



# AMERICAN SOCIETY OF SAFETY PROFESSIONALS

April 22, 2019

The Honorable Alma Adams  
United States House of Representatives: Committee on Education and Labor  
Chair, Subcommittee on Workforce Protections  
United States Congresswoman for the 12th District  
2436 Rayburn House Office Building  
Washington, DC 20515-3312

The Honorable Bradley Byrne  
United States Congressman for the 1st District  
United States House of Representative: Subcommittee on Workforce Protections  
119 Cannon House Office Building  
Washington, DC 20515

The Honorable Joe Courtney  
United States Congressman for the 2<sup>nd</sup> District  
2332 Rayburn House Office Building  
Washington, DC 20515

## **AMERICAN SOCIETY OF SAFETY PROFESSIONALS (ASSP):** **COMMENTS ON HR 1074, *PROTECTING AMERICA'S WORKERS ACT***

The American Society of Safety Professionals (ASSP) is pleased to submit the following comments concerning HR 1074, legislation to amend the Occupational Safety and Health (OSH) Act of 1970 in several substantive ways. The *Protecting America's Workers Act* (PAW Act) has been introduced in the past several congressional sessions, and ASSP has submitted position statements concerning our support for portions of the legislation that address key issues of concern to our members. ASSP also historically has offered constructive feedback on areas of legislation that could be improved to advance workplace safety and health protections.

ASSP is the oldest society of safety professionals in the world. Founded in 1911 as the American Society of Safety Engineers (ASSE), ASSP today represents more than 38,000 dedicated occupational safety and health (OSH) professionals. Our members are experts in managing workplace safety and health issues in every industry, in every state and across the globe. ASSP is also the Secretariat for various voluntary consensus standards related to best practices in OSH management and training.



## AMERICAN SOCIETY OF SAFETY PROFESSIONALS

The following issues addressed in HR 1074 are of primary concern to ASSP and its members, and we offer these comments in support of sound public policy in the OSH arena, rather than as specific endorsement of, or opposition to, specific proposals in this legislation.

### *Public Sector Employee Protections*

Section 101 of the PAW Act expands federal OSHA coverage to include state, county and municipal employees and employees of the federal government. Currently, workers in OSHA state-plan states have workplace safety and health protections (typically federal OSHA rules that are enforced by the states, or state rules that are more protective than those of federal OSHA) that can be enforced by the state agencies, with accompanying abatement requirements and civil penalties. Conversely, public sector workers in federal OSHA states have disparate and lesser levels of protections, unless they are located in a jurisdiction (e.g., NY, NJ, IL) that has enacted separate protections for their public employees.

This leaves 8.5 million public sector workers in 24 states without any enforceable workplace safety protections. According to 2015 data, state and local government workers reported a 70 percent higher injury and illness rate than private industry workers. This is an imbalance that has long needed correction. There can be no second-class citizens when it comes to safety and health in the workplace.

### *Enhanced Whistleblower Protections*

Currently, the statute of limitations period for filing a whistleblower complaint with OSHA is only 30 days following any adverse action arising from protected safety activity under Section 11(c) of the OSH Act. Protected activities include actions such as reporting a safety hazard, opposing retaliation arising from reporting an injury, speaking privately to OSHA, testifying against an employer, or refusing to work in an unsafe area or with hazardous equipment. This is the shortest statute of limitations of any whistleblower statute in federal law. Most agencies have longer periods for reporting safety-related retaliation, such as the Mine Safety and Health Administration (60 days), the U.S. Department of Transportation (180 days) and environmental statutes (typically 180 days).

Section 201 of the PAW Act would expand OSHA's 30-days statute to 180 days, aligning it with the majority of the whistleblower statutes from other agencies that OSHA is also tasked with enforcing. In the 2016 Electronic Recordkeeping final rule, OSHA made it a citable offense to interfere with a worker's protected activities, and employers can now be cited for up to 180 days following an adverse action under 29 CFR Part 1904, and fined up to \$132,598 per affected worker. In light of this codified provision, amending Section 11(c) of the OSH Act to provide the same enforcement period would appear reasonable.



## AMERICAN SOCIETY OF SAFETY PROFESSIONALS

### *Modification of the General Duty Clause*

Section 301 would expand employer liability for violations under the General Duty Clause of the OSH Act of 1970 [Section 5(a)(1)] to encompass hazards to which workers of another employer are exposed, as well as to situations where the employer's own workers are at risk.

OSHA's multiemployer worksite enforcement doctrine, recently reaffirmed by the U.S. Court of Appeals in the *Hensel Phelps* case, permits OSHA to issue citations to employers who: 1) control the worksite; 2) create a hazard that exposes workers to death or serious injury/illness; 3) expose their workers to a hazardous situation created by a different employer; or 4) are required (by contract or practice) to correct hazardous conditions. However, this multiemployer policy only applies to codified standards and not to violative conditions cited under the General Duty Clause. In today's fissured workplace, where it is common to outsource hazardous activities to staffing agencies or subcontractors, public policy supports bridging this gap in worker protections.

### *Update of National Consensus Standards Enforced by OSHA*

Section 302 of the proposed legislation would direct OSHA to update national consensus standards that were initially incorporated by reference as enforceable standards (when OSHA was initially established) within 2 years of enactment of the PAW Act. The Secretary of Labor could opt out of such updates where it would not improve the safety or health of affected workers, and approximately 200 such consensus standards would potentially require updating. The statutory language provides that no changes can reduce the existing level of worker protections.

Because of constitutional protections related to fair notice and due process, the regulated community must have knowledge of what is required for compliance. OSHA by law must incorporate by reference a specific version of any consensus standards it utilizes in rules to avoid providing a moving target for compliance. However, this has had the unintended consequence of preserving in Title 29 of the Code of Federal Regulations references to OSH consensus practices that were promulgated in the 1960s, shortly before OSHA was established. As a result, these incorporated standards lag being the current versions and are no longer reflective of best practices concerning worker protections.

As the secretariat for a large number of national consensus standards, including the ANSI A10 standards addressing construction safety, ASSP endorses the utilization of the most current standards as these tend to be most protective and reflective of current technology and safety engineering. Eliminating references to standards that may now be up to 50 years old is in the public interest and will advance worker protections and eliminate confusion among the employer community as to which rules are applicable.



## AMERICAN SOCIETY OF SAFETY PROFESSIONALS

As a matter of public policy, ASSP urges OSHA and Congress to consider support for increased utilization of current and properly promulgated consensus standards<sup>1</sup> and the negotiated rulemaking process as an alternative to the more laborious, decades-long standards-setting process that too often can render a OSHA rule obsolete even before it can take effect.

### *Statutory Adoption of E-Recordkeeping, Continuing Violation and Severe Injury Rules*

The legislation would address three controversial OSHA rules in the following ways:

- (1) It would restore the requirements of the 2016 Electronic Recordkeeping Act and rescind the 2019 amendments that took effect in February 2019. Those provisions are currently the subject of multiple court battles (arising from both the 2016 rule's data submission and anti-retaliation provisions, and the 2019 amendments that reduced data submission requirements, as well as from the agency's decision not to make the data publicly searchable by establishment). It is ASSP's position that the agency and courts should continue to address this issue and there is no need for Congress to intervene at this time.
- (2) It would codify the OSHA 2016 continuing violations rule that permitted OSHA to issue citations and civil penalties beyond the current six-month statute of limitations for any regulations that have recordkeeping requirements that extend beyond that period. The continuing violations rule itself came on the heels of a U.S. Court of Appeals decision (the *Volks* case) and was subsequently rescinded by Congress in 2017 under the Congressional Review Act (H. Res. 83). This appears to be settled law at the present time, and there is no need to revisit the litigation or rescinded.
- (3) It would codify the 2015 severe injury reporting rules that require immediate reporting of fatalities (within eight hours), or inpatient hospitalizations, amputations or eye loss (within 24 hours). While the rule drives many of OSHA's unprogrammed inspections and consumes significant resources, these cases have always had priority status for inspection purposes, and there seems little need to codify the rule.

### *Abatement Issues*

The proposed legislation would require prompt abatement of cited conditions that present a serious safety or health hazard to workers, even where a contest has been filed by the employer, rather than having a contestment serve as a stay of hazard mitigation. ASSP understands the value of such a provision (which mirrors the statutory abatement requirements of the Mine Safety and Health Administration) in removing hazards from the workplace in a timely manner. The language of the proposed measure affords employers sufficient due

---

<sup>1</sup> See OMB Circular A-119 as a reference for which standards organizations meet the criteria under the Technology Transfer Act of 1995, including transparency and balance in the standards-setting process.



## AMERICAN SOCIETY OF SAFETY PROFESSIONALS

process protections by allowing for a stay to be granted by the courts under certain conditions, balanced against the best practice of encouraging prompt corrective action.

### *Civil & Criminal Penalty Enhancement*

Section 351 of the proposed bill would establish a new statutory penalty framework that potentially would eliminate the vagaries of future administrations to arbitrarily raise or lower OSHA penalties. However, the levels set forth in the bill have already been overtaken by the indexed civil penalty increases that became effective January 23, 2019. The current maximum penalty for a willful/repeat violation is \$132,598, whereas Section 351 would cap this at \$129,336, rendering the increase a nullity. However, Section 351 also sets a new minimum penalty of \$50,000 (\$25,000 for small businesses) for a willful violation resulting in a fatality, and of \$20,000 (\$10,000 for small businesses) for a serious violation resulting in death. Currently, a serious violation resulting in the death of one or more workers is capped at \$13,620.

Section 352 of the PAW Act would increase criminal penalties for certain classes of violations, and also change the standard from a “willful” violation to a “knowing” violation. Under the 2019 version, the PAW Act would increase criminal sanctions arising from a fatal incident from six months incarceration to up to 10 years in prison, plus personal criminal fines of up to \$250,000 and corporate penalties of up to \$500,000. The legislation would add a new category of violations eligible for criminal prosecution, knowing violations resulting in serious bodily harm, that would carry a maximum five-year prison term, plus potentially financial sanctions. Advance notice of inspections or providing false statements would also be punishable by up to five years in prison.

ASSP has long acknowledged that a six-month misdemeanor for willful violations that cause the death of workers is highly inappropriate as a matter of public policy, when balanced against more severe felony penalties imposed for various environmental infractions. ASSP also believes that the entire safety culture of an organization must be examined when ascertaining where to place criminal liability. We welcome the opportunity to engage in continued dialogue on this issue.

### *Conclusion and Future Work*

ASSP invites Congress to explore some additional issues as it evaluates current and prospective OSHA activities and considers additional statutory modifications to the organic law. The following items are among the topics that could be explored during oversight or stakeholder informational hearings. ASSP pledges its support in sharing information with the appropriate committees and with the agency in support of these policy considerations.

- A shift to risk-based approaches for safety and health management in the workplace



## AMERICAN SOCIETY OF SAFETY PROFESSIONALS

- Broader implementation of effective OSH management programs, such as the I2P2 initiative considered by OSHA in previous administrations and as adopted by several state OSHA agencies
- Expansion of third-party auditing to leverage OSHA's limited resources by utilization of qualified OSH professionals to inspect workplaces, recommend solutions, and establish implementation timetables
- Utilization of control banding to address critical gaps in chemical protections is now being implemented in European countries
- Increased collaboration between OSHA and NIOSH for improved guidance, and identification of emergent health hazards or areas such as nanotechnology
- Codification of the Voluntary Protection Programs (and SHARP) to protect this valuable positive recognition program from the vagaries of annual appropriations battles
- Integration of Total Worker Health into OSHA programs.

Thank you for consideration of ASSP's comments. We look forward to working with Congress in a proactive manner to address the critical issues affecting the health and safety of all Americans in the workplace.

Respectfully Submitted

Rixio Medina, CSP, CPP  
2018-19 ASSP President

Copy To:      ASSP Board of Directors  
                  ASSP Council on Professional Affairs  
                  ASSP Governmental Affairs Committee  
                  ASSP Overall Contact List