Your Essential Connection

April 3, 2006

Honorable Michael B. Enzi
Chairman
Committee on Health, Education, Labor and Pensions
SD-428 Dirksen Senate Office Building
Washington, DC 20510-6300

Dear Chairman Enzi:

On behalf of the American Industrial Hygiene Association (AIHA), I am writing to offer comments on S. 2066, the "Occupational Safety Fairness Act", a bill that would provide numerous changes to the Occupational Safety and Health Act of 1970. AIHA supports your view that the Occupational Safety and Health Administration (OSHA) should be working hard to help employers and workers make their workplaces safer and healthier and hopes that our comments assist in this effort.

AIHA is interested in any amendments to the OSH Act that may have an impact on the health and safety of workers. Most of the issues you address in S. 2066 have a direct impact on worker health and safety, while others more directly address the process used by OSHA.

The diversity of our membership requires us to carefully consider all points of view. While each of the sections in this legislation would have some impact on employers or employees, several sections are beyond the scope of areas where our members may be professionally involved. Because of this we defer comment on some sections.

AIHA COMMENTS ON S. 2066

SECTION 2 – WORKSITE-SPECIFIC COMPLIANCE METHODS.

This section proposes to vacate citations if an employer "demonstrates that employees were protected by alternative methods that are substantially equivalent or more protective". AIHA

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believes that for this section to become law the following issues must be addressed. Language in this section needs to clarify what constitutes "substantially equivalent or more protective". Who determines whether or not the employer's efforts fit this definition? Language also states that the citation "shall" be vacated. AIHA suggests changing the wording to read that the citation "may" be vacated, thereby allowing for each situation to be reviewed prior to making a final determination.

SECTION 3 – DISCRETIONARY COMPLIANCE ASSISTANCE.

On the surface, the proposal in this section seems to make good sense. But as one knows "the devil is in the details".

OSHA has existing mechanisms to recognize employers who promptly abate violations during the inspection process including: "Corrected During Inspection", "Quick Fix" for low gravity violations, and "Expedited Informal Settlement Agreements". Often, as part of a settlement agreement, OSHA will work cooperatively in a non-enforcement capacity to further educate and provide compliance assistance to industry groups, impacting a larger audience. OSHA also has existing mechanisms to issue warnings, the Section 21 letter as an example.

AIHA is pleased that the language in this section does not "require" a warning be issued in lieu of a citation, but simply provides the option for issuing such a warning. However, AIHA believes this section should define "violation that has no significant relationship to employee safety or health". Compliance Safety and Health Officers across the nation will likely face inconsistency in interpreting this language. Who determines "no significant relationship"? Does this only pertain to paperwork violations? There are many questions that need to be asked and answered prior to adoption of this section.

SECTION 4 – EXPANDED INSPECTION METHODS.

An excellent approach to stretching the limited resources of OSHA. However, OSHA already has existing mechanisms to evaluate the facts of safety and health complaints and conduct phone and fax investigations. As an example, AIHA is aware that in one OSHA region, a look at quarterly statistics showed roughly 40 percent of the complaints received were inspected; meaning 60 percent were handled via other means.

To change language in the OSH Act is unnecessary and only seeks to lessen OSHA's responsibility to worker safety and health. The flexibility of handling complaints via phone and fax is a mechanism already in place and well utilized.

SECTION 5 – OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

AIHA supports increasing the membership of the Occupational Safety and Health Review Commission (OSHRC) from three to five members to ensure that cases are reviewed in a timely fashion. This change will have a positive impact on the health and safety of workers.

Because a quorum of two Commissioners (of the three total) is needed for decision-making, OSHRC has in the past often been unable to act. Statistics show that since 1982, the Commission has consistently faced the inability to have a quorum present to review cases.

Notwithstanding our support for increasing the number of Commissioners, AIHA recommends language requiring that the two new appointees have legal training be deleted and language added that the two new Commission appointees must have practical expertise and be qualified in the field of occupational safety and health. We are aware that many believe all members of the Commission should be representatives from the legal profession; however AIHA feels that individuals on the front line of health and safety (such as a Certified Industrial Hygienist or Certified Safety Professional) would add expertise that is needed.

AIHA also questions why language has been inserted that require only two members of the Commission be present to constitute a quorum and official action can be taken by a majority of the members participating but in no case fewer than two. One of the reasons for increasing the number of Commissioners was to increase the opportunity for a quorum; however reducing the number for a quorum to less than a majority of the members would be moving in the wrong direction.

SECTION 6 – AWARD OF ATTORNEYS' FEES AND COSTS.

AIHA has no position on this section. There is difficulty in finding within this recommendation how the change would directly impact worker health and safety and the profession of industrial hygiene. However, we would caution Congress to seriously review existing laws prior to enacting such far-reaching language. The Equal Access to Justice Act is already a mechanism for the awarding of attorney fees. In addition, an Administrative Law Judge makes the decision of whether the Secretary was substantially justified. While AIHA has no position on the impact of this section, we are pleased you have included a specific definition of what constitutes a "small business".

An additional comment. Whether or not this legislation is enacted, AIHA believes such a change may negatively impact budgetary considerations within OSHA. While one hopes this legislation would provide direction to OSHA to use caution when prosecuting a small employer, the reality of the situation is that should OSHA not have the "legal ground" against some employers, reimbursement of attorney fees and expenses would have a detrimental impact on OSHA's limited resources. Language should be inserted to ensure OSHA of adequate funds to fully comply with the possibility of this reimbursement. The last thing anyone wishes to see is not

only OSHA taking small employers to court without legal grounds, but the possibility that OSHA funds more appropriately spent on protecting workers would be needed to offset a reimbursement requirement.

SECTION 7 – JUDICIAL DEFERENCE.

AIHA agrees that the OSHRC is the proper forum for employers to seek an independent review of the charges against them leveled by OSHA. The Commission spends a great deal of time and resources in reviewing these charges and issues a ruling based on this review. Providing the decisions of the Commission to be given "deference" by the courts is a laudable goal.

However, AIHA believes the decisions of the Secretary of Labor and OSHA in relationship to the rulings of the OSHRC should be given preference. The interpretation of standards and enforcement action by OSHA, while sometimes seemingly overreaching, is still preferable to the interpretation by the Commission because of the openness of OSHA as it relates to employers. Commission rulings should be given serious consideration, but the interpretation of the Secretary of Labor and OSHA is, in our view, preferable.

SECTION 8 – CONTESTING CITATIONS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970.

Section 11 of this legislation addresses the same issue; however Section 11 provides language to extend the amount of time available in which to contest a citation. Section 8 includes language that would allow employers to miss the deadline for contesting a citation because of "mistake, inadvertence, surprise, or excusable neglect".

The Occupational Safety and Health Review Commission already has this option (Commission Rule 2200.5 – Extension of Time). The Commission can review any missed deadlines on a case-by-case basis and extend the filing time, even if the time has expired. In addition, as stated in other sections, AIHA has concerns about what would define "mistake, inadvertence, surprise or excusable neglect". Inclusion of this language in the OSH Act could open the door for every single failure to meet the deadline to fall into one of these categories.

Waiving the deadline is an excellent idea that is working well in its current form.

SECTION 9 – RIGHT TO CORRECT VIOLATIVE CONDITION.

As OSHA continues to focus more and more on compliance assistance initiatives, enactment of this section seems to be a step in the right direction. If enacted, this section would allow employers to avoid a penalty for a citation if the employer abates the violation within 72 hours of the issuance of the citation.

AIHA recommends, however, that what constitutes a "non-serious citation" and who determines whether or not the violation is non-serious should be defined within the legislation.

SECTION 10. WRITTEN STATEMENT TO EMPLOYER FOLLOWING INSPECTION.

AIHA supports portions of this section. In the past, many employers, (particularly those without full-time health and safety employees) have concluded an inspection with more questions than answers. Many times the employer is unsure exactly what the next step is.

Providing the employer or a representative of the employer the right to request a written statement that clearly and concisely lays out the results of the inspection and the many options available to the employer makes good business sense. More importantly, the language in this section allows the employer or a representative of the employer the right to request such a written statement, making it voluntary on the part of the employer.

Under existing procedures, when an inspection concludes as in compliance and no citations are issued, a written statement to the employer that contains the results of the inspection is reasonable and easily achievable. However, when the inspection results in the issuance of citations, it is sometimes difficult to provide the employer with the citation information until later.

Alleged hazards and citations issues are both contained in writing in the OSHA-2 Citation and Notification of Penalty. An additional letter required under this section is duplicative as this information is already disclosed to the employer. During the closing conference, the employer is provided and reviews the OSHA 3000, Employer Rights and Responsibilities Following an OSHA Inspection. This pamphlet contains all of the information listed in this proposed Section 10 of Senate Bill 2066.

Again, AIHA supports providing employers with a written report upon the conclusion of an inspection; however requiring that all information on any citations issued also be provided at that time should be removed.

SECTION 11. TIME PERIODS FOR ISSUING CITATIONS.

AIHA supports this section. OSHA inspectors should be able, in most cases, to issue a citation within thirty days of an inspection. Removing existing language that required a citation to be issued "with reasonable promptness" will allow employees assurance that any existing health or safety violations are addressed in a much improved timeframe. AIHA notes that language in Section 11 also includes language that allows OSHA to waive this 30-day period for good cause, including death, novel issues, large or complex worksites, or pursuant to an agreement by the parties to extend such period. AIHA supports this waiver, yet has concern about what other instances may be interpreted as "good cause". The definition for "good cause" should be complete and provide no ambiguity.

SECTION 12. TIME PERIODS FOR CONTESTING CITATIONS.

AIHA supports providing the Occupational Safety and Health Review Commission (OSHRC) with the authority to extend the time limits under which an employer normally is required to respond to a citation or proposed assessment issued by OSHA, so long as this provision is limited to small business. A small business is not likely to have full-time health and safety staff; therefore providing the possibility of extending the deadline to thirty days may provide a small business with the necessary time to secure professional assistance on a health and safety issue.

Granting an employer an additional 15-day period in which to determine whether or not to contest a citation should not have any negative impact on the health and safety of workers. Frankly, if language requiring employers to receive a written inspection within 30 days of an inspection is also enacted, contesting citations with a new thirty-day deadline may still improve the time in which a potential hazard is corrected.

AIHA is concerned with the possibility that the "additional time to respond" could inadvertently allow a harmful condition to continue for a longer period of time. AIHA suggests language be added to prohibit an extension of the 15-day time limit for any condition that is deemed to be a hazard that if not addressed may cause a serious injury or fatality.

SECTION 13 – PENALTIES.

AIHA has no position on this section.

SECTION 14 – UNANTICIPATED CONDUCT.

AIHA has no position on this section.

SECTION 15. ADOPTION OF NON-GOVERNMENTAL STANDARDS.

AIHA is opposed to this section. While we are well aware of the ongoing debate over consensus standards versus non-consensus standards, we do not believe that incorporating new language into the OSH Act will improve the health and safety of workers.

Standard-setting organizations, whether consensus or non consensus, have a right to establish limits and values for use by professionals in their organization as well as employers who wish to use these guidelines for reference. We are sure everyone agrees with this right.

The problem arises not with the organizations setting these guidelines, but with the government agency referencing these guidelines. OSHA has attempted many times over the course of the last thirty years to update permissible exposure limits thereby providing employers and employees

with a limit that has been proven to be healthier and safer for workers. However, because of the enormous number of legal challenges on nearly every new recommended limit, OSHA has been forced to simply "reference" the new limits rather than provide them as a legally enforceable limit.

AIHA has attempted to bring the many factions together to see if agreement could be reached on updating permissible exposure limits. Unfortunately, after four years, we are no closer to an agreement. However, one thing is certain. Workers are healthier and safer because many employers and OSHA are using "recommended levels" as the acceptable workplace standard.

The solution to this problem is not to prohibit the agency from referencing these guidelines, but to provide the means for the agency to adopt these recommendations as enforceable limits. The agency should be willing and able to adopt these guidelines as permanent limits and if challenged, the agency should be the one responsible to justify the new limit in court proceedings. The burden should not be on private organizations to justify to the courts voluntary guidelines developed for use by employers and others. If there is a question as to the process used by a private organization in its standard-setting, the burden should fall upon the agency to satisfy itself that the process being used is proper and open to all stakeholders. Once the process is found acceptable, the recommended limits could be adopted.

SECTION 16. EMPLOYEE RESPONSIBILITY.

In cases where employees blatantly ignore company policy and where the employer has a work rule, communicates the work rule, has enforcement of the work rule, and makes sincere efforts to determine compliance, an OSHA citation is not necessary as the employer has a classic employee misconduct defense.

CONCLUSION

AIHA hopes the input we have provided will be of benefit to you during the upcoming discussions and debate on the future of changes to the Occupational Safety and Health Act.

AIHA applauds your efforts and sincerely hopes you will be successful in your endeavor to advance the cause of worker health and safety. The American Industrial Hygiene Association stands ready to assist Congress in every way possible in developing legislation that will best protect workers.

Thank you for your time and consideration. If AIHA can assist in any way as you move forward with this legislation, please do not hesitate to contact Aaron Trippler, AIHA director of government affairs, or me.

Sincerely,

Roy M. Buchan, Dr.PH., CIH
President

cc: Rep. Charlie Norwood
AIHA Board of Directors
Steven Davis, AIHA Executive Director
Aaron Trippler, AIHA Director Government Affairs