ms. Rabinowitz testified that, “The EEP program was adopted in response to the *New York Times/Frontline* expose on corporate-wide indifference to health and safety at the McWane Company, and OSHA’s inability to identify the horrifying pattern of misconduct at the company. Under the policy, when OSHA identifies high gravity serious violations at a facility, it considers whether to initiate additional enforcement action at that facility or at others.”

designated about 2,000 cases for enforcement under EEP, the program was in fact not being used to target multi-site employers.¹¹⁵ Frank White, Vice-President of ORC Worldwide, a management and consulting membership firm for business, testified before the Workforce Protection Subcommittee that the EEP had only been used by OSHA in a limited fashion.¹¹⁶

OSHA has now recognized that the EEP has not been effective, and on June 18, 2010, OSHA published Directive CPL 02-00-149¹¹⁷ establishing its Severe Violator Enforcement Program (SVEP), which replaces the EEP. The Directive states that the SVEP will focus on “inspecting employers who have demonstrated indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations.”¹¹⁸

According to OSHA, its SVEP enforcement actions for “severe violator cases” include “mandatory follow-up inspections, increased company/corporate awareness of OSHA enforcement, corporate-wide agreements, where appropriate, enhanced settlement provisions, and federal court enforcement under Section 11(b) of the OSH Act.”¹¹⁹ The new system also provides for nationwide referral procedures, including for OSHA state plans. The SVEP, which will target severe violators, is a step in the right direction in addressing hazards at companies with multi-state facilities.

Finally, under current law, OSHA cannot cite an employer for a repeat violation if the original violation occurred in one of the states with its own OSHA state plan. Assistant Secretary Michaels explained the consequences of this weakness in the present civil penalty structure:

If a roofer who was not provided fall protection is killed after falling from a roof in Ohio, OSHA will investigate and determine, among other things, if other employees of that contractor had ever been injured or killed under similar circumstances. If OSHA had previously cited that employer for violations of our fall protection rules in a state where we have jurisdiction, we could cite the employer for a repeat violation. However, if the previous violation had occurred in nearby Indiana or Kentucky, perhaps just a few miles from the site of the fatality, the law states that we could not classify the events around the fatality as a repeat violation, even if the original violation involved a worker who was killed under identical circumstances—simply because they were in State Plan states. This defies any common sense definition of a repeat violation. Enhanced civil penalties and an improved mechanism for going after repeatedly recalcitrant employers are much needed.¹²⁰

If civil OSH Act penalties are too meager to serve as a deterrent, the threat of criminal prosecution for OSH Act violations for a fatality is even less of a threat. These criminal sanctions only apply

¹¹⁵ *Id.*

¹¹⁶ *Hearing, supra* note 112 (testimony of Frank White).

¹¹⁷ http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=4503.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Hearing, supra* note 50 (testimony of David Michaels).

in the case of a fatality, and prosecutors are reluctant to spend their limited resources on these cases, not because they don't have merit, but because they are misdemeanors and, upon conviction, the penalties—up to 6 months in jail and a \$10,000 fine—are simply a “slap on the wrist.” Under the Resource Conservation and Recovery Act (RCRA), which regulates the treatment and disposal of hazardous waste, it is a felony (with up to 15 years in jail/up to \$250,000 for an individual; \$1 million for an organization) to knowingly endanger a person (including a worker) during the commission of a hazardous waste violation. A death or serious injury is not required for a conviction. The Clean Water Act and the Clean Air Act have similar criminal provisions. Even under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1338, a defendant can receive up to one year in jail for harassing a wild horse or burro on public lands.¹²¹

In the 40 years since the passage of the OSH Act, fewer than 80 cases have been criminally prosecuted, resulting in a total of about 89 months in jail.¹²² During this time over 300,000 employees died in workplace incidents.¹²³ By contrast, in 2009 alone, 387 criminal enforcement cases were initiated under the criminal environmental laws (including the Clean Air Act and the Clean Water Act) involving 200 defendants, resulting in 76 years of jail time and \$96 million in fines.¹²⁴ There are more cases, fines and jail time in one year under these two environmental laws than has ever been imposed under the OSH Act in its entire 40-year history.

In addition, the OSH Act applies to “willful” violations. “Willful” is a *mens rea* standard which has been interpreted by the OSHA OSHRC, the administrative body that reviews contested penalties and assesses civil penalties, to mean “an intentional violation of the Act or plain indifference to its requirements.”¹²⁵ Under the Commission’s interpretation of willful, knowledge of the law is not required to find that an employer has committed a willful violation; they need only be aware “that a condition was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or take corrective action.”¹²⁶

Some courts have approved this interpretation of “willful” in cases reviewing the Commission’s administrative determinations. For example, the 8th and D.C. Circuits found willful violations of OSHA health and safety standards when the owner of a car wash knew that a lock on his industrial dryer was broken but failed to fix it, resulting in the amputation of an employee’s arm,¹²⁷ and when a fireworks company knew of the dangers of combustible materials being used in certain procedures but failed to prevent an explosion.¹²⁸ At least one court has also applied this interpretation in the criminal context. In *United States v. Dye Construction*, the

¹²¹ *Id.*

¹²² *Hearing, supra* note 2 (testimony of Lynn Rhinehart).

¹²³ AFL-CIO, *supra* note 55, at 16.

¹²⁴ *Id.*

¹²⁵ *Are OSHA’s Penalties Adequate to Deter Health and Safety Violations? Hearing Before the H. Comm. on Education and Labor*, 111th Cong. (2009) (testimony of David Uhlmann). See *United States v. Dye Construction*, 510 F.2d 78 (10th Cir. 1975) (criminal violation); see also *Valdak Corp. v. OSHRC*, 73 F.3d 1466 (8th Cir. 1996); and *Ensign-Bickford Co., v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct 1909 (1984) (administrative violations).

¹²⁶ *Hearing, supra* note 125 (testimony of David Uhlmann).

¹²⁷ *Valdak Corp. v. OSHRC*, 73 F.3d 1466 (8th Cir. 1996).

¹²⁸ *Ensign-Bickford Co., v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct 1909 (1984).

10th Circuit held that a construction company willfully failed to comply with an OSHA safety standard when it did not support the sides of a trench, resulting in the trench's collapse and the death of an employee.¹²⁹ The Court defined a willful violation as one "done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement."¹³⁰

This administrative definition is similar to the "knowing" standard under environmental and other criminal laws, which requires that a defendant possess knowledge of the facts that constitute the offense, not knowledge that the conduct at issue was unlawful. However, in most criminal contexts, "willful" connotes a higher mental state requirement,¹³¹ which requires that the defendant "acted with the knowledge that his conduct was unlawful."¹³² Under those circumstances, a defendant could escape liability if he committed a willful violation that killed a worker, but was not aware he was breaking the law. As David Uhlmann, a professor at the University of Michigan Law School and former Chief of the Environmental Crimes Division pointed out in testimony to the Committee in 2009, the requirement of a "willful" criminal standard "could make ignorance of the law a defense, contrary to the time-honored maxim of American jurisprudence that ignorance of the law is not an excuse."¹³³ The Committee believes that to ensure consistency and the even application of the OSH Act's criminal provision, the "willful" standard should be changed to a "knowing" one.

In addition, only "employers" (which consists of sole proprietors and corporate entities), and not corporate officers and directors, can be prosecuted for criminal violations of the OSH Act. This means that those individuals who engage in the criminal conduct are immune from prosecution. This is contrary to the environmental laws and the Mine Act, which provide for liability for those officials.¹³⁴ The case of *United States v. Hansen*,¹³⁵ is instructive on this point. In that matter, the chief executive officer, vice-president and plant manager of Hansen, a chemical company that manufactured bleach, soda, gas, and acid, were charged and convicted under the Clean Water Act for knowingly endangering workers who often stood in contaminated water while at work. They were sentenced to prison (108 months for the CEO; 46 months for the VP; and 78 months for the plant manager) for their illegal conduct. While the company had also been cited for willful violations under the OSH Act, the individual officers could not have been prosecuted, and no one was killed as a result of their actions.

In 2005, the Environmental Crimes Division at the Department of Justice launched its Worker Endangerment Initiative (WEI) with the goal of prosecuting those companies and company officials who systematically violate both federal environmental and worker safety laws. This initiative has been very successful only because of the

¹²⁹ 510 F.2d 78 (10th Cir. 1975).

¹³⁰ *Id.* at 81.

¹³¹ *Protecting America's Workers Act: Modernizing OSHA Penalties: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor*, 111th Cong. (2010) (testimony of John Cruden).

¹³² *Hearing*, *supra* note 125 (testimony of David Uhlmann).

¹³³ *Id.*

¹³⁴ *Hearing*, *supra* note 2 (testimony of Lynn Rhinehart).

¹³⁵ *United States v. Hansen*, 262 F. 3d 1217 (11th Cir. 2001).

strong criminal enforcement provisions in the federal environmental and criminal laws; of the hundreds of cases that have been successfully prosecuted, only two have involved convictions under the OSH Act.¹³⁶

One of the 2 cases involved McWane, a privately owned company and one of the largest pipe manufacturers in the world. During the 1990's and the first part of this decade, its facilities were extremely dangerous places to work. From 1995 to 2003, 4,600 of its workers were injured. However, despite McWane's dismal safety record, the only time it had been convicted criminally was in 2002 when it was found guilty of a misdemeanor under the criminal provisions of the OSH Act for a willful violation, which caused the death of worker (he was crushed to death) at its facility in Tyler, Texas. McWane's safety issues became the subject of a series of articles in the New York Times and a story on Frontline.¹³⁷

Criminal cases against McWane for violations of the worker safety and environmental laws at five of its facilities ensued, including the Atlantic States facility in New Jersey, arguably the most dangerous of all its plants. McWane had engaged in a wide-spread conspiracy to violate health and safety laws, including its concealment of the death of a worker and the injuries of others. The Justice Department prosecuted the case under criminal and environmental laws. The company received a fine of \$8 million and four individual defendants were sentenced from six months to 5 years in prison. No criminal charges were brought under the OSH Act. As Professor Uhlmann testified before this Committee in 2009, "There were no criminal charges brought under the OSHA Act because there were no felony charges available, and the one possible misdemeanor count (for the worker death) would have lengthened the trial and distracted from the more serious felony charges."¹³⁸ McWane did plead guilty to criminal charges under the OSH Act for violations at its Union Foundry facility in Alabama and received a fine.¹³⁹ However, because it had been convicted under federal environmental and other criminal laws that had stiff penalties, McWane and its management paid a high price. As a result, it has changed its behavior and has made a significant commitment to safety and to complying with regulatory laws.¹⁴⁰

This contrast between criminal penalties under the OSH Act and other laws is also illustrated by the result in *United States vs. Elias*.¹⁴¹ Allen Elias, the owner of a fertilizer company, ordered workers to remove cyanide-laced sludge from a 25,000 gallon railroad car. He did not tell his employees what was in the car and did not provide them any personal protective equipment. When a worker named Scott Dominguez collapsed inside the car, Elias lied about the content of the sludge to both the emergency workers at the scene and the attending physician. The incident caused Mr. Dominguez to suffer permanent brain injury. Elias was convicted under RCRA (the Resource Conservation and Recovery Act),¹⁴²

¹³⁶ *Hearing, supra* note 131 (testimony of John Cruden).

¹³⁷ *Hearing, supra* note 125 (testimony of David Uhlmann).

¹³⁸ *Id.*

¹³⁹ *Id.* The company (and senior management) was also convicted under the criminal and environmental laws for crimes committed at its four other facilities.

¹⁴⁰ *Id.*

¹⁴¹ 269 F.3d 1003 (9th Cir. 2001).

¹⁴² 42 U.S.C. §§ 6901-6992.

which regulates hazardous waste, and he received 17 years in prison and a \$6 million fine. He could not be prosecuted under the OSH Act's criminal provisions because Mr. Dominguez did not die. And even if he could have been prosecuted and had been convicted, he would have only served 6 months in jail and paid a \$10,000 fine.¹⁴³

A similar result occurred in the prosecution of BP after an explosion at its Texas City Refinery in Texas City, Texas in 2005, an accident that killed 15 workers and injured 170 others. For its violations of health and safety laws, BP settled with OSHA and paid a \$21 million civil penalty. The Justice Department successfully prosecuted BP under its criminal provisions in the Clean Air Act, and BP agreed to pay a \$50 million fine.¹⁴⁴

Only a small percentage of workplace facilities and serious injuries involve the release of harmful substances into the environment. In 2007, for example, only 9% of worker fatalities involved a violation of an environmental law.¹⁴⁵ Thus, environmental laws cannot serve as a replacement for OSHA's criminal provisions.

SEC. 705—CIVIL PENALTIES

Solution: To better deter future violations, Section 705 increases the minimum penalty for a willful violation from \$5,000 to \$8,000 and increases its maximum penalty from \$70,000 to \$120,000. A serious violation, defined as a violation that causes a substantial probability of death or serious harm, would be increased from a maximum of \$7,000 to \$12,000. These increases are intended to correct for the erosion due to inflation since 1990.¹⁴⁶

Under current law, there is no increase in penalty when a willful or serious violation results in a fatality. Given that OSHA's penalties are tied to the gravity of the harm, when a worker loses his or her life due to the employer's conduct, a higher penalty should apply. A willful violation resulting in a fatality would carry a minimum penalty of \$50,000 and a maximum penalty of \$250,000. An employer with 25 employees or less would pay a minimum fine of \$25,000.

A serious violation resulting in a fatality would carry a minimum penalty of \$20,000 and a maximum of \$50,000, and the minimum for an employer with 25 employees or less would be \$10,000. An "other than serious" violation and a failure to comply with any OSHA posting requirements would be increased by a maximum of \$7,000 to a maximum of \$12,000. The failure to abate a safety or health hazard in the time set for that abatement, employers could be assessed a maximum daily penalty of \$12,000 up from \$7,000 under current law.

Section 705 requires the Secretary and the OSHRC, in determining whether a violation is repeated, to consider the employer's history of violations, including violations that have occurred in state-plan states. Finally, Section 705 mandates that the Secretary indexes these penalties for inflation at least once every 4 years.

¹⁴³ Hearing, *supra* note 131 (testimony of John Cruden).

¹⁴⁴ Hearing, *supra* note 2 (testimony of Lynn Rhinehart).

¹⁴⁵ Hearing, *supra* note 125 (testimony of David Uhlmann).

¹⁴⁶ Inflation adjusted penalties for a willful violation would be a minimum of \$8,347 and a maximum of \$116,851; for a serious or other than serious violation, a failure to correct a hazard, and a failure to post the penalty would be a maximum of \$11,785.

These penalties will not affect the ability of OSHA to settle cases, because the Agency retains the discretion to compromise a penalty so long as it is above the minimum prescribed in Section 705. In addition, while the provisions of Section 702 give families the right to be heard if a penalty is withdrawn or reduced, OSHA still has the authority to withdraw, reduce or re-designate violations.

SEC. 706—CRIMINAL PENALTIES

Problem: While most companies comply with health and safety standards and other requirements in the OSH Act, they are at a competitive disadvantage with those that flout the law.¹⁴⁷ This Committee believes that strong criminal penalties level the economic playing field for law abiding companies that devote significant resources to compliance with worker safety laws.

An aggressive criminal enforcement program provides an important deterrence to illegal activity. Assistant Secretary Michaels testified at the July 13, 3010 legislative hearing on H.R. 5663 that aggressive law enforcement activities in Texas and California in the 1980's dramatically improved occupational safety and health. In Texas, "the number of trenching fatalities dropped from 15 to 2 in one year when one county adopted a well-publicized criminal prosecution effort."¹⁴⁸ As well, in Los Angeles County, officials established a criminal prosecution program that improved safety and health compliance. The Assistant Secretary also cited ongoing efforts by New York State to swiftly prosecute violators.¹⁴⁹

According to Professor Uhlmann, strong criminal enforcement has other benefits as well. Where there is a "credible enforcement threat, companies are quicker to resolve administrative penalty actions and respond more productively to regulatory actions." He testified that the OSHA inspectors trained as part of the WEI describe companies that are "indifferent or hostile to OSHA compliance officers." Professor Uhlmann testified "that would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSHA Act provides."¹⁵⁰

The penalties for advance notice of an inspection or making false statements, which apply to individuals as well, are also misdemeanors, each carrying 6 month prison sentences. An advance notice of inspection carries a maximum fine of \$1,000, while making a false statement has a maximum fine of \$10,000. This Committee finds it inconceivable that there are only minor penalties for someone who tips off an employer that an inspector is on his way to inspect a workplace, particularly when advance notice allows an employer to temporarily fix hazards and hide others from view.

Solution: Section 706 expands section 666(e) of the OSH Act by making "knowing" criminal violations a felony that can carry a maximum penalty of 10 years (and a fine in accordance with 18 U.S.C. § 3571) for a first offense and 20 years (and a fine under 18 U.S.C. § 3571) for a repeat offense. To be convicted the violation must significantly contribute to the death of an employee. Providing advance notice of an inspection carries a maximum prison term of 5 years or a fine pursuant to 18 U.S.C. § 3571, or both.

¹⁴⁷Hearing, *supra* note 131 (testimony of John Cruden).

¹⁴⁸Hearing, *supra* note 2 (testimony of David Michaels).

¹⁴⁹*Id.*

¹⁵⁰Hearing, *supra* note 125 (testimony of David Uhlmann).

Section 706 allows prosecutions resulting in a maximum prison term of 5 years for a first offense and 10 years for a second for knowing violations, which cause or significantly contribute to serious bodily harm. Under section 706, serious bodily harm is defined as a “bodily injury that involves a substantial risk of death; protracted unconsciousness; protracted and obvious physical disfigurement; or protracted loss or impairment, either temporary or permanent, of the function of a bodily member, organ or mental faculty.” The Committee believes that this definition of serious bodily harm is straightforward, includes only the most serious of harms, and is capable of objective application by courts, prosecutors, and juries. The Committee does not intend that routine, minor, everyday ailments be viewed as seriously bodily injury. These offenses also carry fines under 18 U.S.C. § 3571.

The Committee believes that the mental state (*mens rea*) requirement for criminal prosecutions under the OSH Act should be clarified so there is no doubt it conforms to the administrative standard developed by the OSHRC, and follows other federal criminal and environmental laws. As Assistant Secretary Michaels testified before this Committee: “Using a knowing standard would ease the burden on prosecutors by harmonizing these worker safety provisions with similar (or comparable or analogous) crimes.¹⁵¹ The Department of Justice has urged this change as the best way to capture those employers who knowingly engage in illegal activity and a worker dies or is seriously injured.¹⁵²”

Section 706 adds the term “any officer or director” to the definition of “employer” for purposes of criminal liability under the Act. This expanded provision is similar to the provisions of the Clean Air Act (42 U.S.C. § 7401 *et seq.*) and Clean Water Act (33 U.S.C. § 1319(c)(6)) that include “responsible corporate officers” among “persons” who may be held criminally liable under those statutes. The Committee intends this provision to criminalize only action or inaction by corporate officers or senior managers when they (1) know that the conduct is occurring, (2) have the authority and ability to correct, or cause the correction, of the act or condition, and (3) fail to exercise their authority to take appropriate action to prevent the action or correct the act or condition. The Committee also subscribes to the position, articulated in related case law, that the failure of the corporate official to have actual knowledge of the violative act or condition will not act as a barrier to criminal liability where there is evidence that the official knowingly shielded himself or herself from information necessary to gain requisite knowledge—in other words, was “willfully blind” to a violative act or condition.

While the Committee believes that enhanced criminal penalties are a strong deterrent to violations of the OSH Act, given the hurdles that will still remain to successful prosecution, the potential universe of criminal OSHA cases will likely be small. Civil enforcement will remain predominant under the OSH Act. A criminal conviction is much harder to obtain than a finding of civil liability under the OSH Act. In criminal cases, the prosecution must prove each element of the violation beyond a reasonable doubt, whereas

¹⁵¹Hearing, *supra* note 2 (testimony of David Michaels).

¹⁵²Hearing, *supra* note 131 (testimony of John Cruden).

in civil cases OSHA only must prove the violation by a preponderance of the evidence. Also, under section 706 criminal cases, the prosecution must demonstrate that the violation caused or significantly contributed to the death or serious bodily injury of an employee. Both of these hurdles will undoubtedly influence the Secretary's decision in referring cases to the DOJ and its decision as to whether to seek prosecution.

Finally, the Committee has no intention of impeding state efforts to criminally prosecute those who flout safety and health laws. Therefore, Section 706 provides that nothing in the OSH Act shall preclude criminal prosecution under these state and local laws of general applicability.

SEC. 707—PRE-FINAL ORDER INTEREST

Problem: There is little in current law to discourage employers from filing contests to gain the benefit of the time value of money. One tool that would assist OSHA would be the authority to assess pre-judgment interest. In addition, to be consistent with the Mine Act, the same post-judgment interest rate should apply to OSH penalties.

Solution: The bill authorizes prejudgment interest from the date of contest to the date of final order at the rate charged by the IRS. Interest is not payable if the employer prevails. Post-judgment interest is already authorized, and this legislation sets an 8% interest rate, the same as the Mine Act.

SEC. 708—REVIEW OF STATE OCCUPATIONAL SAFETY AND HEALTH PLANS

Problem: Currently, under Section 20(a)(6) of the OSH Act, only an employer or authorized representative of a worker may request NIOSH to conduct a Health Hazard Evaluation (HHE) of workers' exposures to toxic substances. Yet physicians and state or local health departments often are the first to be made aware of new and emerging health hazards, while other federal agencies often are made aware of potential occupational hazards when addressing other issues at a workplace.

Since the enactment of the OSH Act, substances other than toxic substances, such as "a physical agent, equipment or working conditions" have been recognized as important hazards to worker health. The HHE Program does not have authority to address a hazard other than a "substance" in a general working environment (OSH Act), although the program can address a "substance or physical agent" in a mining environment under the Miner Act.

Solution: As the percentage of workers represented by organized labor has declined since the passage of the OSH Act, the need to allow for other entities to request assistance from NIOSH has become evident. Section 708 expands the list of those individuals who can request that NIOSH conduct a HHE to include representatives of former workers, physician, another federal agency, or a state or local health department. It also expands the issues that can be covered in a HHE to go beyond toxic substances to include physical agents, equipment, or working conditions.

SEC. 711—EFFECTIVE DATE

The Committee intends for the provisions of Title VII to take effect as soon as possible and provides for an effective date of 90 days after enactment. In addition, section 711 requires state-plan states to amend their plans to conform to Title VII within 12 months after enactment. However, the Committee does recognize that because some state legislatures do not meet every year, it is possible that a state-plan state could not meet the 12-month deadline. As such, Section 711 provides that the Secretary may provide an extension to a state-plan state by an additional 12 months. In that case, the provisions of Title VII would take place within 90 days after the state adopts the amendments.

Amendment at Mark-up Related to OSHA

On July 21, 2010, the Committee marked up H.R. 5663, and one amendment to the OSH Act was voice voted and approved. The Titus Amendment amends section 667 of the OSH Act by establishing a formal mechanism for OSHA to identify a problem with a state plan and compelling a remedy without beginning the process for withdrawing approval; ensures continued application of health and safety regulations by providing OSHA with concurrent enforcement authority for the duration of the time that a state plan is formally remedying deficiencies or being withdrawn, after 30 days notice of official federal action and an opportunity for a public hearing; and holds federal OSHA accountable for providing strong oversight and guidance to state plans by establishing a regular Government Accountability Office (GAO) study—one every five years—to look at the effectiveness of state plans and the Secretary of Labor’s oversight of such plans.

Worker safety will benefit to the extent that OSHA has tools to ensure that state OSHA plans are at least as effective as federal OSHA standards and enforcement, by giving federal OSHA options other than complete plan termination when a state plan is found to be underperforming. For the 27 states/territories with approved state plans, OSHA is very few tools, short of the threat of termination, to compel a state to better enforce worker safety and health laws. It can request that the state do so and hope the state complies or terminate the state plan altogether, which is an extreme step that would remove state control, leave state and local government employees unprotected, and add costs to DOL for funding and running a health and safety program in the state. The Titus amendment provides a middle ground between these extremes.

The Committee also recommends that the Secretary, in consultation with State plans, establish minimum staffing benchmarks in each State and update these benchmarks at least every 5 years. The factors to be consider in establishing these benchmarks should include the number of employers, the heavy industry population, the number of employees, and the size of vulnerable worker populations.

V. SECTION-BY-SECTION ANALYSIS

Sec. 1—Short Title, Table of Contents. The Act may be cited as the “Robert C. Byrd Miner Safety and Health Act of 2010.”

Sec. 2—References. Except in Title VII or otherwise expressly provided, an amendment will be considered made to the Federal Mine Safety and Health Act of 1977.

TITLE I—ADDITIONAL INSPECTION AND INVESTIGATION AUTHORITY

Sec. 101.—Independent Accident Investigations. Requires independent investigations of any mine accident involving 3 or more deaths, or for other severe accidents as designated by the HHS Secretary. The HHS Secretary appoints a 5-member Panel which is chaired by a representative from National Institute for Occupational Safety and Health's (NIOSH) Office of Mine Safety Research. The Panel must include members with expertise in accident investigations, mine engineering, or mine safety and health; and include one individual who represents mine operators and one representative of a labor organization that represents miners. The Panel is charged with investigating and preparing a report on the causes and contributing factors of the accident, including acts or omissions by MSHA itself. The report must identify the strengths and weaknesses in MSHA's accident investigation, and include recommendations to prevent recurrence. Within 90 days of enactment, the Secretary of HHS must establish procedures to ensure the consistency and effectiveness of these investigations, and enter into a Memorandum of Understanding with the Secretary of Labor to facilitate coordination and provide access for Panel members to MSHA's investigative activities, interviews and information. The Committee urges that this Memorandum be made public.

Sec. 102.—Subpoena Authority and Miner Rights During Inspections and Investigations. Provides MSHA the authority to subpoena documents and testimony in carrying out inspections and investigations. MSHA lacks authority to subpoena witnesses or documents, except when it is conducting an accident investigation through a public hearing. Clarifies that MSHA (or a DOL attorney) can interview mine employees and other individuals with relevant information privately without the presence, involvement, or knowledge of the operator, his agent, or attorney, provided that an individual may bring his own attorney to any interview.

Voluntary safety and health self-audits are conducted by some mine operators to identify violations or hazards and establish corrective actions plans. Effective July 28, 2000, the Occupational Safety and Health Administration issued a policy which provides that the agency will not routinely request self-audit reports at the initiation of an inspection, and the Agency will not use self audit reports as a means of identifying hazards upon which to focus during an investigation. In addition, where a voluntary self audit identifies a hazardous condition and the employer has corrected the violative condition prior to the initiation of any inspection and taken steps to prevent the recurrence of the condition, the Agency will refrain from issuing a citation. To encourage voluntary self audits and prompt corrective actions, the Secretary is urged to develop a similar policy with regards to the Mine Act.

Sec. 103.—Designation of Miner Representative. Provides that, if a miner is trapped in a mine or is otherwise prevented as a result of an accident to designate a representative, this Act authorizes the closest relative of the miner to designate such a representative (current law says only a miner can designate a representative). Au-

thorizes a representative of miners to participate in accident investigations, including interviews, unless the Secretary in consultation with the Attorney General excludes such representatives from the investigation on the grounds that inclusion would interfere with or adversely impact a criminal investigation that is pending or under consideration.

Sec. 104.—Additional Amendments Relating to Inspections and Investigations. Clarifies that inspections are to be conducted by MSHA inspectors during all shifts and days of the week when miners are present.

Directs the Secretary of Labor to review the Secretary's most recent evaluation for a mine's pattern status with appropriate mine officials during a regular inspection, if so requested.

Requires that operators and contractors report occupational injuries, illnesses, deaths, and man-hours worked for miners in their employ or under their direction or authority for each mine, and requires that these reports or logs submitted to MSHA shall be signed and certified as accurate and complete by a knowledgeable and responsible person possessing a certification or other approval issued by MSHA or a state agency that issues miner certifications. Knowingly falsifying such records or reports shall be grounds for revoking such certification under standards established by MSHA for certifications issued by states or MSHA. In establishing mandatory certification standards for MSHA or the states under Section 118(b)(1), the section requires that one basis for revocation include knowing falsification of accident, injury, illness and man-hours reports required by the Secretary under Section 103 of the Mine Act.

Following an accident, authorizes MSHA to issue "control orders" under Section 103(k) of the Mine Act without having to be physically present. Current law requires MSHA to be physically present to issue such orders.

An operator's attorney is prohibited from representing both the operator and any other individual, including a miner, in an accident investigation unless there is a voluntary and knowing waiver of all foreseeable conflicts of interest by the individual. Authorizes the Secretary to petition a federal district court to disqualify such attorney as counsel to an individual, if the Secretary finds that such individual cannot be adequately represented due to conflicts of interest.

TITLE II—ENHANCED ENFORCEMENT AUTHORITY

Sec. 201.—Technical Amendment. Clarifies that the Secretary may cite an employer not only for violations of mandatory health and safety standards under Section 104(d), but also for any violations of the Mine Act, or regulations promulgated under the Mine Act.

Sec. 202.—A Pattern of Recurring Noncompliance or Accidents. Mines with significantly poor compliance with health and safety standards that result in unsafe or unhealthy conditions shall be placed in "pattern status," if the mine has a pattern of:

- (1) citations for S&S violations;
- (2) citations and withdrawal orders caused by an unwarrantable failure to comply with mandatory health and safety standards;

- (3) withdrawal orders for imminent danger or withdrawal orders under any other section of the Act;
- (4) citations for flagrant violations; and
- (5) accidents or injuries; or
- (6) any combination of these citations, orders, accidents and injuries.

In establishing regulations to trigger pattern status, MSHA must consider the frequency and rates of citations, and the rates of reportable accidents and injuries within the preceding 180-day period, and assign weights to citations, orders, illnesses or injuries or other factors. In addition, MSHA may consider other factors, such as mine type, production levels, number of miners, hours worked, number of mechanized mining units, and the designation of representatives of miners at the mine, and the mine's history of non-compliance or rates of reportable incidents and injuries. Excluded from the orders counted towards pattern status are the so-called "control orders" under Section 103(j) or 103(k) of the Act, which MSHA issues after accidents to protect miners' lives and facilitate rescue and recovery.

Citations are the basis for placing a mine in pattern status—not final orders. MSHA is required to issue a final interim regulation that defines the threshold criteria that triggers pattern status and the performance benchmarks 120 days after enactment. A final rule is required 2 years after the date of enactment.

Not less than once every six months, MSHA must identify mines which meet the criteria to trigger pattern status.

MSHA has the discretion not to place an otherwise qualifying mine in pattern status if it certifies that there are mitigating circumstances wherein the operator has already implemented remedial measures which has eliminated any elevated risk to the safety and health of miners, and has taken sufficient measures to ensure that elevated risk will not recur. To provide transparency, MSHA must publish the written finding that there are mitigating circumstances that would preclude placing the mine on pattern status within 10 days on the web site for MSHA and provide copies to the House Education and Labor Committee and Senate HELP Committee.

Once a mine is placed in pattern status, MSHA is required to:

- (1) Notify the mine operator that it must withdraw all miners from the mine; and
- (2) Issue a remediation order tailored to conditions at the particular mine within 3 days.

The remediation order may require additional training, an effective health and safety management program, the employment of safety professionals, certified persons or adequate number of personnel to implement the remediation plan, increased reporting, and a timetable for completion. MSHA is authorized to communicate with miners (outside the presence of operators) about conditions in the mine, and also to advise them of their rights under the Act. MSHA may reinstate a withdrawal order if an operator fails to comply with the remediation order while in pattern status. MSHA can modify the remediation order or extend deadlines, but only on a showing by the operator that the operator took all measures to comply with the order and only if it was prevented from doing so by factors outside its control.

The mine-wide withdrawal order is lifted when the Secretary verifies that all violations or conditions have been or are being fully corrected as outlined in the remediation order (or if other plans or orders have unfulfilled requirements) and the operator has completed specific requirements in the remedial order that are prerequisites for reopening the mine.

Once in pattern status, the mine is on probation for at least 1 year, during which the mine is subject to double the number of regular inspections: For underground mines that means 8 regular inspections per year instead of 4. MSHA will assess and collect fees from each mine in pattern status for the cost of these additional inspections. MSHA will issue a fee schedule through a rule within 120 days of enactment.

Once a mine is on pattern status, MSHA will review a mine's performance every 90 days to determine whether it has met "performance benchmarks." Within 90 days, a mine must improve to the point that it has during the previous 90-day period:

- Reduced the rate of citations for S&S violations by 70% (provided that the rate is not greater than the mean for mines of similar size and type), or
- The mine has reduced its rate of S&S violations so that it is in the top performing 35th percentile for all mines of similar size and type.
- Reduced the rate of accidents and injuries so that it is in the top performing 35th percentile for mines of similar size and type, and
- Has been issued no withdrawal orders, imminent danger orders, or citations for flagrant violations during this period.

If a mine fails to meet these benchmarks within any 90-day period, the Secretary may issue another withdrawal order to remedy conditions that led to pattern status, and may modify the remediation order. Section 301(b) provides that, if after 180 days on pattern status, the mine fails to meet these benchmarks, penalties for violations shall be doubled.

A mine can be removed from pattern status if, for a 1-year period:

- The mine reduced the rate of citations for S&S violations by 80% (provided that the rate is not greater than the mean for mines of similar size and type), or
- Reduced its rate of S&S violations so that it is in the top performing 25th percentile for all mines of similar size and type.
- The mine's rate of accidents and injuries are in the top performing 25th percentile for all mines of similar size and type, and
- The mine has been issued no withdrawal orders, imminent danger orders, or citations for flagrant violations during this period.

If a mine operator fails to meet these performance benchmarks, MSHA must extend the mine's placement in pattern status until the benchmarks are achieved for a 1-year period. If a withdrawal order was issued as a result of factors entirely beyond the operator's ability to prevent or control (such as seal leakage due to rapid change in barometric pressure), and no citation was issued in connection with such withdrawal order, such withdrawal order shall

not be counted as a disqualifying factor for purposes of removing an operator from pattern status.

Mine operators can obtain an expedited review by the Federal Mine Safety and Health Review Commission (Review Commission). MSHA must establish and maintain a publically available, easily searchable electronic database with the information the Secretary uses to establish pattern status and make publically available mines placed in pattern status within 7 days of such placement, and provide guidance to assist operators and the public in assessing each mine's performance relative to criteria set forth in regulations.

Sec. 203.—Injunctive Authority. Provides the Secretary of Labor with the authority to seek an injunction to close a mine for a “course of conduct” which, in the judgment of the Secretary, constitutes a continuing hazard to the health and safety of miners, including violations of the law or health and safety standards or regulations. Course of conduct means a pattern of conduct composed of 2 or more acts.

Sec. 204.—Revocation of Approval of Plans. Authorizes the Secretary to revoke a plan which is based upon inaccurate information or that circumstances have materially changed from the time that the plan was approved and continued operation under such plan constitutes a hazard to miners. The Secretary is authorized to issue a withdrawal order upon such revocation, until the operator has submitted and the Secretary has approved a new plan.

Sec. 205.—Challenging a Decision to Approve, Modify, or Revoke a Coal or other Mine Plan. Codifies an “arbitrary and capricious” standard of review for the Review Commission or courts to decide appeals regarding the Secretary's decision to approve, modify, or revoke a mine plan.

Sec. 206.—GAO Study on MSHA Mine Plan Approval. Directs the Government Accountability Office to assess factors that contribute to delays in MSHA's approval of required plans for underground coal mines, and to make recommendations for improving timeliness of plan review and for achieving prompt decisions.

TITLE III—PENALTIES

Sec. 301.—Civil Penalties. Operators in pattern status will be assessed double penalties for any violations, if the mine fails to improve enough to meet performance benchmarks after 180 days in pattern status. Fines may not exceed the maximum statutory penalty.

Operators who violate the anti-retaliation provisions in Section 105(c) the Mine Act shall be assessed a civil penalty of between \$10,000 and \$100,000 for the first violation, and between \$20,000 and \$200,000 for repeat offenses within a 3-year period. This penalty is in addition to remedies afforded to miners or employees under Section 105(c).

Sec. 302.—Civil and Criminal Liability of Officers, Directors and Agents. Clarifies that Section 110(c) of the Mine Act extends the civil and criminal liability of directors, officers, or agents to all types of operators regardless of the legal form of business organization. To eliminate ambiguity, the legislation replaces the term “corporate operator” with the term “operator” to ensure that all types of operators are covered without regard to form of their business

organization. This change will eliminate any question that limited liability corporations, partnerships and other forms of business organization are covered operators. Actions covered in this section are expanded to cover any officer or director who knowingly authorizes or carries out a policy or practice that resulted in a violation of a standard or failure or refusal to comply with an order.

Sec. 303.—Criminal Penalties. For violations of mandatory health and safety standards, the intent standard for criminal conduct in Section 110(d) of the Mine Act is changed from a “willful” to a “knowing” violation. “Knowing” remains the criminal standard for an operator who violates, fails to or refuses to comply with an order.

The Mine Act’s current criminal misdemeanor is retained for an operator who knowingly violates a mandatory health and safety standard, or violates or fails or refuses to comply with any order. Unchanged is the current fine of not more than \$250,000 for the first instance, or 1 year in prison, or both. For a subsequent knowing violation of the same mandatory health and safety standard or order, the fine for a conviction is increased from \$500,000 to \$1,000,000, and but the legislation retains the existing felony provisions of up to 5 years imprisonment, or both.

New felony provisions are established for instances where the operator knowingly violates a mandatory health and safety standard or violates, or fails or refuses to comply with an order, and knowingly exposed miners to a significant risk of serious injury or illness or death. In the first instance, such violation is punishable. For a subsequent conviction of the same violation, punishment shall be by a fine of not more than \$2,000,000, or by imprisonment for not more than 10 years, or both. An additional category of felony is added if an operator knowingly tampers with or disables a required safety device which exposes miners to a significant risk of serious injury or illness or death, punishment shall be by a fine of not more than \$2,000,000, or by imprisonment for not more than 10 years, or both.

Retaliation.—Authorizes criminal penalties against any person who engages in retaliation that is directly or indirectly harmful to any person, including action that interferes with lawful employment or livelihood of any person, because that person has provided any information related to a violation of mine safety and health violations or an unhealthful or unsafe condition, policy or practice under the Mine Act to MSHA, a federal law enforcement officer or a state mine safety agency. The penalties include a fine of up to \$250,000 for an individual and up to 10 years imprisonment, or both, and up to \$500,000 for an organization.

Advance Notice of Inspection.—Authorizes criminal penalties for any person who knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection with the intent to impede, interfere with, or adversely affect the results of any inspection. Penalties are increased from a misdemeanor to a felony with 5 years/maximum or \$250,000 for an individual, and \$500,000 for an organization. Requires operators to post a notice, in a form and manner to be prescribed by the Secretary, stating that such advance notice is unlawful and sets forth maximum penalties for a violation.

Sec. 304.—Commission Review of Penalty Assessments. Requires the Review Commission to assess penalties using the same methodology used by MSHA to calculate proposed fines, however, the Review Commission can use the statutory penalty criteria when there are extraordinary circumstances, or the type of penalty is not based on an MSHA regulation in place (currently regulations do not specify a methodology for special assessment). Currently, MSHA uses a formal system of points to calculate penalty amounts based on statutory factors. Currently, Review Commission and its administrative law judges can apply their own discretion using statutory criteria under Section 110(i) of the Mine Act, but are not bound to use MSHA's penalty formula.

Sec. 305.—Delinquent Payments and Prejudgment Interest. Provides for prejudgment interest on contested fines and penalties based on IRS interest rates. Operators who fail to pay finally-adjudicated penalties within 180 days face a withdrawal order until they pay their overdue fines or make timely payments on a payment plan.

TITLE IV—WORKER RIGHTS AND PROTECTIONS

Sec. 401.—Protection from Retaliation. If the nation's mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. If miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. This provision strengthens anti-retaliation provisions in Section 105(c) of the Mine Act by prohibiting any person from discharging or taking adverse action against a miner, other employee, or applicant for employment because that person has (1) complained about any unsafe condition in a mine; (2) instituted any proceeding related to this Act, or testified or is about to testify in any such proceeding, or exercised any right provided by this Act; (3) testified or is about to testify to Congress or any federal or state proceeding related to safety or health in a mine, or has reported an injury or illness to an operator or agent; (4) refused to violate any provision of this Act (including a mandatory health and safety standard, a regulation, an order or a plan); or (5) such miner is the subject to a medical evaluation and potential transfer. In addition, a miner or other employee cannot be retaliated against for refusing to work if the employee has a "good-faith and reasonable belief" that performing his duties would pose a safety or health hazard to himself or any other miner or employer.¹⁵³

This section extends the statute of limitations for filing a complaint from 60 to 180 days. Within 15 days of receipt of a complaint, the Secretary is required to begin an investigation and make a determination whether or not the complaint was frivolously brought. Under current law, if the Secretary finds the complaint

¹⁵³ Good faith belief means honest belief that a hazard exists. The purpose of this requirement to remove the Act's protection work refusals involving fraud or other forms of deception [such as] lying about the existence of an alleged hazard, deliberately causing one or otherwise acting in bad faith. See: Secretary of Labor on behalf of Robinette v United Castle Coal Co. The belief must be based on what a "reasonable person" would conclude confronted with the same circumstances. The miner or other employee, when practicable, is required to communicate or attempt to communicate the concern to the operator and have not received a response that allays the concern.

was not frivolously brought, she shall, on an expedited basis, apply to the Review Commission or an order of immediate reinstatement of the miner. The Secretary must complete the investigation, and if she finds retaliation, must immediately file a complaint with the Review Commission along with a proposed order for permanent relief. If the Secretary finds that a violation has not occurred, the miner (or applicant) has the option of filing a complaint with the Review Commission. A complainant alleging discrimination has the burden of proving that protected activity was a "contributing factor" to the adverse action. The employer can overcome this by demonstrating by clear and convincing evidence that the employer would have taken the same adverse action in the absence of such conduct.

Under this section, the Review Commission's existing authority to order make whole remedies is expanded to provide for exemplary damages. This legislation does not alter Review Commission precedent in *Moses v Whitley Development Corporation*, 4 FMSHRC 1475 (1982), that adverse action taken against a miner because of the mistaken suspicion or belief that the miner had engaged in protected activity nonetheless violates Section 105(c) of the Mine Act.

Sec. 402—Protection from Loss of Pay. Retains the existing provision of Section 111 of the Mine Act which provides payments to miners who are idled due to an MSHA withdrawal order for the balance of their shift and for 4 hours on the next working shift, including orders issued under Sections 103, 104, 107, 108, or 110 of the Mine Act. However, after the 2nd working shift, the operator shall pay miners their full pay who are idled for up to 60 days, provided that miners are idled due to an order issued under Sections 104, 107 (in connection with a citation), 108 or 110. Payments shall be made regardless of the result of any review of such order. This section authorizes payments to miners who are idled for up to 60 days when the operator closes the mine in anticipation of an MSHA withdrawal order, except in those circumstances when the operator promptly withdraws miners due to a hazard and notifies MSHA, if required, within the prescribed time period. This is intended to ensure that mine operators, who try to game the system by keeping miners exposed to a hazard until just before MSHA issues a withdrawal order will have to pay miners who are idled. However, if a mine operator promptly withdraws miners rather than continue to expose them to a hazard, and notifies MSHA where required, and MSHA subsequently issues an order, the mine operator will not be liable for the pay of idled miners. The section provides for an expedited proceeding and decision before the Review Commission using the same time frames as are provided for the review of emergency response plans. If a miner or other employee is not paid, current law provides that he can file a complaint with the Review Commission which can order payment, and authorizes reasonable attorney fees and costs to a miner who prevails in whole or in part. Further, this section authorizes the Secretary to close a mine which fails to pay its miners by the next regular payroll period.

Sec. 403—Underground Coal Miner Employment Standard for Mines Placed in Pattern Status. For three years after an underground coal mine is placed on pattern status, hourly workers at an underground coal mine cannot be discharged except for "good cause," which is defined as "failure to satisfactorily perform job du-

ties, including compliance with this Act . . . or other legitimate business reason,” following an employee’s probationary period not to exceed 6 months. A miner who is discharged without good cause has a private right of action to federal district court within 1 year. If the miner prevails, a court can take action to further the purposes of this Act, including ordering reinstatement with back pay and compensatory damage, and shall award reasonable attorney’s fees and costs to a prevailing miner.

TITLE V—MODERNIZING HEALTH AND SAFETY STANDARDS

Sec. 501.—Pre-shift Review of Mine Conditions. Requires implementation of a communication program to ensure that each miner is made aware of the current conditions of the mine at the start of his shift. This is accomplished by requiring oral communication between incoming and outgoing miners and shall include a description of both general conditions and any specific hazardous conditions or health and safety violations identified where the miner will be working or traveling. The intent of this section is for the content of these communications to be recorded in a log.

Sec. 502.—Rock Dust Standards. Increases the percentage from 65% to 80% of the amount of rock dust that needs to be mixed with coal dust in all working areas of underground bituminous coal mines in order to prevent coal dust explosions. Currently 80% incombustible content is required in the return entries, but only 65% is required for intakes and neutral areas of the mine. This standard was based on research conducted in the 1920s. However, with the advent of modern mining machinery, coal dust is much finer today and this fine float dust presents a greater explosive risk. NIOSH has conducted experiments on coal dust from every region of the country and recommended that the law be changed to require 80% total incombustible content in all entries and returns and neutral areas.

This section also requires operators to take accurate samples of dust in active working areas of coal mines to ensure that dust is kept below explosive levels. Sampling will have to be done using direct reading monitors once the Secretary of Health and Human Services (HHS) HHS has certified that they are commercially available and MSHA has approved them as permissible for use in an underground mine. Currently, samples have to be sent to a lab and results can take 2 weeks.

Section 502 requires the Secretary of Labor and the Secretary of HHS to submit a report to the House and Senate labor committees within 2 years of enactment on whether direct reading devices are sufficiently reliable and accurate to be used for enforcement of the rock dust standard. If the report determines that direct reading devices are sufficiently reliable and accurate, the Secretary must promulgate a final rule authorizing the use of direct reading devices for enforcement purposes. However, measurements taken by operators or MSHA using the direct reading devices cannot be used in enforcement actions under this Act, until after such final rule is promulgated.

Sec. 503—Atmospheric Monitoring Systems. Requires NIOSH to issue recommendations within 1 year about how atmospheric monitoring systems could be used in underground coal mines to improve safety. NIOSH is urged to consult with a technical working group,

and work in partnership with operators, vendors, state mine safety agencies and labor on opportunities to install continuous atmospheric monitoring to detect methane, CO and air flow. Following such report, DOL is required to promulgate regulations within 1 year requiring operators to install such systems consistent with NIOSH's recommendations.

Sec. 504—Technology Related to Respirable Dust. Requires DOL to promulgate regulations requiring operators to use environmental controls to give miners the maximum feasible protection from respirable dust, including coal and silica dust.

Sec. 505—Refresher Training on Miner Rights and Responsibilities. Requires operators to provide miners with 9 hours of training every 12 months, including one hour of training on their statutory rights and responsibilities. Currently the Mine Act only requires instruction in statutory rights and responsibilities for new miners, and there is no refresher training requirement. Training on miners' rights and responsibilities must be conducted by MSHA or an MSHA-approved trainer independent from the operator, to ensure miners receive an unbiased explanation of their rights. Requires that MSHA mandated safety training program must include distribution of information to miners regarding miners' rights under the Act, and a toll free hotline telephone number at MSHA to be used for reporting unsafe conditions or retaliation. Durable wallet cards with the toll free hotline number shall also be distributed.

Sec. 506.—Authority to Mandate Additional Training. Gives the Secretary authority to require an operator to provide additional training beyond what is normally required if the mine has experienced a fatal accident or has injury, accident, S&S citation, or withdrawal order rates that are above the average for mines of similar size and type.

Sec. 507.—Certification of Personnel. Sets minimum requirements for states to certify, recertify, and decertify certain mine personnel. If a state does not meet the minimum standards for such procedures or cover certain mine classifications (e.g., mine superintendents), MSHA's certification processes will apply in that state. Many states do not have laws covering mandating recertification; others lack decertification procedures. The Secretary is authorized to assess and collect a fee from operators to cover the costs for testing and certification of a miner. MSHA must establish a database of individuals whose certification, registration or qualification has been revoked, and to make such information accessible to states. Section 104 of this legislation (additional amendments relating to inspections and investigations) requires that knowingly falsifying a report under Section 103 of the Mine Act related to accidents, injuries, illnesses and man-hours worked is grounds for revoking a certification under this section.

TITLE VI—ADDITIONAL MINE SAFETY PROVISIONS

Sec. 601.—Definitions. Expands the definition of the term "operator" to include those who directly or indirectly "control" management decisions which impact health and safety at a mine. This expanded definition will subject entities who do not directly "operate" a mine, but have control over managerial decisions, to be subject to civil and criminal enforcement.

Sec. 602.—Assistance to States. Expands MSHA’s state grant program to allow grants for upgrading states’ miner certification programs to meet the new requirements established in this Act. Increases state grant program authorization from \$10 million to \$20 million annually.

Sec. 603.—Black Lung Medical Reports. Requires operators to provide claimants who are required by the mine operator to submit to a medical examination in connection with a claim under the Black Lung Program with a complete copy of the examining physician’s report within 14 days, without the need for the claimant to request the report.

Sec. 604.—Rules of Application to Certain Mines. Section 604 limits the applicability of titles I through VI to all underground coal mines as well as other underground mines which are “gassy” (including surface mines physically connected to such mines) Gassy mines emit methane or other flammable gases and can catch fire or explode. Examples include gilsonite mines in Utah, trona ore mines in Wyoming, and salt mines in salt domes in Louisiana The Belle Isle Salt mine in Franklin, Louisiana caught fire in 1968, killing 21 workers underground. In June 2010, the Weeks Island salt mine was evacuated due to a fire.

“Surface facilities . . . physically connected” to an underground mine, include surface facilities physically connected by conveyor belt, and is intended to include surface lands, shafts, slopes, structures, equipment, coal preparation and loading facilities, impoundments, retention dams, and tailings ponds on the surface that are related to mineral extraction, and private roads and ways so connected. The application of this section should be applied based on physical connection, and without regards to whether a surface facility connected to an underground mine has a different MSHA mine identification number from the underground mine.

Surface metal/non metal mines and non-gassy underground metal/non metal mines are exempted from the changes made to the Mine Act by the Robert C. Byrd Miner Safety and Health Act of 2010, including stone, sand and gravel mines, limestone mines, cement mines and surface coal mines and coal processing facilities (except for those surface facilities physically connected to an otherwise covered underground mine). The existing provisions of the Mine Act will continue to apply to these surface and subsurface non-gassy mines. Nothing is intended to impact the authority of the Secretary to promulgate or modify regulations pursuant to her authority under the Mine Act as in effect prior to the enactment of the Robert C. Byrd Miner Safety and Health Act of 2010 with respect to surface and non gassy underground mines, nor should this section be construed to alter or modify any precedent with regards to the Review Commission or courts.

TITLE VII—AMENDMENTS TO THE OCCUPATIONAL SAFETY AND HEALTH ACT

Sec. 701—Enhanced Protections from Retaliation. Employee’s protected activity is expanded under the anti-retaliation provisions contained in Section 11(c) of the OSH Act to cover: an employee’s refusal to perform work he/she reasonably believes would result in serious injury or illness or to violate the Act; an employee’s report-

ing of injuries, illnesses, or unsafe conditions; and an employee testifying before Congress.

This section extends the statute of limitations from 30 to 180 days. OSHA must order preliminary reinstatement to individuals where OSHA has found reasonable grounds that the claimant was discriminated against. Where DOL declines to investigate, employees can request a *de novo* hearing before an Administrative Law Judge (ALJ).

A complainant alleging discrimination has the burden of proving that protected activity was a “contributing factor” to the adverse action. The employer can overcome this by demonstrating by clear and convincing evidence that the employer would have taken the same adverse action in the absence of such conduct. When an ALJ finds a violation of the law, she can order reinstatement, preservation of seniority, back pay with interest, exemplary damages (as appropriate), attorney’s fees, and expungement of adverse information in the employee’s record. Claimants or respondents can seek administrative appeal within the DOL within 30 days of receipt of an ALJ decision. Such appeal shall be decided in 90 days. Judicial review is provided in the Court of Appeals. The employer’s history of violating OSHA’s anti retaliation provisions will be a factor considered by the Occupational Safety and Health Review Commission when assessing penalties.

If the Labor Department does not investigate, adjudicate, hear appeals and decide the claim in a timely manner (330 days), the claimant is allowed to “kick out” and file suit in federal district court for a *de novo* review of the matter. Claimants employed by employers in OSHA state-plans, can elect to file their claim with the state OSHA or with federal OSHA, if a claim is filed with federal OSHA, federal OSHA must investigate and adjudicate the claim, and may not send the claim back to the state to have it investigated or adjudicated.

Sec. 702.—Victims’ Rights. OSHA must inform family members of workers killed (or incapacitated from a job related injury) or victims about OSHA’s investigation before final decisions are made about whether to issue any citations. Victims include workers who suffered an injury which is the subject of an OSHA inspection or investigation.

OSHA must provide a copy of any citations or reports related to the investigation to families or victims at the same time the employer receives them. OSHA is required to notify families or victims about formal or informal settlements and provide families or victims with an opportunity to meet with OSHA or submit statements prior to reaching any agreement. OSHA must establish a family liaison in each area office to keep families and victims informed and assist them in asserting their rights.

Families and victims must be notified of employer contests; notified of time and date of any proceeding before the OSHA Review Commission; be provided copies of all pleadings and decisions; and be provided an opportunity to appear and make a statement before the Commission. The Commission must provide due consideration to statements and information provided by families.

Sec. 703.—Correction of Serious, Willful or Repeated Violations Pending Contest and Procedures for a Stay. Requires employers to correct serious, willful, and repeat violations while they are con-

testing citations for OSHA violations. The OSHA Act allows employers to postpone abatement while they litigate, which puts workers in harm's way. This forces OSHA to eliminate penalties or downgrade citations in order to secure correction of the violation.

Provides employers with the right to seek a temporary stay of OSHA's abatement order through an expedited proceeding before an Occupational Safety and Health Review Commission (OSHRC) ALJ while the merits of the citation are litigated. To obtain a stay, the employer must show it is likely to succeed in challenging the underlying the merits of the citation or in challenging the length of the abatement period, and a stay will not harm the health and safety of workers. Unions can intervene as a party. Decisions on a request for a stay must be rendered within 30 days. Any party can appeal to the full OSHRC, and if the OSHRC declines to act, or act in a timely manner, parties can appeal to the Court of Appeals.

Sec. 704.—Conforming Amendment. Allows DOL to assess a civil penalty up to \$7,000 for each day an employer fails to correct or abate a serious, willful, or repeat violation by the date established by DOL for correction, unless the OSHRC has issued a stay.

Sec. 705.—Civil Penalties. OSHA's civil penalties have not been adjusted for inflation since 1990, due to an exemption in the Federal Civil Penalties Inflation Adjustment Act. Section 705 increases civil penalties to account for inflation, and establishes higher penalties when workers are killed due a willful or serious violation. A reduced penalty is established for small businesses where workers are killed due to a willful or serious violation. OSHA must adjust civil penalties for inflation at least once every 4 years, beginning January 1, 2015 (see Chart #1).

CHART 1—OSHA CIVIL PENALTIES

Category of violation	OSHA Current civil penalty		Proposed increase in civil penalty in H.R. 5663	
	Minimum	Maximum	Minimum	Maximum
Willful or Repeated	\$5,000	\$70,000	\$8,000	\$120,000
Willful or Repeated, resulting in a fatality	Not in law		\$50,000 ^a	\$250,000
Serious	\$0	\$7,000	\$0	\$12,000
Serious, resulting in a fatality	Not in law		\$20,000 ^a	\$50,000
Other than serious	\$0	\$7,000	\$0	\$12,000
Failure to correct (abate) a safety or health hazard	\$0	\$7,000/day	\$0	\$12,000/day
Failure to post	\$0	\$7,000	\$0	\$12,000

^aThis minimum is reduced by half for employers of 25 or fewer employees.

When assessing penalties for repeat violation, Section 705 also authorizes OSHA and the Review Commission to consider the history of similar violations in state-plan states as well as federal OSHA states. Currently, federal OSHA must overlook violations in 21 different states when assessing an employer's past history with respect to repeat violations.

Consistent with the objective of addressing repeat violations across multi-establishment employers, the Committee urges the Secretary, when bringing enforcement actions against multi-estab-

lishment employers to assess whether there is a potential for the same or similar violations to be repeated at the employer’s other establishments. As part of such assessment, the Secretary should use its authority under the Act to obtain data on injury and illnesses across all similar establishments. For employers receiving a “high-severity” violation from OSHA as part of OSHA’s Severe Violator Enforcement Program, the Secretary should consistently evaluate all of the employer’s similar establishments to determine whether the violation exists at such establishments and certify to OSHA that the hazards were abated or that the violation does not exist at any comparable establishment. This policy can and should be achieved through improvements to the Field Operations Manual.

Sec. 706.—Criminal Penalties. Section 706 increases the criminal penalty and modifies the intent standard for a violation that causes a worker’s death. Penalties are increased from a misdemeanor to a felony (see Chart #2). Under this section, knowing violations which cause or contribute to the death of a worker are designated as felonies with a maximum fine of \$250,000 for individuals and \$500,000 for organizations, or a 10-year prison term, or both. Knowing violations which cause “serious bodily harm” are subject to maximum fine of \$250,000 for individuals and \$500,000 for organizations or a 5-year prison term, or both. Serious bodily harm is defined as an injury or illness that involves a substantial risk of death, protracted unconsciousness, obvious physical disfigurement, or loss or impairment (either permanent or temporary) of the function of a bodily member, organ or mental facility.” While corporations and sole proprietors are liable under the OSHA Act, officers and directors of corporations are immune from criminal liability. Section 706 adds officers and directors as parties who can be prosecuted for criminal violations.

Section 706 also updates the OSH Act with regards to unauthorized advance notice of inspections. Strict liability provision in existing law is replaced with a requirement that a person must knowingly provide advance notice with the intent to impede, interfere with or adversely affect the result of an inspection. Current law provides that advance notice of inspections by any person is a misdemeanor. Penalties are increased from a misdemeanor to a felony with 5 years/maximum or \$250,000 for an individual, and \$500,000 for an organization.

Nothing preempts state or local law enforcement agencies from conducting criminal prosecutions in accordance with state or local laws.

CHART 2—OSHA CRIMINAL PENALTIES

Category of violation	Current maximum OSHA criminal penalty	Criminal OSHA penalty in H.R. 5663
Knowing, resulting in a fatality.	\$10,000; misdemeanor with a 6 mo max prison term.	For an individual—\$250,000; felony with a 10 yr max prison term. For an organization—\$500,000; felony.
Knowing, repeat, resulting in a fatality.	\$20,000; misdemeanor with a 1 yr max prison term.	For an individual—\$250,000; felony with a 20 yr max prison term. For an organization—\$500,000; felony.

CHART 2—OSHA CRIMINAL PENALTIES—Continued

Category of violation	Current maximum OSHA criminal penalty	Criminal OSHA penalty in H.R. 5663
Knowing, resulting in serious bodily harm.	Not in law	For an individual—\$250,000; felony with a 5 yr max prison term. For an organization—\$500,000; felony.
Knowing, resulting in serious bodily harm.	Not in law	For an individual—\$250,000; felony with a 10 yr max prison term. For an organization—\$500,000; felony.
Advance notice of inspection.	\$1,000; misdemeanor with a 6 mo max prison term.	For an individual—\$250,000; felony with a 5 yr max prison term. For an organization—\$500,000; felony.
False statements	\$10,000; misdemeanor with a 6 mo max prison term.	For an individual—\$250,000; felony with a 5 yr max prison term. For an organization—\$500,000; felony.

Sec. 707.—Pre-final Order Interest. Authorizes prejudgment interest from the date of contest to the date of final order at the rate charged by the IRS. Post judgment interest is already authorized, and this legislation sets an 8% interest rate, the same as the Mine Act.

Sec. 708.—Review of State Occupational Safety and Health Plans. Authorizes the Secretary of Labor to assert concurrent enforcement authority over a state OSHA plan, if she determines that there is a failure by the state plan to comply substantially with any provision of a state plan. Such amendment provides states with an opportunity for a hearing regarding an initial determination by the Secretary, provided such request is made within 10 days of such initial determination. If the Secretary affirms such determination following a hearing, the Secretary may inspect and enforce OSHA standards or under the general duty clause. Requires GAO to conduct a study every 5 years to assess: whether a sample of state plans are at least as effective as federal OSHA, whether federal OSHA's oversight of state plans is effective, whether the Secretary is adequately investigating Complaints About State Plan Administration, and to whether the funding formula for state plans is fair and adequate.

Sec. 709.—Health Hazard Evaluations by the National Institute for Occupational Safety and Health. Modifies Section 20 of the Occupational Safety and Health Act of 1970 to expand the list of those individuals who can request that NIOSH conduct a Health Hazard Evaluation (HHE). This section authorizes representatives of former workers, physicians, another federal agency, or a state or local health department to request an HHE, in addition to employers and employee representatives who are already authorized to make such requests. It also expands the issues that can be covered in an HHE to go beyond toxic substances to include physical agents, equipment, or working conditions. Such expanded authority already exists for NIOSH to cover physical agents for miners.

Sec. 710.—Authorization of Cooperative Agreements by the National Institute for Occupational Safety and Health. Amends Section 22(h)(3) of the Occupational Safety and Health Act of 1970 to authorize the National Institute for Occupational Safety and Health through its Office of Mine Safety and Health to enter into

cooperative agreements with international institutions to improve mine safety and health through new interventions.

Sec. 711.—Effective Date. Title VII takes effect not more than 90 days after being enacted, with the exception of state-plan states, which have 1 year from the date of its enactment to implement its requirements. In addition, DOL may extend the 1-year period for up to 12 additional months if a state-plan state's legislature is not in session during the 12-month period after enactment.

VI. EXPLANATION OF AMENDMENTS

The Committee adopted a substitute amendment to the bill. The substitute amendment is described in total in the summary of the bill above. The Committee adopted four other amendments to the substitute amendment: Amendment by Ms. Shea-Porter, Amendment by Ms. Woolsey, Amendment by Mr. Hare, and Amendment by Ms. Titus. These four amendments are described in the Legislative History section of this report.

VII. APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of this bill to the legislative branch. H.R. 5663 would have no impact on the legislative branch insofar as it amends the Mine Act. The Congressional Accountability Act applies the Occupational Safety and Health Act to the legislative branch.

VIII. REGULATORY IMPACT STATEMENT

The Committee has determined that H.R. 5663 will have a minimal impact on the regulatory burden. In fact, H.R. 5663 will reduce the Department of Labor's regulatory burden significantly by enacting into law or providing specific guidance on a number of matters that have been pending on its regulatory agenda for some time.

IX. UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

X. EARMARK STATEMENT

H.R. 5663 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

XI. ROLLCALL

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1 BILL: H.R. 5663 DATE: JULY 21, 2010
 AMENDMENT NUMBER: 2 DEFEATED: 17-30
 SPONSOR/AMENDMENT: MR. KLINE / SUBSTITUTE AMENDMENT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
Ms. CHU		X		
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE	X			
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
Vacancy	X			
TOTALS	17	30		1

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 2 BILL: H.R. 5663 DATE: JULY 21, 2010
 AMENDMENT NUMBER: 4 DEFEATED: 17-30
 SPONSOR/AMENDMENT: MRS. MCMORRIS RODGERS / STRIKE TITLE VII -
 OSHA AMENDMENTS

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
Ms. CHU		X		
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE	X			
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
Vacancy	X			
TOTALS	17	30		1

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 3 BILL: H.R. 5663 DATE: JULY 21, 2010
 AMENDMENT NUMBER: 6 DEFEATED: 17-30
 SPONSOR/AMENDMENT: MR. PRICE / STRIKE "KNOWING" INTENT STANDARD

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Ms. FUDGE		X		
Mr. POLIS		X		
Mr. TONKO		X		
Mr. PIERLUISI		X		
Mr. SABLAN		X		
Ms. TITUS		X		
Ms. CHU		X		
Mr. KLINE, Senior Republican Member	X			
Mr. PETRI	X			
Mr. McKEON	X			
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. WILSON	X			
Mrs. McMORRIS RODGERS	X			
Mr. PRICE	X			
Mr. ROB BISHOP	X			
Mr. GUTHRIE	X			
Mr. CASSIDY	X			
Mr. McCLINTOCK	X			
Mr. HUNTER	X			
Mr. ROE	X			
Mr. THOMPSON	X			
Vacancy	X			
TOTALS	17	30		1

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 4

BILL: H.R. 5663

DATE: JULY 21, 2010

PASSED: 30-17

SPONSOR/AMENDMENT: WOOLSEY/MOTION TO FAVORABLY REPORT THE
BILL, AS AMENDED, TO THE HOUSE

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Ms. FUDGE	X			
Mr. POLIS	X			
Mr. TONKO	X			
Mr. PIERLUISI	X			
Mr. SABLAN	X			
Ms. TITUS	X			
Ms. CHU	X			
Mr. KLINE, Senior Republican Member		X		
Mr. PETRI		X		
Mr. McKEON		X		
Mr. HOEKSTRA				X
Mr. CASTLE		X		
Mr. EHLERS		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. WILSON		X		
Mrs. McMORRIS RODGERS		X		
Mr. PRICE		X		
Mr. ROB BISHOP		X		
Mr. GUTHRIE		X		
Mr. CASSIDY		X		
Mr. McCLINTOCK		X		
Mr. HUNTER		X		
Mr. ROE		X		
Mr. THOMPSON		X		
VACANCY				
TOTALS	30	17		1

XII. 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.

XIII. NEW BUDGET AUTHORITY AND CBO 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 estimate for H.R. 5663 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 26, 2010.

Hon. GEORGE MILLER,
*Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: Based on a review of H.R. 5663, the Robert C. Byrd Miner Safety and Health Act of 2010 as ordered reported on July 21, 2010, CBO estimates that enacting this legislation would not affect direct spending over the 2010–2020 period. However, CBO estimates that the legislation would increase revenues by \$200 million over the 2010–2020 period. CBO has not completed an estimate of the bill's impact on discretionary spending.

H.R. 5663 would amend several sections of the Federal Mine Safety and Health Act of 1977 (FMSHA) and the Occupational Safety and Health Act of 1970 (OSHA). The bill would require certain mine operators to implement safety measures to protect mine workers, require mine operators to comply with new standards regarding employee rights, and require independent accident investigations for certain accidents. The bill would also enhance whistleblower protections and victims' rights under OSHA.

H.R. 5663 would increase civil and criminal penalties for violations under both FMSHA and OSHA. Based on information from the Department of Labor, CBO estimates that \$120 million would be generated from penalties collected under title III (relating to FMSHA) of the bill and \$80 million would be generated from penalties collected under title VII (relating to OSHA). Because enacting H.R. 5663 would affect revenues, pay-as-you-go procedures would apply (see enclosed table).

CBO has determined that the bill contains several private-sector mandates and one intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). Because of insufficient information about the incremental costs related to some of the mandates, CBO cannot determine whether the aggregate cost of those private-sector mandates would exceed the annual threshold established in UMRA (\$141 million in 2010, adjusted annually for inflation). CBO estimates that the total cost of the intergovernmental mandate would be small and would not exceed the annual

threshold established for state, local, and tribal entities (\$70 million in 2010, adjusted annually for inflation).

I hope this information is helpful to you. If you would like further details on this estimate, the CBO contacts are Grant Driessen, Sean Dunbar, and Andrea Noda.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR H.R. 5663, THE ROBERT C. BYRD MINER SAFETY AND HEALTH ACT OF 2010, AS ORDERED REPORTED BY THE HOUSE
COMMITTEE ON EDUCATION AND LABOR ON JULY 21, 2010

	By fiscal year, in millions of dollars—												
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2010– 2015	2010– 2020
Statutory Pay-As-You-Go Impact	0	-20	-20	-20	-20	-20	-20	-20	-20	-20	-20	-100	-200
NET INCREASE OR DECREASE (-) IN THE DEFICIT													
Statutory Pay-As-You-Go Impact	0	-20	-20	-20	-20	-20	-20	-20	-20	-20	-20	-100	-200

Source: Congressional Budget Office.

XIV. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House rule XIII, the goal of H.R. 5663 is to improve the protection of miners in some of the nation's most dangerous working environments and other workers from occupational safety and health hazards.

XV. CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 5663. The Committee believes that the amendments made by this bill, which amends the Federal Mine Safety and Health Act to provide increased protection to miners and other workers from occupational safety and health hazards, are within Congress' authority under Article I, section 8, clause 3 of the Constitution of the United States.

XVI. COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 5663. 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.

XVII. 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):

FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

* * * * *

DEFINITIONS

SEC. 3. For the purpose of this Act, the term—

(a) * * *

* * * * *

[(d) “operator” means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;]

(d) “operator” means—

(1) any owner, lessee, or other person that—

(A) operates or supervises a coal or other mine; or

(B) controls such mine by making or having the authority to make management or operational decisions

that affect, directly or indirectly, the health or safety at such mine; or

(2) any independent contractor performing services or construction at such mine;

(e) “agent” means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of **[the miners]** *any miner* in a coal or other mine;

* * * * *

(g) “miner” means any individual working in a coal or other mine, *and includes any individual who is not currently working in a coal or other mine but would be currently working in such mine, but for an accident in such mine;*

* * * * *

(m) “Panel” means the Interim Compliance Panel established by this Act; **[and]**

(n) “Administration” means the Mine Safety and Health Administration in the Department of Labor **[.]**;

(o) “Commission” means the Federal Mine Safety and Health Review Commission **[.]**; *and*

(p) “*significant and substantial violation*” means a violation of this Act, including any mandatory health or safety standard or regulation promulgated under this Act, that is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard as described in section 104(d).

* * * * *

TITLE I—GENERAL

* * * * *

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. *Such inspections shall be conducted during the various shifts and days of the week during which miners are normally present in the mine to en-*

sure that the protections of this Act are afforded to all miners working all shifts. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. *The Secretary shall, upon request by an operator, review with the appropriate mine officials the Secretary's most recent evaluation for pattern status (as provided in section 104(e)) for that mine during the course of a mine's regular quarterly inspection of an underground mine or a biannual inspection of a surface mine, or, at the discretion of the Secretary, during the pre-inspection conference.* For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine. *During inspections and investigations under this section, and during any litigation under this Act, no attorney shall represent or purport to represent both the operator of a coal or other mine and any other individual, unless such individual has knowingly and voluntarily waived all actual and reasonably foreseeable conflicts of interest resulting from such representation. The Secretary is authorized to take such actions as the Secretary considers appropriate to ascertain whether such individual has knowingly and voluntarily waived all such conflicts of interest. If the Secretary finds that such an individual cannot be represented adequately by such an attorney due to such conflicts of interest, the Secretary may petition the appropriate United States District Court which shall have jurisdiction to disqualify such attorney as counsel to such individual in the matter. The Secretary may make such a motion as part of an ongoing related civil action or as a miscellaneous action.*

[(b) For the purpose]

(b) ACCIDENT INVESTIGATIONS.—

(1) IN GENERAL.—*For all accident investigations under this Act, the Secretary shall—*

(A) determine why the accident occurred;

(B) determine whether there were violations of law, mandatory health and safety standards, or other requirements, and if such violations are found, issue citations and penalties, and in cases involving possible criminal actions, the Secretary may refer such matters to the Attorney General; and

(C) make recommendations to avoid any recurrence.

(2) INDEPENDENT ACCIDENT INVESTIGATIONS.—

(A) IN GENERAL.—There shall be, in addition to an accident investigation under paragraph (1), an independent investigation by an independent investigation panel (referred to in this subsection as the "Panel") appointed under subparagraph (B) for—

(i) any accident involving 3 or more deaths; or

(ii) any accident that is of such severity or scale for potential or actual harm that, in the opinion of the Secretary of Health and Human Services, the accident merits an independent investigation.

(B) APPOINTMENT.—

(i) *IN GENERAL.*—As soon as practicable after an accident described in subparagraph (A), the Secretary of Health and Human Services shall appoint 5 members for the Panel required under this paragraph from among individuals who have expertise in accident investigations, mine engineering, or mine safety and health that is relevant to the particular investigation.

(ii) *CHAIRPERSON.*—The Panel shall include, and be chaired by, a representative from the Office of Mine Safety and Health Research, of the National Institute for Occupational Safety and Health (referred to in this subsection as NIOSH).

(iii) *CONFLICTS OF INTEREST.*—Panel members, and staff and consultants assisting the Panel with an investigation, shall be free from conflicts of interest with regard to the investigation, and be subject to the same standards of ethical conduct for persons employed by the Secretary.

(iv) *COMPOSITION.*—The Secretary of Health and Human Services shall appoint as members of the Panel—

(I) 1 operator of a mine or individual representing mine operators, and

(II) 1 representative of a labor organization that represents miners,

and may not appoint more than 1 of either such individuals as members of the Panel.

(v) *STAFF AND EXPENSES.*—The Director of NIOSH shall designate NIOSH staff to facilitate the work of the Panel. The Director may accept as staff personnel on detail from other Federal agencies or re-employ annuitants. The detail of personnel under this paragraph may be on a non-reimbursable basis, and such detail shall be without interruption or loss of civil service status or privilege. The Director of NIOSH shall have the authority to procure on behalf of the Panel such materials, supplies or services, including technical experts, as requested in writing by a majority of the Panel.

(vi) *COMPENSATION AND TRAVEL.*—All members of the Panel who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States. Each Panel member who is not an officer or employee of the United States shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which such member is engaged in the performance of duties of the Panel. The members of the Panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter 1 of chapter 57 of title 5, United States Code, while away from their

homes or regular places of business in the performance of services for the Panel.

(C) *DUTIES.—The Panel shall—*

(i) *assess and identify any factors that caused the accident, including deficiencies in safety management systems, regulations, enforcement, industry practices or guidelines, or organizational failures;*

(ii) *identify and evaluate any contributing actions or inactions of—*

(I) *the operator;*

(II) *any contractors or other persons engaged in mining-related functions at the site;*

(III) *any State agency with oversight responsibilities;*

(IV) *any agency or office within the Department of Labor; or*

(V) *any other person or entity (including equipment manufacturers);*

(iii) *review the determinations and recommendations by the Secretary under paragraph (1);*

(iv) *prepare a report that—*

(I) *includes the findings regarding the causal factors described in clauses (i) and (ii);*

(II) *identifies any strengths and weaknesses in the Secretary's investigation; and*

(III) *includes recommendations, including interim recommendations where appropriate, to industry, labor organizations, State and Federal agencies, or Congress, regarding policy, regulatory, enforcement, administrative, or other changes, which in the judgment of the Panel, would prevent a recurrence at other mines; and*

(v) *publish such findings and recommendations (excluding any portions which the Attorney General requests that the Secretary withhold in relation to a criminal referral) and hold public meetings to inform the mining community and families of affected miners of the Panel's findings and recommendations.*

(D) *HEARINGS; APPLICABILITY OF CERTAIN FEDERAL LAW.—The Panel shall have the authority to conduct public hearings or meetings, but shall not be subject to the Federal Advisory Committee Act. All public hearings of the Panel shall be subject to the requirements under section 552b of title 5, United States Code.*

(E) *MEMORANDUM OF UNDERSTANDING.—Not later than 90 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary of Labor and the Secretary of Health and Human Services shall conclude and publically issue a memorandum of understanding that—*

(i) *outlines administrative arrangements which will facilitate a coordination of efforts between the Secretary of Labor and the Panel, ensures that the Secretary's investigation under paragraph (1) is not delayed or otherwise compromised by the activities of the Panel, and*

establishes a process to resolve any conflicts between such investigations;

(ii) ensures that Panel members or staff will be able to participate in investigation activities (such as mine inspections and interviews) related to the Secretary of Labor's investigation and will have full access to documents that are assembled or produced in such investigation, and ensures that the Secretary of Labor will make all of the authority available to such Secretary under this section, including subpoena authority, to obtain information and witnesses which may be requested by such Panel; and

(iii) establishes such other arrangements as are necessary to implement this paragraph.

(F) PROCEDURES.—Not later than 90 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary of Health and Human Services shall establish procedures to ensure the consistency and effectiveness of Panel investigations. In establishing such procedures, such Secretary shall consult with independent safety investigation agencies, sectors of the mining industry, representatives of miners, families of miners involved in fatal accidents, State mine safety agencies, and mine rescue organizations. Such procedures shall include—

(i) authority for the Panel to use evidence, samples, interviews, data, analyses, findings, or other information gathered by the Secretary of Labor, as the Panel determines valid;

(ii) provisions to ensure confidentiality if requested by any witness, to the extent permitted by law, and prevent conflicts of interest in witness representation; and

(iii) provisions for preservation of public access to the Panel's records through the Secretary of Health and Human Services.

(G) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection such sums as may be necessary.

(3) POWERS AND PROCESSES.—For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any

failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) *ADDITIONAL POWERS.*—*For purposes of making inspections and investigations, the Secretary or the Secretary's designee, may sign and issue subpoenas for the attendance and testimony of witnesses and the production of information, including all relevant data, papers, books, documents, and items of physical evidence, and administer oaths. Witnesses summoned shall be paid the same fees that are paid witnesses in the courts of the United States. In carrying out inspections and investigations under this subsection, authorized representatives of the Secretary and attorneys representing the Secretary are authorized to question any individual privately. Under this section, any individual who is willing to speak with or provide a statement to such authorized representatives or attorneys representing the Secretary may do so without the presence, involvement, or knowledge of the operator or the operator's agents or attorneys. The Secretary shall keep the identity of an individual providing such a statement confidential to the extent permitted by law. Nothing in this paragraph prevents any individual from being represented by that individual's personal attorney.*

* * * * *

(d) All accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary or his authorized representative and the appropriate State agency. Such records shall be open for inspection by interested persons. [Such records shall include man-hours worked and shall be reported at a frequency determined by the Secretary, but at least annually.] *The records to be kept and made available by the operator of the mine shall include man-hours worked and occupational injuries and illnesses with respect to the miners in their employ or under their direction or authority, and shall be maintained separately for each mine and be reported at a frequency determined by the Secretary, but at least annually. Independent contractors (within the meaning of section 3(d)) shall be responsible for reporting accidents, occupational injuries and illnesses, and man-hours worked for each mine with respect to the miners in their employ or under their direction or authority, and shall be reported at a frequency determined by the Secretary, but not less than annually. Reports or records of operators and contractors required and submitted to the Secretary under this subsection shall be signed and certified as accurate and complete by a knowledgeable and responsible person possessing a certification, registration, qualification, or other approval, as provided for under section 118. Knowingly falsifying such records or reports shall be grounds for revoking such certification, registration, qualification, or other approval under the standards established under subsection (b)(1) of such section.*

* * * * *

(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners

shall be given an opportunity to accompany the Secretary of his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. *If any miner is entrapped or otherwise prevented as the result of an accident in such mine from designating such a representative directly, such miner's closest relative may act on behalf of such miner in designating such a representative. If any miner is not currently working in such mine as the result of an accident in such mine, but would be currently working in such mine but for such accident, such miner may designate such a representative. A representative of miners shall have the right to participate in any accident investigation the Secretary initiates pursuant to subsection (b), including the right to participate in investigative interviews and to review all relevant papers, books, documents and records produced in connection with the accident investigation, unless the Secretary in consultation with the Attorney General excludes such representatives from the investigation on the grounds that inclusion would interfere with or adversely impact a criminal investigation that is pending or under consideration.* Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

* * * * *

(k) In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary **[, when present,]** may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

CITATIONS AND ORDERS

SEC. 104. (a) * * *

* * * * *

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of **[any mandatory health or safety standard]** *any provision of this Act, including any mandatory health or safety standard or regulation promulgated under this Act,* and if he also finds that, while the conditions created by such violation do not cause immi-

ment danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with **such mandatory health or safety standards** *such provisions, regulations, or mandatory health or safety standards*, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of **any mandatory health or safety standard** *any provision of this Act, including any mandatory health or safety standard or regulation promulgated under this Act*, and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

* * * * *

[(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

[(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

[(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent vio-

lations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

[(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.]

(e) *PATTERN OF RECURRING NONCOMPLIANCE OR ACCIDENTS.*—

(1) *PATTERN STATUS.*—

(A) *IN GENERAL.*—*For purposes of this subsection, a coal or other mine shall be placed in pattern status if such mine has, as determined based on the regulations promulgated under paragraph (8)—*

(i) *a pattern of—*

(I) *citations for significant and substantial violations;*

(II) *citations and withdrawal orders issued for unwarrantable failure to comply with mandatory health and safety standards under section 104(d);*

(III) *citations for flagrant violations within the meaning of section 110(b);*

(IV) *withdrawal orders issued under any other section of this Act (other than orders issued under subsections (j) or (k) of section 103); and*

(V) *accidents and injuries; or*

(ii) *a pattern consisting of any combination of citations, orders, accidents, or injuries described in subclauses (I) through (V).*

(B) *MITIGATING CIRCUMSTANCES.*—*Notwithstanding subparagraph (A), if the Secretary, after conducting an assessment of a coal or other mine that otherwise qualifies for pattern status, certifies that there are mitigating circumstances wherein the operator has already implemented remedial measures that have reduced risks to the health and safety of miners to the point that such risks are no longer elevated and has taken sufficient measures to ensure such elevated risk will not recur, the Secretary may deem such mine to not be in pattern status under this subsection. The Secretary shall issue any such certification of such mitigating circumstances that would preclude the placement of a mine in pattern status as a written finding, which shall, not later than 10 days after the certification is made, be—*

(i) *made available on the public website of the Mine Safety and Health Administration; and*

(ii) *transmitted to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.*

(C) *FREQUENCY.*—*Not less frequently than every 6 months, the Secretary shall identify any mines which meet the criteria set forth in paragraph (8).*

(2) *ACTIONS FOLLOWING PLACEMENT OF MINE IN PATTERN STATUS.*—*For any coal or other mine that is in pattern status, the Secretary shall—*

(A) *notify the operator of such mine that the mine is being placed in pattern status;*

(B) issue an order requiring such operator to cause all persons to be withdrawn from such mine, except those persons referred to in subsection (c) or authorized by an order of the Secretary issued under this subsection;

(C) issue a remediation order described in paragraph (3) to such operator within 3 days; and

(D) require that the number of regular inspections of such mine required under section 103 be increased to 8 per year while the mine is in pattern status.

Notice advising operators that they face potential placement in pattern status shall not be a requirement for issuing a withdrawal order to operators under this subsection.

(3) **REMEDIATION ORDER.**—

(A) **IN GENERAL.**—A remediation order issued to an operator under paragraph (2)(C) may require the operator to carry out one or more of the following requirements, pursuant to a timetable for commencing and completing such actions or as a condition of miners reentering the mine:

(i) Provide specified training, including training not otherwise required under this Act.

(ii) Institute and implement an effective health and safety management program approved by the Secretary, including—

(I) the employment of safety professionals, certified persons, and adequate numbers of personnel for the mine, as may be required by the Secretary;

(II) specific inspection, recordkeeping, reporting and other requirements for the mine as the Secretary may establish; and

(III) other requirements to ensure compliance and to protect the health and safety of miners or prevent accidents or injuries as the Secretary may determine are necessary.

(iii) Facilitate any effort by the Secretary to communicate directly with miners employed at the mine outside the presence of the mine operators or its agents, for the purpose of obtaining information about mine conditions, health and safety practices, or advising miners of their rights under this Act.

(B) **MODIFICATION OF AND FAILURE TO COMPLY WITH REMEDIATION ORDER.**—The Secretary may modify the remediation order, as necessary, to protect the health and safety of miners. If the mine operator fails to fully comply with the remediation order during the time a mine is in pattern status, the Secretary shall reinstate the withdrawal order under paragraph (2)(B).

(C) **EXTENSION OF DEADLINES.**—An extension of a deadline under the remediation order may be granted on a temporary basis and only upon a showing that the operator took all feasible measures to comply with the order and only to the extent that the operator's failure to comply is beyond the control of the operator.

(4) **CONDITIONS FOR LIFTING A WITHDRAWAL ORDER.**—A withdrawal order issued under paragraph (2)(B) shall not be lifted until the Secretary verifies that—

(A) any and all violations or other conditions in the mine identified in the remediation order have been or are being fully abated or corrected as outlined in the remediation order; and

(B) the operator has completed any other actions under the remediation order that are required for reopening the mine.

(5) PERFORMANCE EVALUATION.—

(A) PERFORMANCE BENCHMARKS.—The Secretary shall evaluate the performance of each mine in pattern status every 90 days during which the mine is producing and determine if, for such 90-day period—

(i) the rate of citations at such mine for significant and substantial violations—

(I) is in the top performing 35th percentile of such rates, respectively, for all mines of similar size and type; or

(II) has been reduced by 70 percent from the date on which such mine was placed in pattern status, provided that the rate of such violations is not greater than the mean for all mines of similar size and type;

(ii) the accident and injury rates at such mine are in the top performing 35th percentile of such rates, respectively, for all mines of similar size and type; and

(iii) no citations or withdrawal orders for a violation under section 104(d), no withdrawal orders for imminent danger under section 107 (issued in connection with a citation), and no flagrant violations within the meaning of section 110(b), were issued for such mine.

(B) REISSUANCE OF WITHDRAWAL ORDERS.—If an operator being evaluated fails to achieve the performance benchmarks described in subparagraph (A), the Secretary may reissue a withdrawal order under paragraph (2)(B) to remedy any recurring conditions that led to pattern status under this subsection, and may modify the remediation order, as necessary, to protect the health and safety of miners.

(6) TERMINATION OF PATTERN STATUS.—

(A) PERFORMANCE BENCHMARKS.—The Secretary shall remove a coal or other mine from pattern status if, for a 1-year period during which the mine is producing—

(i) the rate of citations at such mine for significant and substantial violations—

(I) is in the top performing 25th percentile of such rates, respectively, for all mines of similar size and type; or

(II) has been reduced by 80 percent from the date on which such mine was placed in pattern status, provided that the rate of such violations is not greater than the mean for all mines of similar size and type;

(ii) the accident and injury rates at such mine are in the top performing 25th percentile of such rates, respectively, for all mines of similar size and type; and

(iii) no citations or withdrawal orders for violations under section 104(d), no withdrawal orders for imminent danger under section 107 (issued in connection with a citation), and no flagrant violations within the meaning of section 110(b), were issued for such mine.

(B) *CONTINUATION OF PATTERN STATUS.*—Should the mine operator fail to meet the performance benchmarks described in subparagraph (A), the Secretary shall extend the mine’s placement in pattern status until such benchmarks are achieved.

(C) *CONSTRUCTION.*—A withdrawal order issued as the result of a condition that was entirely beyond the operator’s ability to prevent or control shall not preclude the operator from being removed from pattern status, provided the operator did not cause or allow miners to be exposed to the condition in violation of any provision of this Act or a mandatory health or safety standard or regulation promulgated under this Act.

(7) *EXPEDITED REVIEW.*—If any order under this subsection is contested, the review of such order shall be conducted on an expedited basis, in accordance with section 105(d).

(8) *REGULATIONS.*—

(A) *IN GENERAL.*—Not later than 120 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall issue interim final regulations that shall define—

(i) the threshold benchmarks to trigger pattern status under paragraph (1) and cause a withdrawal order to be issued or reissued; and

(ii) the performance benchmarks described in paragraphs (5)(A) and (6)(A).

(B) *THRESHOLD BENCHMARKS.*—In establishing threshold benchmarks to trigger pattern status for mines with significantly poor compliance that contributes to unsafe or unhealthy conditions, the Secretary—

(i) shall—

(I) consider rates of citations and orders described in paragraph (1)(A) and rates of reportable accidents and injuries within the preceding 180-day period; and

(II) assign appropriate weight to various types of citations, orders, accidents, injuries, or other factors; and

(ii) may include—

(I) factors such as mine type, production levels, number of miners, hours worked by miners, number of mechanized mining units (or similar production characteristics), and the presence of a representative of miners at the mine for purposes of collective bargaining;

(II) the mine’s history of citations, violations, orders, and other enforcement actions, or rates of reportable accidents and injuries, over any period determined relevant by the Secretary; and

(III) other factors the Secretary may determine appropriate to protect the safety and health of miners.

(C) FINAL REGULATION.—Not later than 2 years after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall promulgate a final regulation implementing this paragraph.

(9) PUBLIC DATABASE AND INFORMATION.—The Secretary shall establish and maintain a publically available electronic database containing the data used to determine pattern status for all coal or other mines which shall be updated as frequently as practicable. Such database shall be searchable and have the capacity to provide comparative data about the health and safety at mines of similar sizes and types. The Secretary shall also make publicly available—

(A) a list of all mines the Secretary places in pattern status, updated within 7 days of placing an additional mine in pattern status;

(B) the metrics, including percentile information, used for the purposes of the performance benchmarks and threshold benchmarks described in paragraphs (5), (6), and (8); and

(C) guidance for the use of such metrics and benchmarks to assist operators in determining the performance their mines under criteria established by the Secretary.

(10) OPERATOR FEES FOR ADDITIONAL INSPECTIONS.—

(A) ASSESSMENT AND COLLECTION.—Beginning 120 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall assess and collect fees, in accordance with this paragraph, from each coal or other mine in pattern status for the costs of additional inspections under this subsection. The Secretary shall issue, by rule, a schedule of fees to be assessed against coal or other mines of varying types and sizes, and shall collect and assess amounts under this paragraph based on the schedule.

(B) USE.—Amounts collected as provided in subparagraph (A) shall only be available to the Secretary for making expenditures to carry out the additional inspections required under paragraph (2)(D).

(C) AUTHORIZATION OF APPROPRIATIONS.—In addition to any other amounts authorized to be appropriated under this Act, there is authorized to be appropriated to the Assistant Secretary for Mine Safety and Health for each fiscal year in which fees are collected under subparagraph (A) an amount equal to the total amount of fees collected under such subparagraph during that fiscal year. Such amounts are authorized to remain available until expended. If on the first day of a fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect fees (as offsetting collections) under this subsection at the rate in effect during the preceding fiscal year, until 5 days after the date such regular appropriation is enacted.

(D) COLLECTION AND CREDITING OF FEES.—Fees authorized and collected under this paragraph shall be deposited

and credited as offsetting collections to the account providing appropriations to the Mine Safety and Health Administration and shall not be collected for any fiscal year except to the extent and in the amount provided in advance in appropriation Acts.

* * * * *

(g)(1) * * *

(2) No miner who is ordered withdrawn from a coal or other mine **【under paragraph (1)】** *under paragraph (1) or under section 115(e)* shall be discharged or otherwise discriminated against because of such order; and no miner who is ordered withdrawn from a coal or other mine **【under paragraph (1)】** *under paragraph (1) or under section 115(e)* shall suffer a loss of compensation during the period necessary for such miner to receive such training and for an authorized representative of the Secretary to determine that such miner has received the requisite training.

* * * * *

PROCEDURE FOR ENFORCEMENT

SEC. 105. (a) * * *

* * * * *

【(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

【(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investiga-

tion, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. 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) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

[(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). 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), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).]

(c) *PROTECTION FROM RETALIATION.*—

(1) *RETALIATION PROHIBITED.*—

(A) *RETALIATION FOR COMPLAINT OR TESTIMONY.*—No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination

against or otherwise interfere with the exercise of the statutory rights of any miner or other employee of an operator, representative of miners, or applicant for employment, because—

(i) such miner or other employee, representative, or applicant for employment—

(I) has filed or made a complaint, or is about to file or make a complaint, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine;

(II) instituted or caused to be instituted, or is about to institute or cause to be instituted, any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such miner or other employee, representative, or applicant for employment on behalf of him or herself or others of any right afforded by this Act, or has reported any injury or illness to an operator or agent;

(III) has testified or is about to testify before Congress or any Federal or State proceeding related to safety or health in a coal or other mine; or

(IV) refused to violate any provision of this Act, including any mandatory health and safety standard or regulation; or

(ii) such miner is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101.

(B) RETALIATION FOR REFUSAL TO PERFORM DUTIES.—

(i) IN GENERAL.—No person shall discharge or in any manner discriminate against a miner or other employee of an operator for refusing to perform the miner's or other employee's duties if the miner or other employee has a good-faith and reasonable belief that performing such duties would pose a safety or health hazard to the miner or other employee or to any other miner or employee.

(ii) STANDARD.—For purposes of clause (i), the circumstances causing the miner's or other 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 miner or other employee, would conclude that there is such a hazard. In order to qualify for protection under this paragraph, the miner or other employee, when practicable, shall have communicated or attempted to communicate the safety or health concern to the operator and have not received from the operator a response reasonably calculated to allay such concern.

(2) COMPLAINT.—Any miner or other employee or representative of miners or applicant for employment who believes that he

or she has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) may file a complaint with the Secretary alleging such discrimination not later than 180 days after the later of—

(A) the last date on which an alleged violation of paragraph (1) occurs; or

(B) the date on which the miner or other employee or representative knows or should reasonably have known that such alleged violation occurred.

(3) INVESTIGATION AND HEARING.—

(A) COMMENCEMENT OF INVESTIGATION AND INITIAL DETERMINATION.—Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent, and shall commence an investigation within 15 days of the Secretary's receipt of the complaint, and, as soon as practicable after commencing such investigation, make the determination required under subparagraph (B) regarding the reinstatement of the miner or other employee.

(B) REINSTATEMENT.—If the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner or other employee until there has been a final Commission order disposing of the underlying complaint of the miner or other employee. If either the Secretary or the miner or other employee pursues the underlying complaint, such reinstatement shall remain in effect until the Commission has disposed of such complaint on the merits, regardless of whether the Secretary pursues such complaint by filing a complaint under subparagraph (D) or the miner or other employee pursues such complaint by filing an action under paragraph (4). If neither the Secretary nor the miner or other employee pursues the underlying complaint within the periods specified in paragraph (4), such reinstatement shall remain in effect until such time as the Commission may, upon motion of the operator and after providing notice and an opportunity to be heard to the parties, vacate such complaint for failure to prosecute.

(C) INVESTIGATION.—Such investigation shall include interviewing the complainant and—

(i) providing the respondent an opportunity to submit to the Secretary a written response to the complaint and to present statements from witnesses or provide evidence; and

(ii) providing the complainant an opportunity to receive any statements or evidence provided to the Secretary and rebut any statements or evidence.

(D) ACTION BY THE SECRETARY.—If, upon such investigation, the Secretary determines that the provisions of this subsection have been violated, the Secretary shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner or other employee or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief.

(E) *ACTION OF THE COMMISSION.*—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) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The complaining miner or other employee, representative, or applicant for employment may present additional evidence on his or her own behalf during any hearing held pursuant to this paragraph.

(F) *RELIEF.*—The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation and prescribe a remedy as the Commission considers appropriate, including—

(i) the rehiring or reinstatement of the miner or other employee with back pay and interest and without loss of position or seniority, and restoration of the terms, rights, conditions, and privileges associated with the complainant's employment;

(ii) any other compensatory and consequential damages sufficient to make the complainant whole, and exemplary damages where appropriate; and

(iii) 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.

(4) *NOTICE TO AND ACTION OF COMPLAINANT.*—

(A) *NOTICE TO COMPLAINANT.*—Not later than 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner or other employee, applicant for employment, or representative of miners of his determination whether a violation has occurred.

(B) *ACTION OF COMPLAINANT.*—If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days after receiving notice of the Secretary's determination, to file an action in his or her own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

(C) *HEARING AND DECISION.*—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), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate as described in paragraph (3)(D). Such order shall become final 30 days after its issuance.

(5) *BURDEN OF PROOF.*—In adjudicating a complaint pursuant to this subsection, the Commission may determine that a violation of paragraph (1) has occurred only if the complainant demonstrates that any conduct described in paragraph (1) with respect to the complainant was a contributing factor in the adverse action alleged in the complaint. A decision or order that is favorable to the complainant shall not be issued 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.

(6) *ATTORNEYS' FEES.*—Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses, including attorney's fees, as determined by the Commission to have been reasonably incurred by the complainant for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. The Commission shall determine whether such costs and expenses were reasonably incurred by the complainant without reference to whether the Secretary also participated in the proceeding.

(7) *EXPEDITED PROCEEDINGS; JUDICIAL REVIEW.*—Proceedings under this subsection shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this subsection shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)(4).

(8) *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.

(9) *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.

(d) *REVOCAION OF APPROVAL OF PLANS.*—

(1) *REVOCAION.*—If the Secretary finds that any program or plan of an operator, or part thereof, that was approved by the Secretary under this Act is based on inaccurate information or that circumstances that existed when such plan was approved have materially changed and that continued operation of such mine under such plan constitutes a hazard to the safety or health of miners, the Secretary shall revoke the approval of such program or plan.

(2) *WITHDRAWAL ORDERS.*—Upon revocation of the approval of a program or plan under subsection (a), the Secretary may immediately issue an order requiring the operator to cause all persons, except those persons referred to in section 104(c), to be withdrawn from such mine or an area of such mine, and to be prohibited from entering such mine or such area, until the operator has submitted and the Secretary has approved a new plan.

[(d)] (e) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty

issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, 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), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104. *In any proceeding in which a party challenges the Secretary's decision to approve, modify, or revoke a coal or other mine plan under this Act, the Commission and the courts shall affirm the Secretary's decision unless the challenging party establishes that such decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.*

* * * * *

INJUNCTIONS

SEC. 108. (a)(1) * * *

(2) The Secretary may institute a civil action for relief, including permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the coal or other mine is located or in which the operator of such mine has his principal office whenever the Secretary believes that the operator of a coal or other mine is engaged in **[a pattern of violation of the mandatory health or safety standards of this Act, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners.]** *a course of conduct that in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners, including violations of this Act or of mandatory health and safety standards or regulations under this Act.*

* * * * *

POSTING OF ORDERS AND DECISIONS

SEC. 109. (a) * * *

* * * * *

(e) *POSTING OF ADVANCE NOTICE PENALTIES.—Each operator of a coal or other mine shall post, on the bulletin board described in subsection (a) and in a conspicuous place near each staffed entrance onto the mine property, a notice stating, in a form and manner to be prescribed by the Secretary—*

(1) that giving, causing to give, or attempting to give or cause to give advance notice of any inspection to be conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection is unlawful pursuant to section 110(e); and

(2) the maximum penalties for a violation under such subsection.

PENALTIES

SEC. 110. (a)(1) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provisions of this Act, *including any regulation promulgated under this Act*, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

* * * * *

(4) If any person violates section 105(c), the Secretary shall propose, and the Commission shall assess, a civil penalty of not less than \$10,000 or more than \$100,000 for the first occurrence of such violation, and not less than \$20,000 or more than \$200,000 for any subsequent violation, during any 3-year period.

[(4)] (5) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 106, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection.

(b)(1) * * *

* * * * *

(3) Notwithstanding any other provision of this Act, an operator of a coal or other mine that is in pattern status under section 104(e) and that fails to meet the performance benchmarks set forth by the Secretary under section 104(e)(5)(A) during any performance review of the mine following the first performance review shall be assessed an increased civil penalty for any violation of this Act, including any mandatory health or safety standard or regulation promulgated under this Act. Such increased penalty shall be twice the amount that would otherwise be assessed for the violation under this Act, including the regulations promulgated under this Act, subject to the maximum civil penalty established for the violation under this Act. This paragraph shall apply to violations at such mine that occur during the time period after the operator fails to meet the performance benchmarks in this paragraph, and ending when the Secretary determines at a subsequent performance review that the mine meets the performance benchmarks under section 104(e)(5)(A).

[(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprison-

ment that may be imposed upon a person under subsections (a) and (d).】

(c) *CIVIL AND CRIMINAL LIABILITY OF OFFICERS, DIRECTORS, AND AGENTS.*—Whenever an operator violates a provision of this Act, including any mandatory health or safety standard or regulation promulgated under this Act, or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, any director, officer, or agent of such operator who knowingly authorized, ordered, or carried out such violation, failure, or refusal, or any policy or practice that resulted in such violation, failure, or refusal, shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under this section.

(d)(1) Any operator who **【willfully】** knowingly violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a)(1) or section 105(c), shall, upon conviction, be punished **【**by a fine of not more than \$250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than \$500,000, or by imprisonment for not more than five years, or both.**】** as follows:

(A) *By a fine of not more than \$250,000, or by imprisonment for not more than 1 year, or both.*

(B) *If the conviction is for a violation committed after a previous conviction of such operator for a violation of the same mandatory health or safety standard, by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both.*

(C) *If the conviction is for a violation committed after a previous conviction of such operator for a violation of an order, by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both.*

(D) *If the operator's actions knowingly exposed miners to a significant risk of serious injury or illness or death, by a fine of not more than \$1,000,000, or by imprisonment for not more than 5 years, or both.*

(E) *If the operator knowingly tampered with or disabled a required safety device which exposed miners to a significant risk of serious injury or illness or death, or if the conviction is for a violation described in subparagraph (D) committed after a previous conviction of such operator for a such a violation, by a fine of not more than \$2,000,000, or by imprisonment for not more than 10 years, or both.*

(2) *Whoever knowingly takes any action that is directly or indirectly harmful to any person, including action that interferes with the lawful employment or livelihood of any person, because such person has provided an authorized representative of the Secretary, a State or local mine safety or health officer or official, or any other law enforcement officer with any information related to the existence of a health or safety violation or an unhealthful or unsafe condition,*

policy, or practice under this Act shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.

[(e) Unless otherwise authorized by this Act, any person who gives advance notice of any inspection to be conducted under this Act shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both.]

(e) Unless otherwise authorized by this Act, any person that knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection, shall be fined under title 18, United States Code, imprisoned for not more than 5 years, or both.

* * * * *

(i) The Commission shall have authority to assess all civil penalties provided in this Act. **[In assessing civil monetary penalties, the Commission shall consider]** *In any review of a citation and proposed penalty assessment contested by an operator, the Commission shall assess not less than the penalty derived by using the same methodology (including any point system) prescribed in regulations under this Act, so as to ensure consistency in operator penalty assessments, except that the Commission may assess a penalty for less than the amount that would result from the utilization of such methodology if the Commission finds that there are extraordinary circumstances. If there is no such methodology prescribed for a citation or there are such extraordinary circumstances, the Commission shall assess the penalty by considering the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.*

(j) 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 occurred or where the operator has its principal office. **[Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.]** *Pre-final order interest on such penalties shall begin to accrue on the date the operator contests a citation issued under this Act, including any mandatory health or safety standard or regulation promulgated 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 annum.

* * * * *

(l) *ENSURING PAYMENT OF PENALTIES.—*

(1) *DELINQUENT PAYMENT LETTER.—If the operator of a coal or other mine fails to pay any civil penalty assessment that has become a final order of the Commission or a court within 45 days after such assessment became a final order, the Secretary shall send the operator a letter advising the operator of the consequences under this subsection of such failure to pay. The letter shall also advise the operator of the opportunity to enter into or modify a payment plan with the Secretary based upon a demonstrated inability to pay, the procedure for entering into such plan, and the consequences of not entering into or not complying with such plan.*

(2) *WITHDRAWAL ORDERS FOLLOWING FAILURE TO PAY.—If an operator that receives a letter under paragraph (1) has not paid the assessment by the date that is 180 days after such assessment became a final order and has not entered into a payment plan with the Secretary, the Secretary shall issue an order requiring such operator to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, the mine that is covered by the final order described in paragraph (1), until the operator pays such assessment in full (including interest and administrative costs) or enters into a payment plan with the Secretary. If such operator enters into a payment plan with the Secretary and at any time fails to comply with the terms specified in such payment plan, the Secretary shall issue an order requiring such operator to cause all persons, except those referred to in section 104(c), to be withdrawn from the mine that is covered by such final order, and to be prohibited from entering such mine, until the operator rectifies the noncompliance with the payment plan in the manner specified in such payment plan.*

[(1)] (m) The provisions of this section shall not be applicable with respect to title IV of this Act.

[ENTITLEMENT OF MINERS

[SEC. 111. If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public

hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.】

SEC. 111. ENTITLEMENT OF MINERS.

(a) *PROTECTION FROM LOSS OF PAY.*—

(1) *WITHDRAWAL ORDERS.*—*If a coal or other mine or area of such mine is closed by an order issued under section 103, 104, 107, 108, or 110, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104, 107 (in connection with a citation), 108, or 110, all miners who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay and in accordance with their regular schedules of pay for the entire period for which they are idled, not to exceed 60 days.*

(2) *CLOSURE IN ADVANCE OF ORDER.*—*If the Secretary finds that such mine or such area of a mine was closed by the operator in anticipation of the issuance of such an order, all miners who are idled by such closure shall be entitled to full compensation by the operator at their regular rates of pay and in accordance with their regular schedules of pay, from the time of such closure until such time as the Secretary authorizes reopening of such mine or such area of the mine, not to exceed 60 days, except where an operator promptly withdraws miners upon discovery of a hazard, and notifies the Secretary where required, and within the prescribed time period.*

(3) *REFUSAL TO COMPLY.*—*Whenever an operator violates or fails or refuses to comply with any order issued under section 103, 104, 107, 108, or 110, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work per-*

formed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

(b) ENFORCEMENT.—

(1) COMMISSION ORDERS.—*The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code. Whenever the Commission issues an order sustaining the complaint under this subsection in whole or in part, the Commission shall award the complainant reasonable attorneys' fees and costs.*

(2) FAILURE TO PAY COMPENSATION DUE.—*Consistent with the authority of the Secretary to order miners withdrawn from a mine under this Act, the Secretary shall order a mine that has been subject to a withdrawal order under section 103, 104, 107, 108, or 110, and has reopened, to be closed again if compensation in accordance with the provisions of this section is not paid by the end of the next regularly scheduled payroll period following the lifting of a withdrawal order.*

(c) EXPEDITED REVIEW.—*If an order is issued which results in payments to miners under subsection (a), the operators shall have the right to an expedited review before the Commission using timelines and procedures established pursuant to section 316(b)(2)(G)(ii).*

* * * * *

MANDATORY HEALTH AND SAFETY TRAINING

SEC. 115. (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that—

(1) * * *

* * * * *

[(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;]

(3) *all miners shall receive not less than 9 hours of refresher training not less frequently than once every 12 months, and such training shall include one hour of training on the statutory rights and responsibilities of miners and their representatives under this Act and other applicable Federal and State law, pursuant to a program of instruction developed by the Secretary and delivered by an employee of the Administration or*

by a trainer approved by the Administration that is a party independent from the operator;

* * * * *

(c) Any health and safety training program of instruction provided under this section shall include distribution to miners of information regarding miners' rights under the Act, as well as a toll-free hotline telephone number, which the Secretary shall maintain to receive complaints from miners and the public regarding hazardous conditions, discrimination, safety or health violations, or other mine safety or health concerns. Information regarding the hotline shall be provided in a portable, convenient format, such as a durable wallet card, to enable miners to keep the information on their person.

[(c)] (d) Upon completion of each training program, each operator shall certify, on a form approved by the Secretary, that the miner has received the specified training in each subject area of the approved health and safety training plan. A certificate for each miner shall be maintained by the operator, and shall be available for inspection at the mine site, and a copy thereof shall be given to each miner at the completion of such training. When a miner leaves the operator's employ, he shall be entitled to a copy of his health and safety training certificates. False certification by an operator that training was given shall be punishable under section 110 (a) and (f); and each health and safety training certificate shall indicate on its face, in bold letters, printed in a conspicuous manner the fact that such false certification is so punishable.

(e) *AUTHORITY TO MANDATE ADDITIONAL TRAINING.*—

(1) *IN GENERAL.*—The Secretary is authorized to issue an order requiring that an operator of a coal or other mine provide additional training beyond what is otherwise required by law, and specifying the time within which such training shall be provided, if the Secretary finds that—

(A)(i) a serious or fatal accident has occurred at such mine; or

(ii) such mine has experienced accident and injury rates, citations for violations of this Act (including mandatory health or safety standards or regulations promulgated under this Act), citations for significant and substantial violations, or withdrawal orders issued under this Act at a rate above the average for mines of similar size and type; and

(B) additional training would benefit the health and safety of miners at the mine.

(2) *WITHDRAWAL ORDER.*—If the operator fails to provide training ordered under paragraph (1) within the specified time, the Secretary shall issue an order requiring such operator to cause all affected persons, except those persons referred to in section 104(c), to be withdrawn, and to be prohibited from entering such mine, until such operator has provided such training.

[(d)] (f) The Secretary shall promulgate appropriate standards for safety and health training for coal or other mine construction workers.

[(e)] (g)(1) * * *

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SEC. 117. UNDERGROUND COAL MINER EMPLOYMENT STANDARD FOR MINES PLACED IN PATTERN STATUS.

(a) *IN GENERAL.*— For purposes of ensuring miners’ health and safety and miners’ right to raise concerns thereof, when an underground coal mine is placed in pattern status pursuant to section 104(e), and for 3 years after such placement, the operator of such mine may not discharge or constructively discharge a miner who is paid on an hourly basis and employed at such underground coal mine without reasonable job-related grounds based on a failure to satisfactorily perform job duties, including compliance with this Act and with mandatory health and safety standards or other regulations issued under this Act, or other legitimate business reason, where the miner has completed the employer’s probationary period, not to exceed 6 months.

(b) *CAUSE OF ACTION.*—A miner aggrieved by a violation of subsection (a) may file a complaint in Federal district court in the district where the mine is located within 1 year of such violation.

(c) *REMEDIES.*—In an action under subsection (b), for any prevailing miner the court shall take affirmative action to further the purposes of the Act, which may include reinstatement with backpay and compensatory damages. Reasonable attorneys’ fees and costs shall be awarded to any prevailing miner under this section.

(d) *PRE-DISPUTE WAIVER PROHIBITED.*—A miner’s right to a cause of action under this section may not be waived with respect to disputes that have not arisen as of the time of the waiver.

(e) *CONSTRUCTION.*—Nothing in this section shall be construed to limit the availability of rights and remedies of miners under any other State or Federal law or a collective bargaining agreement.

SEC. 118. CERTIFICATION OF PERSONNEL.

(a) *CERTIFICATION REQUIRED.*—Any person who is authorized or designated by the operator of a coal or other mine to perform any duties or provide any training that this Act, including a mandatory health or safety standard or regulation promulgated pursuant to this Act, requires to be performed or provided by a certified, registered, qualified, or otherwise approved person, shall be permitted to perform such duties or provide such training only if such person has a current certification, registration, qualification, or approval to perform such duties or provide such training consistent with the requirements of this section.

(b) *ESTABLISHMENT OF CERTIFICATION REQUIREMENTS AND PROCEDURES.*—

(1) *IN GENERAL.*—Not later than 1 year after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall issue mandatory standards to establish—

(A) requirements for such certification, registration, qualification, or other approval, including the experience, examinations, and references that may be required as appropriate;

(B) time limits for such certifications and procedures for obtaining and renewing such certification, registration, qualification, or other approval; and

(C) procedures and criteria for revoking such certification, registration, qualification, or other approval, including procedures that ensure that the Secretary (or a State agency, as applicable) responds to requests for revocation and that the names of individuals whose certification or other approval has been revoked are provided to and maintained by the Secretary, and are made available to appropriate State agencies through an electronic database.

(2) COORDINATION WITH STATES.—In developing such standards, the Secretary shall consult with States that have miner certification programs to ensure effective coordination with existing State standards and requirements for certification. The standards required under paragraph (1) shall provide that the certification, registration, qualification, or other approval of the State in which the coal or other mine is located satisfies the requirement of subsection (a) if the State's program of certification, registration, qualification, or other approval is no less stringent than the standards established by the Secretary under paragraph (1).

(c) OPERATOR FEES FOR CERTIFICATION.—

(1) ASSESSMENT AND COLLECTION.—Beginning 180 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall assess and collect fees, in accordance with this subsection, from each operator for each person certified under this section. Fees shall be assessed and collected in amounts determined by the Secretary as necessary to fund the certification programs established under this section.

(2) USE.—Amounts collected as provided in paragraph (1) shall only be available to the Secretary, as provided in paragraph (3), for making expenditures to carry out the certification programs established under this subsection.

(3) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds authorized to be appropriated under section 114, there is authorized to be appropriated to the Assistant Secretary for Mine Safety and Health for each fiscal year in which fees are collected under paragraph (1) an amount equal to the total amount of fees collected under paragraph (1) during that fiscal year. Such amounts are authorized to remain available until expended. If on the first day of a fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect fees (as offsetting collections) under this subsection at the rate in effect during the preceding fiscal year, until 5 days after the date such regular appropriation is enacted.

(4) COLLECTING AND CREDITING OF FEES.—Fees authorized and collected under this subsection shall be deposited and credited as offsetting collections to the account providing appropriations to the Mine Safety and Health Administration and shall not be collected for any fiscal year except to the extent and in the amount provided in advance in appropriation Acts.

(d) CITATION; WITHDRAWAL ORDER.—Any operator who permits a person to perform any of the health or safety related functions described in subsection (a) without a current certification which meets the requirements of this section shall be considered to have com-

mitted an unwarrantable failure under section 104(d)(1), and the Secretary shall issue an order requiring that the miner be withdrawn or reassigned to duties that do not require such certification.

SEC. 119. APPLICABILITY OF CERTAIN PROVISIONS TO CERTAIN MINES.

(a) *RULE OF CONSTRUCTION.*—With respect to the mines described in subsection (b), this Act as in effect on the date before the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, shall continue to apply to such mines as then in effect.

(b) *APPLICABLE MINES.*—

(1) *IN GENERAL.*—The mines referred to in subsection (a) are—

(A) surface mines, except for surface facilities or impoundments physically connected to—

(i) underground coal mines; or

(ii) other underground mines which are gassy mines; and

(B) underground mines which are neither coal mines nor gassy mines.

(2) *DEFINITION.*—As used in paragraph (1), the term “gassy mine” means a mine, tunnel, or other underground workings in which a flammable mixture has been ignited, or has been found with a permissible flame safety lamp, or has been determined by air analysis to contain 0.25 percent or more (by volume) of methane in any open workings when tested at a point not less than 12 inches from the roof, face of rib.

(c) *SAVINGS PROVISION.*—Nothing in this section shall impact the authority of the Secretary to promulgate or modify regulations pursuant to the authority under any such provisions as in effect on the date before the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, or shall be construed to alter or modify precedent with regards to the Commission or courts.

TITLE II—INTERIM MANDATORY HEALTH STANDARDS

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DUST STANDARD AND RESPIRATORY EQUIPMENT

SEC. 202. (a) * * *

* * * * *

(d) Beginning six months after the operative date of this title and from time to time thereafter, the Secretary [of Health, Education, and Welfare] shall establish, in accordance with the provisions of section 101 of this Act, a schedule reducing the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed below the levels established in this section to a level of personal exposure which will prevent new incidences of respiratory disease and the further development of such disease in any person. [Such schedule shall specify the minimum time necessary to achieve such levels taking into consideration present and future advancements in technology to reach these levels.] *Not later than 2 years after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall promulgate final regulations that require operators, beginning on the date such regulations are issued, to provide*

coal miners with the maximum feasible protection from respirable dust, including coal and silica dust, that is achievable through environmental controls, and that meet the applicable standards.

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TITLE III—INTERIM MANDATORY SAFETY STANDARDS FOR UNDERGROUND COAL MINES

* * * * *

VENTILATION

SEC. 303. (a) * * *

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(d)(1) * * *

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(3)(A) Not later than 30 days after the issuance of the interim final rules promulgated under subparagraph (C), each operator of an underground coal mine shall implement a communication program at the underground coal mine to ensure that each miner is orally briefed on and made aware of, prior to traveling to or arriving at the miner's work area and commencing the miner's assigned tasks—

(i) any conditions that are hazardous, or that violate a mandatory health or safety standard or a plan approved under this Act, where the miner is expected to work or travel; and

(ii) the general conditions of that miner's assigned working section or other area where the miner is expected to work or travel.

(B) Not later than 180 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary shall promulgate interim final rules implementing the requirements of subparagraph (A). The Secretary shall issue a final rule not later than 2 years after such date.

* * * * *

COMBUSTIBLE MATERIALS AND ROCK DUSTING

SEC. 304. (a) * * *

* * * * *

(d) **Where rock** *ROCK DUST.*—

(1) IN GENERAL.—Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than [65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.] 80 percent. Where methane is present in any ventilating current, the percentage of incombustible content of such combined

dusts shall be increased 0.4 percent for each 0.1 percent of methane.

(2) *METHODS OF MEASUREMENT.*—

(A) *IN GENERAL.*—Each operator of an underground coal mine shall take accurate and representative samples which shall measure the total incombustible content of combined coal dust, rock dust, and other dust in such mine to ensure that the coal dust is kept below explosive levels through the appropriate application of rock dust.

(B) *DIRECT READING MONITORS.*—By the later of June 15, 2011, or the date that is 30 days after the Secretary of Health and Human Services has certified in writing that direct reading monitors are commercially available to measure total incombustible content in samples of combined coal dust, rock dust, and other dust and the Department of Labor has approved such monitors for use in underground coal mines, the Secretary shall require operators to take such dust samples using direct reading monitors.

(C) *REGULATIONS.*—The Secretary shall, not later than 180 days after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, promulgate an interim final rule that prescribes methods for operator sampling of total incombustible content in samples of combined coal dust, rock dust, and other dust using direct reading monitors and includes requirements for locations, methods, and intervals for mandatory operator sampling.

(D) *RECOMMENDATIONS.*—Not later than 1 year after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Secretary of Health and Human Services shall, based upon the latest research, recommend to the Secretary of Labor any revisions to the mandatory operator sampling locations, methods, and intervals included in the interim final rule described in subparagraph (B) that may be warranted in light of such research.

(3) *LIMITATION.*—Until a final rule is issued by the Secretary under section 502(b)(2) of the Robert C. Byrd Miner Safety and Health Act of 2010, any measurement taken by a direct reading monitor described in paragraph (2) shall not be admissible to establish a violation in an enforcement action under this Act.

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MISCELLANEOUS

SEC. 317. (a) * * *

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(u) *ATMOSPHERIC MONITORING SYSTEMS.*—

(1) *NIOSH RECOMMENDATIONS.*—Not later than 1 year after the date of enactment of the Robert C. Byrd Miner Safety and Health Act of 2010, the Director of the National Institute for Occupational Safety and Health, acting through the Office of Mine Safety and Health Research, in consultation, including through technical working groups, with operators, vendors, State mine safety agencies, the Secretary, and labor representatives of miners, shall issue recommendations to the Secretary regarding—

(A) how to ensure that atmospheric monitoring systems are utilized in the underground coal mining industry to maximize the health and safety of underground coal miners;

(B) the implementation of redundant systems, such as the bundle tubing system, that can continuously monitor the mine atmosphere following incidents such as fires, explosions, entrapments, and inundations; and

(C) other technologies available to conduct continuous atmospheric monitoring.

(2) *ATMOSPHERIC MONITORING SYSTEM REGULATIONS.*—Not later than 1 year following the receipt of the recommendations described in paragraph (1), the Secretary shall promulgate regulations requiring that each operator of an underground coal mine install atmospheric monitoring systems, consistent with such recommendations, that—

(A) protect miners where the miners normally work and travel;

(B) provide real-time information regarding methane and carbon monoxide levels, and airflow direction, as appropriate, with sensing, annunciating, and recording capabilities; and

(C) can, to the maximum extent practicable, withstand explosions and fires.

DEFINITIONS

SEC. 318. For the purpose of this title and title II of this Act, the term—

[(a) “certified” or “registered” as applied to any person means a person certified or registered by the State in which the coal mine is located to perform duties prescribed by such titles, except that, in a State where no program of certification or registration is provided or where the program does not meet at least minimum Federal standards established by the Secretary, such certification or registration shall be the Secretary;

[(b) “qualified” person means, as the context requires,

[(1) an individual deemed qualified by the Secretary and designated by the operator to make tests and examinations required by this Act; and

[(2) an individual deemed, in accordance with minimum requirements to be established by the Secretary, qualified by training, education, and experience, to perform electrical work, to maintain electrical equipment, and to conduct examinations and tests of all electrical equipment;]

[(c) (1) “permissible” as applied to—

[(1)] (A) equipment used in the operation of a coal mine, means equipment, other than permissible electric face equipment, to which an approval plate, label, or other device is attached as authorized by the Secretary and which meets specifications which are prescribed by the Secretary for the construction and maintenance of such equipment and are designed to assure that such equipment will not cause a mine explosion or a mine fire,

[(2)] (B) explosives, shot firing units, or blasting devices used in such mine, means explosives, shot firing units, or

blasting devices which meet specifications which are prescribed by the Secretary, and

[(3)] (C) the manner of use of equipment or explosives, shot firing units, and blasting devices, means the manner of use prescribed by the Secretary;

[(d)] (2) "rock dust" means pulverized limestone, dolomite, gypsum, anhydrite, shale, adobe, or other inert material, preferably light colored, 100 per centum of which will pass through a sieve having twenty meshes per linear inch and 70 per centum or more of which will pass through a sieve having two hundred meshes per linear inch; the particles of which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air; and which does not contain more than 5 per centum of combustible matter or more than a total of 4 per centum of free and combined silica (SiO_2), or, where the Secretary finds that such silica concentrations are not available, which does not contain more than 5 per centum of free and combined silica;

[(e)] (3) "anthracite" means coals with a volatile ratio equal to 0.12 or less;

[(f)] (4) "volatile ratio" means volatile matter content divided by the volatile matter plus the fixed carbon;

[(g)(1)] (5)(A) "working face" means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle,

[(2)] (B) "working place" means the area of a coal mine in by the last open crosscut,

[(3)] (C) "working section" means all areas of the coal mine from the loading point of the section to and including the working faces,

[(4)] (D) "active workings" means any place in a coal mine where miners are normally required to work or travel;

[(h)] (6) "abandoned areas" means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under section 303 of this title;

[(i)] (7) "permissible" as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including, where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of

the Secretary, to facilitate compliance by an operator with the requirements of section 305(a) of this title within the periods prescribed therein:

[(j)] (8) "low voltage" means by to and including 660 volts; "medium voltage" means voltages from 661 to 1,000 volts; and "high voltage" means more than 1,000 volts;

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TITLE V—ADMINISTRATION

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ASSISTANCE TO STATES

SEC. 503. (a) The Secretary[, in coordination with the Secretary of Health, Education, and Welfare and the Secretary of the Interior,] is authorized to make grants in accordance with an application approved under this section to any State in which coal or other mining takes place—

(1) * * *

(2) to improve State workmen's compensation and occupational disease laws and programs related to coal or other mine employment; [and]

(3) to promote Federal-State coordination and cooperation in improving the health and safety conditions in the coal or other mines[.]; and

(4) to assist such State in developing and implementing any certification program for coal or other mines required for compliance with section 118.

* * * * *

(h) There is authorized to be appropriated [\$3,000,000 for fiscal year 1970, and \$10,000,000 annually in each succeeding fiscal year] \$20,000,000 for each fiscal year to carry out the provisions of this section, which shall remain available until expended. The Secretary shall provide for an equitable distribution of sums appropriated for grants under this section to the States where there is an approved application, except that no less than one-half of such sum shall be allocated to coal-producing States.

* * * * *

REPORTS

SEC. 511. (a) Within one hundred and twenty days following the convening of each session of Congress the Secretary shall submit through the President to the Congress and to the Office of Science and Technology an annual report upon the subject matter of this Act, the progress concerning the achievement of its purposes, the needs and requirements in the field of coal or other mine health and safety, the amount and status of each loan made pursuant to this Act, a description and the anticipated cost of each project and program he has undertaken under sections 301(b) and 501, the status of implementation of recommendations from each independent investigation panel under section 103(b) received in the preceding 5

years and any other relevant information, including any recommendations he deems appropriate.

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BLACK LUNG BENEFITS ACT

TITLE IV—BLACK LUNG BENEFITS

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PART C—CLAIMS FOR BENEFITS AFTER DECEMBER 31, 1973

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SEC. 435. MEDICAL REPORTS.

In any claim for benefits for a miner under this title, an operator that requires a miner to submit to a medical examination regarding the miner's respiratory or pulmonary condition shall, not later than 14 days after the miner has been examined, deliver to the claimant a complete copy of the examining physician's report. The examining physician's report shall be in writing and shall set out in detail the examiner's findings, including any diagnoses and conclusions and the results of any diagnostic imaging techniques and tests that were performed on the miner.

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OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

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SEC. 9A. VICTIMS' RIGHTS.

(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 or 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.

PROCEDURE FOR ENFORCEMENT

SEC. 10. (a) * * *

* * * * *

(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 that receives a citation alleging a violation designated as serious, willful, or repeated and that files a notice of contest to the citation asserting that the time set for abatement of the alleged violation is unreasonable or challenging the existence of the alleged violation may file with the Commission a motion to stay the period for the abatement of the violation.

(B) *CRITERIA.*—In determining whether a stay should be issued on the basis of a motion filed under subparagraph (A), the Commission may grant a stay only if the employer has demonstrated—

(i) a substantial likelihood of success on the areas contested under subparagraph (A); and

(ii) that a stay will not 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.

JUDICIAL REVIEW

SEC. 11. (a) * * *

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(c)(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】** 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.

【(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.】

(2) PROHIBITION OF RETALIATION.—(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) 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)(B) 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 employ-

ment, 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.

PENALTIES

SEC. 17. (a) 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 or 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 or the Commission 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) 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. *If such a violation caused or contributed to the death of an employee, such civil penalty amounts shall be increased to not more than \$50,000 for each such violation, but not less than \$20,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than \$10,000 for each such violation.*

(c) 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]~~ \$12,000 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 \$12,000 for each day during which such failure or violation continues.]

(d) 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 pen-

alties) may be assessed a civil penalty of not more than \$12,000 for each day during which such failure or violation continues.

(e) 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.

[(e) 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) 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 significantly 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.

[(f) 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, or by both.]

(g) Unless otherwise authorized by this Act, any person that knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection conducted under this Act with the intention of impeding, interfering with, or adversely affecting the results of such inspection, shall be fined under title 18, United States Code, imprisoned for not more than 5 years, or both.

[(g)] (h) 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.

[(h)] (i)(1) Section 1114 of title 18, United States Code, is hereby amended by striking out “designated by the Secretary of Health, Education, and Welfare to conduct investigations, or inspections under the Federal Food, Drug, and Cosmetic Act” and inserting in lieu thereof “or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions”.

* * * * *

[(i)] (j) Any employer who violates 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.

(k)(1) Any employer who knowingly violates any standard, rule, or order promulgated under section 6, or any regulation prescribed under this Act, and that violation caused or significantly contributed 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.

[(j)] (l) 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).*

[(k)] (m) 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.

[(l)] (n) 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) 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.

* * * * *

STATE JURISDICTION AND STATE PLANS

SEC. 18. (a) * * *

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[(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.]

(f)(1) The Secretary shall, on the basis of reports submitted by the State agency and the Secretary's own inspections, make a continuing evaluation of the manner in which each State that has a plan approved under this section is carrying out such plan. Such evaluation shall include an assessment of whether the State continues to meet the requirements of subsection (c) of this section and any other criteria or indices of effectiveness specified by the Secretary in regulations. Whenever the Secretary finds, on the basis of such evaluation, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), the Secretary shall make an initial determination of whether the failure is of such a nature that the plan should be withdrawn or whether the failure is of such a nature that the State should be given the opportunity to remedy the deficiencies, and provide notice of the Secretary's findings and initial determination.

(2) If the Secretary makes an initial determination to reassert and exercise concurrent enforcement authority while the State is given an opportunity to remedy the deficiencies, the Secretary shall afford the State an opportunity for a public hearing within 15 days of such request, provided that such request is made not later than 10 days after Secretary's notice to the State. The Secretary shall review and consider the testimony, evidence, or written comments, and not later than 30 days following such hearing, make a determination to affirm, reverse, or modify the Secretary's initial determination to reassert and exercise concurrent enforcement authority under sections 8, 9, 10, 13, and 17 with respect to standards promulgated under section 6 and obligations under section 5(a). Following such a determination by the Secretary, or in the event that the State does not request a hearing within the time frame set forth in this paragraph, the Secretary may reassert and exercise such concurrent enforcement authority, while a final determination is pending under paragraph

(3) or until the Secretary has determined that the State has remedied the deficiencies as provided under paragraph (4). Such determination shall be published in the Federal Register. The procedures set forth in section 18(g) shall not apply to a determination by the Secretary to reassert and exercise such concurrent enforcement authority.

(3) If the Secretary makes an initial determination that the plan should be withdrawn, the Secretary shall provide due notice and the opportunity for a hearing. If based on the evaluation, comments, and evidence, the Secretary makes a final determination that there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of the withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(4) If the Secretary makes a determination that the State should be provided the opportunity to remedy the deficiencies, the Secretary shall provide the State an opportunity to respond to the Secretary's findings and the opportunity to remedy such deficiencies within a time period established by the Secretary, not to exceed 1 year. The Secretary may extend and revise the time period to remedy such deficiencies, if the State's legislature is not in session during this 1 year time period, or if the State demonstrates that it is not feasible to correct the deficiencies in the time period set by the Secretary, and the State has a plan to correct the deficiencies within a reasonable time period. If the Secretary finds that the State agency has failed to remedy such deficiencies within the time period specified by the Secretary and that the State plan continues to fail to comply substantially with a provision of the State plan, the Secretary shall withdraw the State plan as provided for in paragraph (3).

* * * * *

(i) Not later than 18 months after the date of enactment of this subsection, and every 5 years thereafter, the Comptroller General shall complete and issue a review of the effectiveness of State plans to develop and enforce safety and health standards to determine if they are at least as effective as the Federal program and to evaluate whether the Secretary's oversight of State plans is effective. The Comptroller General's evaluation shall assess—

(1) the effectiveness of the Secretary's oversight of State plans, including the indices of effectiveness used by the Secretary;

(2) whether the Secretary's investigations in response to Complaints About State Plan Administration (CASPA) are adequate, whether significant policy issues have been identified by headquarters and corrective actions are fully implemented by each State;

(3) whether the formula for the distribution of funds described in section 23(g) to State programs is fair and adequate; and

(4) whether State plans are as effective as the Federal program in preventing occupational injuries, illnesses and deaths, and investigating discrimination complaints, through an eval-

uation of at least 20 percent of approved State plans, and which shall cover—

(A) enforcement effectiveness, including handling of fatalities, serious incidents and complaints, compliance with inspection procedures, hazard recognition, verification of abatement, violation classification, citation and penalty issuance, including appropriate use of willful and repeat citations, and employee involvement;

(B) inspections, the number of programmed health and safety inspections at private and public sector establishments, and whether the State targets the highest hazard private sector work sites and facilities in that State;

(C) budget and staffing, including whether the State is providing adequate budget resources to hire, train and retain sufficient numbers of qualified staff, including timely filling of vacancies;

(D) administrative review, including the quality of decisions, consistency with Federal precedence, transparency of proceedings, decisions and records are available to the public, adequacy of State defense, and whether the State appropriately appeals adverse decisions;

(E) anti discrimination, including whether discrimination complaints are processed in a timely manner, whether supervisors and investigators are properly trained to investigate discrimination complaints, whether a case file review indicates merit cases are properly identified consistent with Federal policy and procedure, whether employees are notified of their rights, and whether there is an effective process for employees to appeal the dismissal of a complaint;

(F) program administration, including whether the State's standards and policies are at least as effective as the Federal program and are updated in a timely manner, and whether National Emphasis Programs that are applicable in such States are adopted and implemented in a manner that is at least as effective as the Federal program;

(G) whether the State plan satisfies the requirements for approval set forth in this section and its implementing regulations; and

(H) other such factors identified by the Comptroller General, or as requested by the Committee on Education and Labor of the House of Representatives or the Committee on Health, Education, Labor and Pensions of the Senate.

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RESEARCH AND RELATED ACTIVITIES

SEC. 20. (a)(1) * * *

* * * * *

(6) The Secretary of Health, Education, and Welfare shall publish within six months of enactment of this Act and thereafter as needed but at least annually a list of all known toxic substances by generic family or other useful grouping, and the concentrations at which such toxicity is known to occur. [He shall determine following a written request by any employer or authorized representative of employees, specifying with reasonable particularity the

grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found; and shall submit such determination both to employers and affected employees as soon as possible.] *The Secretary shall determine following a written request by any employer, authorized representative of current or former employees, physician, other Federal agency, or State or local health department, specifying with reasonable particularity the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found or whether any physical agents, equipment, or working condition found or used has potentially hazardous effects; and shall submit such determination both to employers and affected employees as soon as possible.* If the Secretary of Health, Education, and Welfare determines that any substance is potentially toxic at the concentrations in which it is used or found in a place of employment, and such substance is not covered by an occupational safety or health standard promulgated under section 6, the Secretary of Health, Education, and Welfare shall immediately submit such determination to the Secretary, together with all pertinent criteria.

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NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

SEC. 22. (a) * * *

* * * * *

(h) OFFICE OF MINE SAFETY AND HEALTH.—

(1) * * *

* * * * *

(3) FUNCTIONS.—In addition to all purposes and authorities provided for under this section, the Office of Mine Safety and Health shall be responsible for research, development, and testing of new technologies and equipment designed to enhance mine safety and health. To carry out such functions the Director of the Institute, acting through the Office, shall have the authority to—

(A) * * *

(B) award contracts to educational institutions or private laboratories for the performance of product testing or related work with respect to new mine technology and equipment; [and]

(C) enter into cooperative agreements or contracts with international institutions and private entities to improve mine safety and health through the development and evaluation of new interventions; and

[(C)] (D) establish an interagency working group as provided for in paragraph (5).

* * * * *

XVIII. COMMITTEE CORRESPONDENCE

None.

SUPPLEMENTAL VIEW OF REPRESENTATIVE PHIL HARE

I strongly support the majority views expressed in the Committee Report to accompany H.R. 5663, the Robert C. Byrd Mine Safety and Health Act of 2010. This bill goes to great lengths to improve the enforcement powers at the disposal of the Occupational Safety and Health Administration (OSHA) and replace the outdated tools and ineffective enforcement powers it has today. In particular, I agree that OSHA must have the increased capacity to address repeat violations across multi-establishment employers, which this bill strengthens in Section 705 by expanding Section 17(a) of the Occupational Safety and Health Act to authorize OSHA and the Occupational Safety and Health Review Commission to consider an employer's history of violations which occur in OSHA state plan states when assessing penalties for repeat violations.

Additionally, I join the Committee in supporting OSHA's Severe Violator Enforcement Program (SVEP), and feel it is a critical step in the right direction in ensuring that multi-establishment hazards are abated. To underscore and further elaborate on the language provided in the Committee report regarding multi-establishment employers, it should be clear that all employers who have received a "high-severity" violation, not just the employers under the SVEP, need to evaluate any similar establishments and to determine whether the hazard also exists at such establishments. Given limited resources, OSHA's Field Operations Manual should be updated to require OSHA, as part of its enforcement actions involving "high severity" violations to require employers to report back and certify to OSHA that the hazard has either been abated or does not exist at all similar establishments. This clarification is necessary, because the number of employers and violations that fall under the SVEP would not capture all work sites that could be putting workers at needless risk from a repeat violation.

PHIL HARE.

MINORITY VIEWS

INTRODUCTION

On April 5, 2010, an underground explosion at the Upper Big Branch Mine in Montcoal, West Virginia killed 29 coal miners and thrust the dangers of mining into the national spotlight. The tragedy at Upper Big Branch was devastating, and all Americans joined the families, the state of West Virginia and the communities in and around Montcoal in mourning their incalculable loss.

In the wake of this tragedy, Congress once again turned its attention to the issue of mine safety. The Upper Big Branch explosion forced policymakers to focus not only on the efficacy of our nation's mine safety laws and regulations, but also on the manner in which the federal agency responsible for implementing and enforcing those laws and regulations—the Mine Safety and Health Administration (MSHA)—is fulfilling its obligations. While numerous investigations into the Upper Big Branch accident have yet to provide any conclusive findings, preliminary reviews have exposed serious deficiencies in the law and its enforcement. Republicans and Democrats alike have sought to address those deficiencies with the shared intent of improving mine safety and better protecting the Americans who work in this inherently dangerous industry.

Despite its good intentions, H.R. 5663 unfortunately falls short in its effort to provide focused reforms that will improve mine safety. The bill reflects a heavy-handed approach more focused on punishing mine operators than addressing identifiable opportunities to prevent mining accidents in the first place. Moreover, the bill drifts far afield of its stated purpose by including provisions wholly unrelated to mining or mine safety. For reasons only the Majority can explain, H.R. 5663 also includes wholesale changes to the Occupational Safety and Health (OSH) Act.¹ While the inclusion of these unrelated provisions is troubling in and of itself, the implications of the specific proposed policies are of far greater concern. These too appear premised on the notion of imposing punishment rather than improving workplace safety. Also of concern is the speed with which the majority insists on proceeding—refusing to wait for the results of multiple ongoing investigations. For these reasons, Committee Republicans are united in their opposition to this legislation and urge that it be rejected by the House of Representatives in favor of focused, well-informed mine safety reforms.

LEGISLATIVE HISTORY

The issues relating to mine safety are not new to the Members of this Committee. During the 109th Congress, the House passed the Mine Improvement and New Emergency Response Act of 2006

¹29 U.S.C. §§651, *et seq.*

(the MINER Act),² which was signed into law on June 15, 2006 and included the most significant reforms to the Federal Mine Safety and Health Act of 1977³ in more than a generation. Chief among them were new requirements that mine operators adopt emergency response plans, install post-accident breathable air and directional lifelines, and improve worker training and communications.

Essential to the enactment of the MINER Act was the bipartisan manner in which it was developed. Members of both parties worked with industry and worker representatives to fashion a bill all parties agreed would materially improve mine safety.

The Committee again considered mine safety legislation during the 110th Congress, but with far different results. In 2007, the Committee considered H.R. 2768, the Supplemental Mine Improvement and New Emergency Response Act (S-MINER). The bill, developed solely by the panel's Democrats without accepting any meaningful stakeholder input, sought to impose any number of new regulatory requirements with respect to mine seals, belt air, refuge chambers, and communications. Not only were these new requirements unworkable, many would have had the perverse effect of undoing the progress in mine safety brought about by the aforementioned MINER Act. The S-MINER Act was considered and approved by the House on January 16, 2008; it was never considered in the Senate.

Committee Republicans believe lessons can be drawn from these contrasting processes and outcomes. In the case of the MINER Act, an open, bipartisan process produced a consensus product that passed both chambers of Congress and was ultimately signed into law. Mine safety improved as a result. In the case of the S-MINER Act, a closed, partisan process produced an unworkable product that could not advance beyond the House of Representatives. It did nothing to improve mine safety. Unfortunately, the Majority has elected to pursue the latter path for H.R. 5663; Committee Republicans expect the result will be the same.

DEFICIENCIES IN THE CURRENT MINING REGULATORY SYSTEM

In assessing the policy implications of H.R. 5663, it is instructive to consider current strengths and weaknesses in federal mine safety oversight and regulation, which is primarily administered by MSHA.

The Mine Safety and Health Review Commission case backlog

When MSHA issues citations for violations of mining safety laws, mine operators are permitted to contest the violations if they believe the citations were issued in error. In recent years, this process appears to have broken down due, at least in part, to an increase in the number of contested citations at the Mine Safety and Health Review Commission (MSHRC).

The series of events that led to the increase were examined in a Committee hearing on February 23, 2010. One reason behind the

²P.L. 109-236.

³See Federal Mine Safety and Health Act, P.L. 91-173 (December 30, 1969), codified at 30 U.S.C. 801, *et seq.* The legislation was originally known as the Federal Coal Mine Health and Safety Act of 1969, but in 1977 was amended and its name changed to the Federal Mine Safety and Health Act of 1977.

increase in contested citations is the MINER Act's increased penalties for all violations, which resulted in higher costs and increased incentives for mine operators to challenge penalties because of those costs. Further, MSHA came under fire for failing to perform all statutorily required inspections. In response, MSHA removed its representatives that had been working in the conference process used to resolve violations, and transferred them to inspection duties. Also, on February 4, 2008 and March 27, 2009, MSHA issued Procedure Instruction Letters (PIL) that reduced the ability of mine operators to use the conference process to address citations, which had previously been successful in resolving many disputed citations.

Witnesses at the Committee's February 23, 2010 hearing suggested this breakdown in the conference process was a contributing factor to the MSHRC backlog.

On March 27, 2009, MSHA published a new model for conferences. Rather than conducting an informal conference prior to receiving an assessment and filing with the Commission, the new system requires the operator to wait until an assessment is received and file after the enforcement action in question is docketed. Now all conferences will take place only after civil penalties are proposed and timely contested. This means that an operator eager to avoid litigation through the conference process must contest the citation, file a written request for a conference within 10 days, wait for a period of at least four to six weeks, receive the proposed penalty assessment, contest the penalty within 30 days of receipt and then have a conference within 90-days, unless an extension is requested (usually by MSHA).⁴

At the same hearing, the top MSHA official committed to reestablishing the conference process:

After a review of the conferencing process it appears that the best approach is to hold the MSHA health and safety conference, if requested by the mine operator, prior to MSHA issuing a proposed penalty assessment, and provide the mine operator with an estimated penalty amount based on the standard assessment formula. The MSHA field conferencing and litigation representatives (CLRs) and potentially other personnel would review the facts of the violation and the inspector's determination of negligence, likeliness of occurrence, etc., as before. The resolution of these cases does not require Commission approval unless they are later contested. MSHA will implement this change through policy.⁵

To date, however, MSHA has not made the promised changes to the conference process and the backlog of contested citations remains.

⁴ See, Testimony of Bruce Watzman, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.

⁵ See, Testimony of Assistant Secretary Joe Main, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.

Finally, as discussed in greater detail below, MSHA has in recent years attempted a more vigorous use of the “pattern of violations” (POV) system to target mine operators that habitually fail to meet their obligations under the Act. This placed increasing pressure on mine operators to remove and clear as many citations as possible to avoid POV status, which entails significantly increased oversight and cost. This confluence of policy changes increased penalties, fewer conferences, and higher scrutiny of a mine operator’s violation history—contributed to the backlog.

Pattern of violations policy

After several multi-fatality mining accidents in 2006 and the Crandall Canyon incident in 2007, MSHA renewed its efforts to place mines in POV status by issuing criteria for making POV determinations and notifying certain mines of their potential POV status.

Under current rules, if a mine operator’s citation history meets specific criteria, MSHA can place the mine in POV status. Once there, any additional citations issued automatically trigger an increase in monetary penalties. In addition, a mine in POV status is subject to more inspections and MSHA inspectors can issue orders to shut down the mine more readily. To emerge from POV status, a mine must demonstrate a 30 percent reduction in serious and substantial violations of mine safety laws over a 90-day period.⁶

MSHA only considers “final” orders issued by the MSHRC in determining whether to put a mine in POV status. Citations in the process of being contested are not included in that determination. This has led critics to charge that mine operators are purposefully contesting more citations to avoid “final” decisions and thus possibly triggering a POV designation.

However, a closer look at the agency’s own actions reveal systemic problems experienced by MSHA in attempting to enforce existing POV rules. For example, the agency announced on April 14, 2010 that a computer error in the fall of 2009 prevented Upper Big Branch from designation as a potential POV mine.

Further, the U.S. Department of Labor’s Office of Inspector General (OIG) issued an Alert Memorandum on June 23, 2010 calling for immediate corrective action in the wake of revelations that an internal MSHA policy had limited the number of mines identified for potential POV status because of resource limitations, ignoring legitimate safety concerns.⁷ The OIG is currently conducting its own investigation into the POV system and is expected to provide recommendations in September.

Notably, it seems clear changes to the POV system could have occurred prior to the Upper Big Branch fatalities had MSHA revised its own “Pattern of Violations Screening Criteria” guidelines.⁸ Changes to this document do not require legislative action, and months before the Upper Big Branch explosion, Assistant Secretary Main acknowledged the POV system is in need of improvement.

⁶ <http://www.msha.gov/POV/POVScreeningCriteria.pdf>.

⁷ See Alert Memorandum: MSHA Set Limits on the Number of Potential Pattern of Violation Mines to be Monitored Report No. 05-10-004-06-001, June 23, 2010.

⁸ <http://www.msha.gov/POV/POVScreeningCriteria.pdf>.

It is important that we remove the incentive for operators with repeated S&S [Significant and Substantial] safety violations at their mine to contest violations simply to delay enforcement. Delay in addressing S&S hazardous conditions puts miners at risk, is at odds with the purpose of the Mine Act and mission of MSHA, and is unacceptable. MSHA is considering a review of the pattern of violation process to determine whether our current approach is the best one for providing timely protection for miners working at mines with high levels of S&S violations.⁹

To date, no mine has ever been placed in POV status. Reevaluating the POV system was included on MSHA's most recent semi-annual regulatory agenda, released approximately three weeks after the Upper Big Branch mine explosion.¹⁰ However, the agency has not yet announced any proposed changes to the current system, nor has it completed an analysis of mine safety records to identify potential POV status mines since September 2009.

Additional statutory and regulatory weaknesses

In recent months, additional deficiencies at MSHA and within current law have been identified through the Upper Big Branch investigations, the OIG's investigative work, and the Committee's oversight activities. Lawmakers and agency officials agree MSHA is hamstrung by current limitations on its ability to be granted subpoena power for accident investigations. Further, MSHA needs to ensure mine inspectors receive adequate training to identify mining hazards—a responsibility on which it is currently falling short, as described in a March 30, 2010, OIG report.¹¹ Finally, an update of safety and health standards is necessary to improve the safety of miners.

REPUBLICAN VIEWS

Committee Republicans are committed to improving mine safety, a goal that cannot be achieved without first knowing whether mine operators are complying with current laws and whether federal authorities are fully enforcing those laws. Republicans believe certain areas of improvement have been identified and are widely understood; those areas for reform were addressed in the Republican Substitute offered during the Committee's consideration of H.R. 5663.

A flawed process has produced a flawed bill

As noted previously, Congress has a proven history of bipartisanship to improve mine safety. The MINER Act, signed into law in 2006, serves as an example of how divergent views and interests can be accommodated when Members set aside partisanship in the name of workplace safety. The S-MINER Act, on the other hand, stands in stark contrast to that model. In that case, the shared

⁹ See, Testimony of Assistant Secretary Joe Main, Committee on Education and Labor Hearing, "Reducing the Growing Backlog of Contested Mine Safety Cases," February 23, 2010.

¹⁰ See, *Federal Register*, April 28, 2010.

¹¹ See, "Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining," Department of Labor, Inspector General Office of Audit, March 30, 2010. Report Number 05-10-001-06-001.

goal of improving mine safety fell victim to partisan politics, a dynamic that ultimately doomed that effort to failure.

Unfortunately, in the case of H.R. 5663, the Majority elected to follow a path strikingly similar to that which led to the demise of the S-MINER Act three years ago. Rather than engaging Committee Republicans in a meaningful way at the outset of the legislative process, Committee Democrats instead elected to craft H.R. 5663 in a purely partisan manner. Exemplifying this exclusionary process, Committee Republicans were provided a final draft of the legislation less than twelve hours before the Committee met to consider the bill, severely limiting the opportunity for Republicans to evaluate and respond to several significant, last-minute changes. The result, not surprisingly, is a legislative product that reflects a single, narrow point of view; one focused on imposing punishment rather than improving mine safety.

Committee Republicans are also concerned by the haste with which H.R. 5663 is being advanced. No less than three separate investigations—at both the state and federal levels—are currently underway to examine the circumstances that led to the tragic loss of life at the Upper Big Branch mine. The results of those investigations are not yet available.

In addition, the OIG is reviewing—at Congress' request—a number of serious questions raised in connection with MSHA's enforcement of its own mine safety regulations and protocols, some of which may have relevance to the Upper Big Branch investigations. The OIG's investigation is also not concluded.

Finally, less than two months ago, the Committee on Education and Labor was granted by the full House the extraordinary power of deposition authority in order to assess whether mine safety laws are being properly obeyed and enforced. That investigative effort, like every other initiated in response to Upper Big Branch, is also still ongoing.

With so many agencies and so many resources being devoted to examining the circumstances that contributed to the Upper Big Branch tragedy, one cannot help but ask why the Majority is insisting on rushing such an expansive piece of legislation. Committee Republicans believe miners would be better served by focusing our legislative efforts on those areas we know would improve mine safety, while waiting to consider more far-reaching proposals until the conclusion of the various investigations, when all parties can carefully consider the information and recommendations of those inquiries.

Democrats focus on punishment instead of prevention

H.R. 5663 is replete with increased civil and criminal penalties, lower standards of liability, and expansive new whistleblower provisions. Republicans believe punishing bad actors is important. However, we also believe working in a proactive manner to prevent injuries and fatalities before they occur is far more important.

Penalties

In testimony received by this Committee on July 13, 2010, Mr. Cecil Roberts, President of the United Mine Workers of America (UMWA), said that “most of this industry—and I have said as high

as 95 percent—do the right thing.”¹² Yet the Majority proposes substantial increases in civil fines, up to \$2,000,000 in certain cases, and harsh new criminal penalties that include up to 20 years imprisonment for violations of the law. These penalties would apply to all mine operators affected by the legislation’s new penalty framework, including many of the 95 percent that, according to Mr. Roberts, “do the right thing.”

In addition to increasing monetary penalties, the Majority alters the underlying penalty structure, making it more punitive and easier for “good” operators to be unjustly penalized. For example, H.R. 5663 would impose pre-order interest on a violation, the calculation of which starts at the time an operator contests a citation. While apparently intended to reduce the caseload at the MSHRC, this new fee to exercise due process rights would be imposed on operators that contest citations in good faith, significantly increasing the costs of such challenges. Further, these interest amounts on higher base level penalties will likely be compounded through no fault of the operator because of the extended length of time it takes to resolve a case from a contest to final order.¹³ Again, for those mines included in H.R. 5663’s new penalty rubric, the 95 percent of operators that “do the right thing” would be penalized for exercising their rights in good faith.

Standard of liability

H.R. 5663 lowers the standard of liability applicable to many civil and criminal penalties contained in both the mining and occupational safety sections of the bill (Titles III and VII). Specifically, the legislation would replace the current “willful” standard with a “knowing” requirement for violations of mandatory health or safety standards. This change would significantly lower the level of intent required to prove violations, thereby exposing mine operators, businesses, corporate officers, agents and employees to increased liability and endless litigation.

The bill contains no statutory definition of “knowingly,” nor does it provide an explanation or indication of how the “knowing” intent level for penalties under both OSHA and MSHA is to be determined or limited. At the legislative hearing on H.R. 5663 on July 13, 2010, one of the witnesses summarized some of the concerns associated with using a “knowing” standard, especially in relation to criminal sanctions:

Such a change would upend decades of OSHA law—dating to the passage of the OSH Act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the “knowing” standard is used in environmental statutes, it has not been the standard for OSHA criminal culpability. In environmental law, the term “knowing” has come to be associated with a low level of intent, almost akin to a strict liability stand-

¹²See, Testimony of Cecil Roberts, Committee on Education and Labor Hearing, “H.R. 5663, the Mine Safety and Health Act of 2010,” July 13, 2010.

¹³The average number of days it took to dispose of these cases increased from 178 days in FY 2006 to 401 days in FY 2009. See, Testimony of Mary Lu Jordan, Committee on Education and Labor Hearing, “Reducing the Growing Backlog of Contested Mine Safety Cases,” February 23, 2010.

ard where the party in question has to know only that a given activity was taking place, not that there was a violation occurring or that environmental laws were being broken. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.

Further, imposing criminal liability on any “an officer or director” is equally troublesome. The CWS [Coalition for Workplace Safety] believes this proposal will result in a witch hunt to hold officers or directors responsible. Expanding criminal liability to any officer or director will make corporate personnel unduly subject to prosecution even if they generally have no involvement in day to day operations. All of these terms are vague and ambiguous as to who would fall within these categories. These terms are also vague as to how they would be applied in the legal process; do they apply only to the corporate entity or other legal entities such as partnerships? Does this mean that any limited partner or director would now be subject to potential criminal prosecution? How would responsibility be determined? None of these changes will improve workplace safety and health, and actually, this new requirement, if adopted, could result in adverse impacts as corporate employees would now fear that any decision they could make on the jobsite could subject them to prosecution; a safety director or E, H & S employee could be faced with the reality that every one of their decisions would be micromanaged, potentially by employees who have little or no expertise in safety and health. This will create a chilling effect on these employees trying to simply do their job, or even taking these jobs. Furthermore, these are the people that should get those jobs—the ones that care enough and know what should be done, but do not want to be exposed to criminal liability because of the actions of an employee they could not control. This could create uncertainty on the jobsite with a net reduction of workplace safety and health.¹⁴

Application of this new, lower standard of intent to virtually all employees and officers of a business is a monumental shift in workplace safety policy, a stance all the more extreme given that individuals face up to 20 years imprisonment under a standard akin to strict liability, where individuals lack willful intent or a “bad purpose” in their actions or knowledge.

Committee Republicans believe that such punitive measures will likely stifle, rather than support, efforts to improve safety programs and expose individuals to severe criminal penalties without sufficient intent to do harm.

¹⁴ See, Testimony of Jonathan L. Snare, Esq., Committee on Education and Labor Hearing, “H.R. 5663, the Miner Safety and Health Act of 2010,” July 13, 2010. Mr. Snare’s comments appear to have equal relevance to the bill’s proposed changes to mine safety laws.

Expansion of whistleblower protections

Committee Republicans believe the whistleblower expansion proposed by the Majority is not necessary, nor will it accomplish its stated purpose of improving safety. Whistleblowers already receive significant protections under existing mining and occupational safety laws, including the ability to anonymously report safety violations—and rightfully so. But H.R. 5663 appears to treat whistleblowers as the only line of defense against safety violations, using valid whistleblower protections as an opening to insert vast new litigation opportunities.

An example of current legal protections against retaliation for publicly voicing safety concerns can be found in Section 105(c) of the Mine Safety and Health Act of 1977. Under that provision, mine operators cannot retaliate against miners for making safety complaints. This provision was exercised recently in a case involving a miner who publicly spoke out against safety practices and was terminated by the mine operator for alleged safety violations. The Labor Secretary prevailed on a motion for temporary reinstatement of the miner, suggesting that current laws are effectively protecting employees who voice safety-related concerns and raising a serious question as to the need for an expansion.¹⁵ Further, because of a last-minute amendment that excludes certain classes of mines from the requirements of H.R. 5663, workers at those mines would not be able to avail themselves of the Majority's new whistleblower protections. It stands to reason that all miners should have the same protection to report safety violations free from retribution; if miners in non-coal/gassy mines are sufficiently protected by current law and Republicans believe they are protected thanks to the existing statute—miners in coal/gassy mines are also well-protected by these laws.

Significant protections are also provided under existing occupational safety laws, specifically located at Section 11(c) of the Occupational Health and Safety Act, 29 U.S.C. Section 660. In hearings before the Subcommittee on Workforce Protections, one witness testified that current law works and questioned the need for an expansion to whistleblower protections under the OSHA statute:

I am unaware of any empirical data supporting the assertion that the current statute fails to protect occupational safety and health whistleblowers. Indeed, my concern is that this assumption is supported by nothing more than cherry-picked anecdotes or conclusory assertions that occupational safety and health OSH whistleblowers do not “win often enough.”¹⁶

¹⁵The miner involved, Ricky Lee Campbell, was allegedly terminated by Marfork Coal Co. after voicing various safety concerns. In a press release commenting on the successful motion for temporary reinstatement, the Assistant Secretary of Labor for Mine Safety and Health stated that, “The law is clear in its protections toward miners whose actions may lead to retaliation.” See, MSHA Press Release issued on June 17, 2010, at <http://www.msha.gov/MEDIA/PRESS/2010/NR100617.asp>

¹⁶See, Testimony of Lloyd Chinn, Committee on Education and Labor, Subcommittee on Workforce Protections Hearing, “Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act,” April 28, 2010.

The testimony further illustrated that expanding protected whistleblower activity may not increase the win rate for aggrieved workers filing whistleblower claims:

In fact, although [the Majority's legislation] apparently posits access to the federal courts as a panacea for OSH whistleblowers, there is no reason to believe the "win" rate there will be any better than before OSHA. Indeed, in every administrative forum and court system in which I've practiced as an employment lawyer, it has been well understood that, in the aggregate, employment litigation plaintiffs lose more often than they win. This state of affairs is not, in my opinion, because of any particular bias in any of these court or administrative systems against plaintiffs; rather, it is simply because in the context of a particular employment statute, there is some substantial number of meritless claims filed.¹⁷

At the core of these proposed reforms is a fundamental concern whether expanding whistleblower protections will lead to increased safety of workers. Testimony received by the Committee suggests it will not:

. . . one would expect (all other things being equal) that inadequate OSH whistleblower protections have led to a less-safe workplace. But Bureau of Labor Statistics data support no such conclusion. According to BLS, both nonfatal injuries as well as fatalities in the workplace have continually declined over the past decade.¹⁸

Despite the evidence of adequate whistleblower protections, H.R. 5663 significantly expands such protections under mining and occupational safety laws for questionable reasons. For example, the Majority's bill would create expansive new investigation and hearing procedures applicable to whistleblower complaints, increase attorney fee awards, and give whistleblowers the ability to file suit in federal court if they do not receive an administrative decision within 90 days. Given this relatively short timeframe, it appears reasonable to conclude that such deadlines are likely to be missed, resulting in more federal court litigation which will only serve to raise costs and delay justice. Republicans believe there should be a more proactive approach to increase worker safety that does not rely on such litigious measures.

H.R. 5663 includes OSHA provisions wholly unrelated to mine safety

While the title of H.R. 5663 suggests it is intended to address mine safety only, Committee Republicans believe the scope of the bill goes far beyond its stated purpose. In doing so, the bill threatens to negatively affect virtually every business in the country. Specifically, Title VII of H.R. 5663 includes dramatic changes to the Occupational Safety and Health Act. Essentially, this title seeks to import into H.R. 5663 entire sections of H.R. 2067, the Protecting America's Workers Act ("PAWA"), a bill focused on an

¹⁷ *Ibid.*

¹⁸ *Ibid.*

area of law completely unrelated to mining safety. Some of the OSH Act changes are similar to the provisions discussed above. For example, the bill's OSH Act provisions adopt a "knowing" liability standard, increase criminal and civil penalties, and expand protections for whistleblowers. Other changes are unique to the OSH Act title, including the requirement of a mandatory abatement of alleged safety hazards without regard to due process and inclusion of impacted employees or their family members in various legal proceedings. At this point, the Majority has not exempted any industry from this section of the legislation.

During consideration of the bill, Committee Republicans expressed repeated concerns about the far-reaching consequences of the proposed changes to the OSH Act, noting the amendments envisioned in H.R. 5663 reach almost every private-sector employer and worker in this country. Unfortunately, none of the provisions directly promote workplace safety, but again focus only on punishment in the aftermath of an accident.

Standard of liability

As discussed previously, H.R. 5663 changes the OSH Act's legal standard from "willful" to "knowing," a dramatic policy change, the ramifications of which are not fully known. As noted in testimony received by the Committee, such a change could have troubling consequences.

The expected modifications to PAWA's increase in criminal penalties would change the level of intent necessary for criminal penalties from the current "willful" to "knowing." Such a change would upend decades of OSHA law—dating to the passage of the act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the "knowing" standard is used in EPA law, it has not been the standard for OSHA criminal culpability. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.¹⁹

Penalties

Committee Republicans are also concerned by the manner and extent to which H.R. 5663 would increase penalties and fines assessed under the OSH Act. Not only are the monetary increases proposed by the bill significant, these penalties would automatically increase every four years to account for inflation. We are also troubled by the bill's so-called "look back" provision, which would effectively permit the Secretary of Labor to review an employer's past history of OSHA violations and impose significant new penalties if the Secretary judges that history to have caused or contributed to an employee's death, despite the fact that past violations would already have been penalized and adjudicated. Committee Re-

¹⁹See, Testimony of Jonathan L. Snare, Esq., Committee on Education and Labor Hearing, "H.R. 5663, the Miner Safety and Health Act of 2010," July 13, 2010.

publicans share the view that penalties should be retained in statute as a deterrent to policies or practices that might put workers at risk. Moreover, we are willing to consider whether the fines and penalties currently provided for in the OSH Act are sufficient. However, we believe the changes proposed in H.R. 5663 to be punitive in nature, ignoring recent history which has shown a decline in workplace illness and injury rates in conjunction with a compliance-based approach to workplace safety.

Expansion of whistleblower protections

Committee Republicans are also troubled by the fact that H.R. 5663 seeks to expand whistleblower protections under the OSH Act. As with the proposed whistleblower protection expansions under the mining provisions of the legislation, we are unaware of any compelling evidence suggesting such an expanded legal framework is necessary. Indeed, current statistics point to the opposite conclusion. In 2008, according to statistics provided by OSHA, the agency received 1,388 whistleblower complaints (commonly referred to as “11(c) cases,”) for the section of the OSH Act under which they are brought. Seventy-six percent of those cases were without merit (withdrawn or dismissed), and the remainder were settled or litigated.²⁰ In 2009, OSHA statistics revealed 1205 cases; of those, 76 percent again were without merit (dismissed or withdrawn) and the remainder were settled or litigated.²¹ Committee Republicans believe these figures give credence to the notion that the current system of investigating and adjudicating OSHA whistleblower complaints is adequate.

Mandatory Abatement Without Due Process

Committee Republicans are concerned by the inclusion in H.R. 5663 of a new, prompt abatement provision that requires costly and disruptive changes be made in the workplace before disputes over the validity of the citations are resolved. The Majority attempts to draw a parallel to the mining industry and its long adhered-to practice of abatement, while adjudication of a contested citation is pending. However, expert testimony provided to the Committee on this point disputes this notion.

This provision will reduce or eliminate the ability of an employer to challenge a citation through the OSHRC administrative process by requiring immediate abatement. Immediate abatement is already available through the emergency shutdown mechanism when OSHA identifies an imminent hazard. This provision will also eliminate one source of leverage that OSHA and the Solicitor’s Office can use to resolve cases by settling appropriate cases with the requirement of immediate abatement imposed.

²⁰ See, Committee on Education and Labor, Subcommittee on Workforce Protections Hearing, “Whistleblower and Victim’s Rights Provisions of H.R. 2067, the Protecting America’s Workers Act,” April 28, 2010. Item 3, Record Submission, Department of Labor Statistics and Outcomes on Whistleblower Cases filed with OSHA, Fiscal Year 2008.

²¹ See, Committee on Education and Labor, Subcommittee on Workforce Protections Hearing, “Whistleblower and Victim’s Rights Provisions of H.R. 2067, the Protecting America’s Workers Act,” April 28, 2010. Item 4, Record Submission, OSHA’s Actions on 11(c) Cases Completed in Fiscal Year 2009.

The signaled modification to this mandatory abatement provision which would substitute an employer's ability to suspend abatement while contesting the citation with a higher burden of proof akin to what is required for securing a temporary injunction is simply unjustified and an outrageous trampling of due process rights. Abatement is more than just protecting against a hazard; it is part of accepting responsibility for the violation. Mandating abatement before allowing the employer to exhaust their adjudicative process would be like asking a criminal or civil defendant to pay a fine or serve a sentence before the trial is held.

In addition, this provision will eliminate OSHA and the Solicitor's Office prosecutorial discretion in handling these contested cases. This provision strikes me as unduly punitive and makes it much more difficult for employers, particularly smaller employers who lack resources, to challenge certain citations which they may believe in good faith are incorrect or improperly imposed by the agency in the first place. By making it harder to settle cases this will increase the rate of contest cases.²²

The mandatory abatement provision, like much of the bill, is merely punitive in nature; its disregard for due process exposes the Majority's predilection for imposing punishment rather than proactively enhancing workplace safety.

AMENDMENTS OFFERED IN COMMITTEE

Given the expansive and unwieldy nature of the underlying measure, Committee Republicans sought to refocus the measure on the most pressing and well-understood mine safety issues. Committee Republicans offered the following amendments.

Republican Substitute

The Republican substitute would improve mine safety by empowering MSHA and holding the agency accountable, identifying and punishing bad actors, and modernizing mine safety standards. Republicans would provide MSHA the tools it needs and has sought in Congressional hearings—a responsive pattern of violation system and subpoena power for accident investigations. The Republican substitute also mandates that MSHA inspect mines at irregular hours, creates an independent investigation panel to assess MSHA's activities before and during an accident, mandates additional inspector training, and reestablishes the conference process. Further, the substitute requires penalties if the MSHRC determines a frivolous contest had been brought. Finally, the Republican substitute modernizes mine safety standards—provisions that would work to improve the safety of all miners. A summary of the Republican substitute follows.

²²See, Testimony of Jonathan L. Snare, Esq., Committee on Education and Labor Hearing, "H.R. 5663, the Miner Safety and Health Act of 2010," July 13, 2010.

Enhanced Enforcement

PATTERN OF VIOLATIONS

The Republican substitute utilizes the Safe Performance Index (SPI)²³ to draw a bright line for placing perpetually unsafe mines in a pattern of violations. If a mine operator falls below the identified threshold on the SPI, that operator would be placed in POV status and required to submit a comprehensive remediation plan to MSHA explaining how the mine operator intends to improve safety to get out of POV status. While in POV status, a mine would be subject to spot inspections.²⁴ Such inspections, to take place at irregular hours, would focus MSHA's inspectors on the hazardous areas of a mine where greater oversight is needed most.

When the Secretary determines that a mine operator has an adequately improved SPI and has met all the requirements of the remediation plan, the mine shall be notified that it has been removed from POV status.

INCREASED FINES AND PENALTIES

The Republican substitute increases penalties for violations of the Act to include sharp monetary penalties coupled with significant jail time, in those instances where a mine operator's conduct warrants such punishment.

ADVANCED NOTICE OF INSPECTION PENALTIES

The Republican substitute ensures that anyone providing advance notice of an inspection can only do so at the behest of an inspector to facilitate that inspection. Anyone who provides advance notice of an inspection with the intent of interfering with that inspection would be subject to a fine of \$50,000 and up to five years imprisonment.

SUBPOENA POWER

MSHA has continually cited the need for easier access to subpoena power to carry out its duties during a mine investigation. The Republican substitute provides MSHA the appropriate authority to subpoena relevant documents during an investigation and ensures that Rule 45 of the Federal Rules of Civil Procedure guide the agency's actions in this area.

²³The Safe Performance Index is a matrix created by Dr. Larry Greyson to model mine safety. This was discussed at the Committee's July 13, 2010 legislative hearing on H.R. 5663.

²⁴30 U.S.C. §813, Spot Inspections, provides in relevant part: (i) Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

STRENGTHENED INSPECTION AUTHORITY

The Republican substitute requires inspectors to perform inspections at irregular hours. Currently, MSHA is required to inspect underground mines four times per year and surface mines two times per year, an important safety and enforcement tool. The substitute requires that 30 percent of mandated inspections take place on evening and weekend shifts.

PENALTY FOR FRIVOLOUS CONTESTS

The 17,000 case backlog at the MSHRC can be attributed to many actions over the last four years. Industry critics argue that some mine operators contest citations in order to “game the system” and delay the payment of penalties or the inclusion in a potential POV status. Under the Republican substitute, if the Commission determines a contest is frivolous it may assess an additional penalty, thereby targeting the few operators who may be engaging in dilatory adjudication.

Improved statutory processes

INDEPENDENT ACCIDENT INVESTIGATIONS

While MSHA is well-equipped in both expertise and technology to investigate accidents there are questions about the agency’s objectivity when examining its own conduct. The Republican substitute creates an independent investigation panel charged with investigating MSHA’s actions in the wake of serious mining accidents.

DESIGNATION OF MINER REPRESENTATIVE

The Republican substitute requires miners to designate a representative upon employment; information that will be kept on file by the mine operator in the event that miner is entrapped or otherwise prevented from action on his own behalf. This ensures the miner’s wishes are represented and insulates family members from having to determine who is the “next of kin” in distressing situations.

REESTABLISHMENT OF CONFERENCE PROCESS FOR CONTESTS

Previous actions by MSHA suspended the conference process for resolving contested citations, a major contributing factor to the overwhelming case backlog at the MSHRC. The Republican substitute reinstates and improves the conference process while making it a statutory requirement.

Modernizing mine safety standards

ROCK DUST STANDARDS

The Republican substitute implements a new rock dusting standard, which as proposed by NIOSH and reflected in the Republican substitute, will decrease the explosivity of coal dust in mine intakes. Further, NIOSH has developed a real-time coal dust explosivity meter (CDEM). The substitute encourages the use of the NIOSH developed CDEM to test the explosivity of the coal dust/rock dust mixture to ensure no explosive hazard exists.

PERSONAL DUST MONITORS

The UMWA and industry agreed to personal dust monitor protocols in a white paper dated April 4, 2008. The Republican substitute requires the Secretary to issue a standard based on the recommendations of this joint labor-industry task force.

RISK ANALYSIS PILOT PROGRAM

The Republican substitute requires NIOSH to conduct a survey of international mining practices with respect to incident planning with a particular focus on Australia's risk assessment approach. NIOSH will publish these protocols and work with mine operators to utilize the risk assessment tool to improve mine safety.

TRAINING REQUIREMENT

Currently, MSHA's inspectors are required to undergo two weeks of training every two years and one week of specified training every year. Earlier this year, the Inspector General determined that more than 50 percent of the inspectors interviewed had not undergone the required retraining.²⁵ The Republican substitute corrects the training deficiency identified in the IG report by increasing mandatory training requirements.

Studies

STUDY REGARDING ESTABLISHMENT OF A TECHNICAL DISPUTES PANEL

The Republican substitute calls for a study to examine the issues involved in technical mine operation disputes and determines whether a technical disputes panel could facilitate and expedite the resolution of these disputes. Further, the study will include recommendations about the role such a panel would play in conjunction with the MSHRC.

GAO STUDY ON TRANSFER OF AUTHORITY OF NIOSH TO DOL

NIOSH was designed to research the many safety and health issues facing our nation's workers. Given the inherent relationship between NIOSH and the Department of Labor, questions have arisen about the placement of NIOSH outside the purview of the Secretary of Labor. The substitute requires the General Accountability Office (GAO) to study the merits of moving NIOSH within the Department and report to Congress if such a move would improve worker safety and health.

The Republican substitute was defeated on a party line vote of 30 to 17.

Amendment to strike Title VII of the underlying bill

Rep. McMorris Rodgers (R-WA) offered an amendment to strike Title VII of the legislation. This amendment would have removed the expansive and unwarranted amendments to the Occupational Safety and Health Act. Committee Republicans support proactive safety measures that prevent workplace illness and injury. The pu-

²⁵ See, "Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining," Department of Labor, Inspector General Office of Audit, March 30, 2010. Report Number 05-10-001-06-001.

nitive nature of Title VII of the bill does nothing to improve safety, only implementing harsh penalties after an accident or injury has occurred.

More than 230 organizations supported Rep. McMorris Rodgers' position that Title VII was inappropriate public policy.

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.²⁶

This amendment was defeated on a party line vote of 30 to 17.

Amendment to delete the adoption of a "knowing" intent standard

Rep. Tom Price (R-GA) offered an amendment to strike the "knowing" intent standard that would apply to violations in both the mining and occupational safety sections of the bill (Titles III and VII). Specifically, the amendment would have removed provisions that are unduly vague and punitive, are not likely to yield improvements in mine and workplace safety, and would result in an unwarranted increase in liability and litigation applicable to a broad range of mine operators, businesses, corporate officers, agents and employees.

The amendment was defeated on a party line vote of 30 to 17.

CONCLUSION

As a matter of public policy, H.R. 5663 falls well short of its stated purpose—improving the safety and health of American miners. It creates a system that fails to protect surface miners and certain metal/nonmetal miners—as acknowledged by the President,²⁷ the Majority party in Congress,²⁸ and the Assistant Secretary of Labor for Mine Safety and Health.²⁹ As the Majority's own Committee report notes, "In the last decade, over 600 miners have been killed while working in coal and metal/non-metal mines, including 190 underground coal miners." Clearly, the risks to miners are not limited solely to the underground coal/gassy mines affected by this legislation. If, as asserted by the Majority, the POV system is broken, it must be repaired for all mines, not just coal mines. If the backlog at the Mine Safety and Health Review Commission is broken, it must be repaired for all mine operators, not just coal mine operators. Compounding the inexplicable establishment of a dual system of mine safety, is the fact that at its core, H.R. 5663 fails to focus on those issues all parties to this debate agree are in need of attention. Instead, H.R. 5663 reflects a heavy-handed approach more fo-

²⁶ Letter on file with the Committee.

²⁷ "This isn't just about a single mine. It's about all of our mines." See Remarks by the President on Mine Safety, April 15, 2010 available at www.whitehouse.gov.

²⁸ "Chairman Miller has said this backlog is unreasonable and harms the safety of American miners." Democrats to crack down on mining firms that avoid safety penalties. The Hill. April 8, 2010.

²⁹ "As I have said repeatedly, the current system is broken. As I have said on many occasions, we need to fix the pattern of violation system." Assistant Secretary Joe Main, Hearing on "H.R. 5663, Mine Safety and Health Act" July 13, 2010.

cused on punishing mine operators than addressing identifiable solutions to prevent mining accidents in the first place.

H.R. 5663 also fails because it includes provisions wholly unrelated to mining or mine safety. In terms of workers' safety, the bill's wholesale changes to the Occupational Safety and Health Act are perhaps best described as "subtraction by addition," as they make federal workplace safety law less navigable and mining reforms less focused in a bill ostensibly intended to improve mine safety. As with so much of the bill, these provisions appear premised on the notion of imposing punishment rather than improving workplace safety.

Republicans have always held to the tenet that one workplace death is one too many. We also believe proactive safety policies that are practiced everyday will bring workers home to their families at the end of every shift. As such, we will continue to seek policy changes that result in real improvements in worker safety and health and we will resist those proposals predicated solely on imposing punishment after the fact. It is with these guiding principles in mind that we urge our colleagues to reject H.R. 5663 when it reaches the floor of the House of Representatives in favor of a more targeted, thoughtful, and informed approach to miner safety.

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