OSHA and Small Business: Improving the Relationship for Workers
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Testimony

Mr. Chairman, and Members of the Subcommittee: I am pleased to be testifying before you this afternoon. I am a member of the OSHA Practice Group of the law firm of McDermott Will & Emery LLP.

I am testifying today on behalf of the U.S. Chamber of Commerce. I am a member of the Chamber's Labor Relations Committee and its OSHA Policy Subcommittee.

For thirty-one years, I have been deeply involved in OSHA law. For twelve of those years, I served in the Government. I spent over ten years at the Occupational Safety and Health Review Commission, where I became Deputy General Counsel. I also spent two years at the Federal Mine Safety and Health Review Commission as its Special Counsel. For over seventeen years, I have advised employers regarding their obligations under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and I have litigated some of the ground-breaking cases under the statute. I have written and lectured on OSHA law. I have helped to co-author treatises on the OSH Act, including the well-known American Bar Association treatise, OCCUPATIONAL SAFETY AND HEALTH LAW (2d ed. 2002). I was for nine years an adjunct professor at Georgetown University Law Center, where I taught a graduate course in OSHA law.

Many of the U.S. Chamber's members are small- and medium-size companies. The burden of OSHA enforcement falls with special weight upon them, for they can rarely afford to defend themselves against OSHA charges. Unfair aspects of OSHA enforcement – and there are unfair aspects – make it especially difficult for them to assert their rights and often deprives them of a fair hearing entirely.

We therefore encourage the subcommittee to favorably report several bills amending the Occupational Safety and Health Act that we hope will be introduced shortly. These are moderate and limited bills. They are narrowly targeted at some of the worst problems with OSHA enforcement. They do not affect OSHA's ability to adopt standards. They do not affect OSHA's inspection authority. They do not diminish the obligations of any employer or diminish workplace safety. They do not take away any power that Congress in 1970 intended that OSHA have. Yet, they will make important improvements in the OSH Act. They will restore balance to OSHA's enforcement of the Act, and give small businesses a fair chance to plead their case. They will enhance public respect for the fairness of OSHA enforcement, which is essential if the Act is to be effective.

A Pathology in the Enforcement of the Occupational Safety and Health Act

Mr. Chairman, there is a pathology in the enforcement of the OSH Act. It causes courts to issue wrong decisions. It undermines the rulemaking process. It lets OSHA's prosecutorial zeal go unchecked. It encourages arrogance in OSHA's attitude toward employers. It effectively strips from many employers a fair opportunity to assert their rights. And it betrays a promise made to the United States Senate in 1970, when the OSH Act was passed.

That pathology is the emasculation of the agency that Congress established to be a check on OSHA's excesses – the Occupational Safety and Health Review Commission. That emasculation occurred in Martin v. OSHRC (CF&I Steel Corp.), 499 U.S. 144 (1991), where the Supreme Court held that an OSHA interpretation of an ambiguous regulation must be upheld if the interpretation is merely "reasonable" – even if the court believes that the interpretation is wrong. The decision awards OSHA a home run even if the Review Commission and a court think that OSHA has hit only a foul ball. Some courts have even extended that decision to require deference to OSHA even when OSHA interprets the OSH Act, as opposed to OSHA's own standards. As I shall show later, this course of decisions is contrary to known congressional intent and to a pledge made directly to the United States Senate.

I can hardly exaggerate the adverse effects of this decision on the fairness of enforcement under the OSH Act.

As I have said, the decision emasculates the Review Commission as a check on OSHA. Now, OSHA is supposed to enforce the law with zeal. But zeal comes with a price – it can cause enforcement officials to get carried away. It can cause OSHA enforcement officials to resort to wrong legal interpretations merely because their lawyers can make them sound reasonable. Zeal needs to be held in check and overseen by persons chosen for their impartiality. That is why the Commission was created – to serve as an impartial check on prosecutorial over-zealousness. But the Review Commission can no longer do that.

Chief Justice John Marshall once said that the duty of the courts is "to say what the law is." The Review Commission may no longer say what the law is. It may say only whether OSHA's lawyers are reasonable – not right – when they say what the law is. This disability prevents the Review Commission – the body that Congress established to act as a check on OSHA – from doing its job. The Commission cannot restrain over-zealous enforcement officials if it must follow legal interpretations because they are merely defensible, and ignore whether they are wrong. That is the nub of the issue.

Some Examples

The following are just a few examples of the unfortunate consequences of judicial deference to OSHA:

• Depriving small employers of their day in court. A clear example of the destructiveness of deference to OSHA is the Second Circuit's decision in Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219 (2d Cir. 2002). There, OSHA's lawyers had devised an absurdly hyper-technical argument that the Review Commission could not relieve even deserving employers from merely procedural defaults. The court held that it was required by CF&I Steel to follow that interpretation. (See the fuller description of the case beginning on p. 14 below.)

• Telling the public to ignore the Commission. In 1995, OSHA issued an interpretation letter (Letter to L. Kreh from R. Whitmore (April 4, 1995)) that told an employer to ignore a Review Commission decision. OSHA did not appeal the decision. Instead, it just ignored it and, worse, told the public to ignore it too. This is the kind of the arrogance that the CF&I Steel decision breeds.

• Imposing target organ labeling without rulemaking. In Martin v. American Cyanamid Co., 5 F.3d 140, 16 BNA OSHC 1369 (6th Cir. 1993), rev'g 15 BNA OSHC 1497 (Rev. Comm'n 1992), the issue was whether millions of product labels had to be re-written.

OSHA decided – after the rulemaking was over and after internal disagreement – that labels on chemical containers must state the bodily organs they affect. So, "Do Not Inhale" was no longer good enough; only "Causes Lung Damage" would do. Neither the standard nor its legislative history said that OSHA was right, and OSHA could point to only an ambiguous statement in an appendix to the standard. The Review Commission held that OSHA's interpretation was wrong. A court of appeals upheld OSHA's interpretation, however, not because it was right, but because it was merely "reasonable." OSHA thus used deference to avoid rulemaking requirements, to evade scrutiny by the Office of Management and Budget under the Paperwork Reduction Act, and to force millions of perfectly sensible product labels to be re-written.

• Machine-specific lockout training. OSHA has interpreted its lockout standard (29 C.F.R. § 1910.147) to require that maintenance employees be trained on how to lock out every machine they service. Do the words of the standard clearly require such machine-specific training? No. Did OSHA decide in rulemaking that it should be required? No. Would such a requirement be massively expensive? Yes. Would employees remember such training? No. Is such a requirement unreasonable? Yes, but it is very expensive to prove it. We were counsel to a large industrial corporation that received a citation requiring machine-specific training. To our client, the expense of litigating the issue would have been too high and, given CF&I Steel, the probability of success too uncertain, to justify litigation. This employer was thus forced to admit violations it did not commit.

• Chemical-specific hazard training. OSHA has taken the position that when employees are given chemical safety training, the employees must be told the name of every plant chemical and the hazard it presents. This is an absurd interpretation. For example, if you run a gasoline refinery, which has literally thousands of different flammable liquids, you must have a trainer uselessly recite to employees a mind-numbing list of the name of each flammable liquid. To challenge this view, a coalition of seven major trade associations had to finance and file an amicus curiae brief documenting in detail the error in that interpretation. That substantial effort was driven by the effect of the CF&I Steel decision. Ordinary employers – even large employers – simply cannot afford to mount such an effort. And so they forgo their rights.

These are just a few examples of the destructiveness of judicial deference to OSHA. What cannot be cited to the Senate are the thousands of cases that are never brought because this destructive doctrine makes it too expensive and, frankly, fruitless for employers to seek justice in the first place.

Effects on Rulemaking

The CF&I Steel decision has also had the perverse effect of rewarding OSHA for writing ambiguities into its standards. The reason for this is that, under CF&I Steel, ambiguity enhances OSHA's litigating position. If a standard is ambiguous, OSHA need only put forth a "reasonable" interpretation and it will win. This permits OSHA to resolve major policy issues through "interpretation" and without rulemaking. That is why key provisions of the ill-fated ergonomics standard, for example, repeatedly used the ambiguous words "reasonable" or "reasonably" to describe the employer's duty.

The decision also encourages OSHA to evade congressionally-imposed requirements for OSHA standards, such as proving "feasibility" and "significant risk." It encourages OSHA to evade congressional oversight, to evade oversight by the Office of Management

and Budget under the Paperwork Reduction Act, and to evade the requirements of the Small Business Regulatory Enforcement Fairness Act. This is precisely what happened in American Cyanamid, for example. There, OSHA was able to impose a major policy decision without rulemaking and without scrutiny by the Office of Management and Budget under the Paperwork Reduction Act.

The CF&I Steel decision has also caused OSHA to develop at least two non-rulemaking avenues for making new rules – interpretation letters and compliance directives. Especially since the CF&I Steel decision, the interpretation-letter culture has flourished in the OSHA field. The issuance of such letters is often featured in occupational safety and health journals and newletters. OSHA's abortive "home office" policy was announced in an interpretation letter. OSHA's lawyers cite such letters against employers when they favor their litigating position. Similarly, OSHA has taken to announcing major policies in compliance directives, such as its policy on multi-employer worksites. As the home-office debacle shows, this secret law-making process encourages loose thinking and irresponsible decisions. Instead of OSHA regulating through rulemaking, where public comment must be considered and other protections (such as those in the Regulatory Flexibility Act) must be provided, OSHA issues interpretations based merely on internal discussions. The result is rules made without rulemaking.

Effects on Enforcement and Small Employers

But worst of all is the disrespect that these decisions breed for the Commission and even the courts. I will give you an example of how this attitude deprives employers of their legal rights. For over a quarter century, the Commission has held that a violation cannot be found unless OSHA shows that the employer knew or should have known of the violative condition. The courts have accepted this holding. One would think that OSHA would, therefore, educate its employees and compliance officials on this principle and that it would be reflected in OSHA's Field Information Reference Manual.

But neither is the case. I have had settlement conferences with both long-time and new area directors who give me blank stares when I mention the knowledge principle. Their unawareness means that the company will have to contest the citation and then spend time and money fighting charges that should never have been made. Small- and medium-size employers can't afford to do that, and even large employers often find the prospect too expensive, and so they must accept unjustified citations. The result is occasional justice for large employers and no justice for small ones. I have had to tell small employers and medium-size employers who were innocent of any violation, "Yes, you are right, OSHA is wrong, but you can't afford to prove it."

The decision also encourages in OSHA a palpable arrogance. A safety expert I once knew complained to me shortly after the CF&I Steel decision came out that OSHA had suddenly become arrogant in its behavior. As a great legal scholar once said, "There is nothing so calculated to make officials and other men disdainful of the rights of their fellow men, as the absence of accountability."

It Wasn't Supposed to Be This Way: The Promise Made to the Senate

The great irony is that it was not supposed to be this way. This we know for certain. The legislative history of the compromise that permitted the passage of the OSH Act indisputably proves this.

In 1970, the Act almost did not pass. Many feared that, if all functions under the Act were placed in the U.S. Labor Department, that agency would become too powerful and the

confidence of employers in the fairness of the Act would be shattered. Proponents of giving all powers to the Labor Department argued that a departmental appeals board (i.e., a board established by Cabinet agencies to adjudicate cases brought by an enforcement bureau) would afford sufficient oversight and independence. Such boards decided cases de novo and their views were given deference by the courts. But distrust of internal appeals boards was widespread, and a veto was threatened by the President. To permit the passage of the Act, a compromise was agreed upon: An independent Review Commission would be established as a check on prosecutorial excess.

The legislative history directly addresses whether the Review Commission would defer to OSHA. The author of the compromise, Senator Jacob Javits, whom even the Labor Department's own historian has stated "played a major role in the passage of the Act," specifically assured the Senate that the Commission would decide cases "without regard to" OSHA. He stated that adjudication would be conducted by "an autonomous, independent commission which, without regard to the Secretary, can find for or against him on the basis of individual complaints." On the strength of that assurance, Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required …." On the heels of that remark, the Senate passed the OSH Act. These remarks appear to be the only legislative history that directly addresses the deference issue. They indisputably show that the U.S. Senate and the Congress intended that the Commission not defer to OSHA.

Deference to OSHA is, of course, contrary to congressional intent, for the Commission cannot both decide cases "without regard to" OSHA and also defer to its views. Moreover, deference makes the Commission even more subservient than the department appeals boards that Congress in 1970 specifically rejected as insufficiently independent. So why did the CF&I Steel decision come out the other way? Unfortunately, the employer's brief in that case did not bring Senator Javits's floor statement to the Supreme Court's attention. The employer's brief did not quote or cite the remark and, apparently as a result, the Court did not discuss it. The employer, CF&I Steel, was then in bankruptcy, used a sole practitioner with almost no OSHA experience, and apparently could not afford the cost of thorough legal research. The remark was briefly mentioned in only an amicus curiae brief and apparently overlooked. Thus, one cannot blame the Supreme Court for this misstep. The Senate should, however, cure it.

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We urge the Senate to redeem the promise made to its members by Senator Javits by restoring the Review Commission's proper place under the OSH Act.

The Vacancy Problem

Another bill before the Committee would expand the Review Commission from three to five members. This is a much-needed reform, and we most respectfully urge that it be passed.

For over two thirds of its existence, the Commission has been so paralyzed by frequent vacancies that it has been unable to do its job. At the moment, the Commission has only two members, which nearly always results in paralysis. Unfortunately, that is common. For about half its existence, the Commission has had two or fewer members and, for over a third of that time, it has had only two members. For twenty percent of that time, it lacked even a quorum of two. Between 1996 and 1999, it had a full complement for only a third of the time. So cases sit, often for many years, and the backlog mounts as new

cases come in. One large and important case has been pending before the Commissioners for eleven years.

This endemic problem has greatly damaged public respect for the Commission and prevented it from doing what Congress expected – decide cases expeditiously and keep a watch on OSHA's excesses. This would be far less likely to happen if the OSHRC had five members. As I mentioned above, I have served at both the OSHRC and its counterpart under the Mine Safety Act, the Federal Mine Safety and Health Review Commission (FMSHRC), which has five members. The difference between the two agencies is like night and day. A major reason for this is that the FMSHRC has five members while the OSHRC has only three. Because it has five members, the FMSHRC has enjoyed a much more stable membership than the OSHRC. The FMSHRC can usually be assured of having at least a quorum of three to decide cases. The OSHRC cannot.

We respectfully urge the Congress to expand the Commission to five members.

Attorneys' Fees – Leveling the Playing Field Just A Bit

The bill on attorneys' fees is a modest step in the right direction. It would award attorneys' fees and expenses to the very smallest employers if they win. It applies to employers with not more than 100 employees and a net worth of not more than $7 million and applies only to OSHA.

The Equal Access to Justice Act (EAJA) has not succeeded in protecting small employers from erroneous OSHA prosecutions. The principle reason is that, under the EAJA, even if an employer wins, OSHA does not have to pay the employer's attorneys' fees unless OSHA's position was not "substantially justified." That is far too easy a target for OSHA to hit. OSHA's specialized lawyers can almost always come up with a plausible justification for the prosecution, and that is in practice all that they need to show. And it is difficult and expensive to prove that OSHA's position was not "substantially justified" even if it was. Even if a small employer proves that he or she is innocent and OSHA should not have brought the case, that employer must still start another proceeding, incurring even more expenses, to prove that OSHA's position was not "substantially justified." This is a formidable deterrent to seeking fees, particularly since OSHA can meet this test relatively easily.

The bill will help solve this problem, and somewhat re-open the door to the courthouse for small employers. To be sure, the bill's effect will be modest, as it covers only the smallest of the small employers covered under the EAJA, which applies to employers of 500 employees and not more than $7 million. Few small employers will want to gamble on winning in court. Few will beat OSHA's specialized attorneys. Nearly all will continue to settle at the informal conference stage, to which this provision does not apply. Nevertheless, the prospect of having to pay attorney's fees and expenses should encourage OSHA and its lawyers to be sure of their legal ground before prosecuting a small employer. It will force them to focus on employers that truly deserve their attention. That will assuredly be a good thing.

Now some will argue that this provision will "chill" legitimate enforcement by OSHA, because the expenses will be paid from OSHA's budget. However, the Congressional Budget Office estimated the cost of a previous version of this legislation to OSHA at about only three million dollars per year. This seems to be a small price to pay to make OSHA think twice about the strength of its case before going after the small employer

and to inject a little justice into a system that grinds up small employers in litigation costs and effectively denies them the opportunity to vindicate themselves.

Giving Small Employers A Needed Break from Default Judgments

Right now, the case law under the OSH Act deprives employers – and especially small employers – of the same right to seek relief from a default judgment possessed by nearly every other litigant in the Nation. If a small employer fails to file an answer to a complaint on time in almost any other court, that court has the power to relieve the small employer of the default, and give him a day in court. But that is not true under the OSH Act. According to a recent decision by the U.S. Court of Appeals for the Second Circuit, which I will soon describe, an employer flatly loses its opportunity to defend itself before the Occupational Safety and Health Review Commission, and will be deemed guilty, if it misses a rigid fifteen working-day deadline to file a notice contesting an OSHA citation, even if the employer had a good excuse for missing that deadline. The employer is out of luck and the government wins without even proving its case.

Although OSHA recently announced that it would no longer urge this interpretation, administrations change and there is no guarantee that a future OSHA will adhere to this course. Accordingly, a bill to cure this problem permanently is needed.

The Facts of the Le Frois Case – An Undisputed Case of Excusable Neglect

Take the case of Russell P. Le Frois Builder, Inc. OSHA issued citations and $11,265 in proposed penalties to that company by certified mail. A secretary for the company got the envelope from the post office, and put it with the day's other mail on the front seat of her car. The envelope with the OSHA citation apparently slipped behind the seat, where it was found after the fifteen-working-day contest deadline expired. The company had used the same mail pickup system for 18 years and had not previously had a problem with it. Le Frois promptly filed a notice of contest, and asked the independent Occupational Safety and Health Review Commission for "a chance to tell our side and to defend ourselves." The Commission excused the lateness of the notice of contest, finding this to be a case of excusable neglect.

OSHA agreed that the Le Frois case involved excusable neglect. But OSHA appealed anyway to the U.S. Court of Appeals for the Second Circuit – and won, with one judge dissenting. Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219 (2d Cir. 2002). OSHA convinced the court that the Review Commission lacked the power to relieve an employer from a default on the ground of excusable neglect.

The Upshot – Excusable Neglect is Irrelevant

The Review Commission thus stands nearly alone among the courts of the Nation in lacking the power to relieve an employer of a procedural default caused by neglect that is excusable. If this result makes no sense, that is because sense has nothing to do with it. OSHA's litigation position and the decision of the Second Circuit turn instead on a hyper-technical reading of the OSH Act and judicial deference to OSHA. The decision holds that Section 12(g) – in which Congress ordered the Commission to apply court rules, including a rule permitting relief from default judgments – was overridden by Section 10(c) of the OSH Act, which makes uncontested citations final and not subject to review.

I will spare the Subcommittee my technical analysis of the matter. Suffice it to say that the bill would do away with this unequal result and put employers on the same footing as nearly every other litigant in the Nation: They will have the right to ask for relief from a

default judgment and, after explaining, have a reasonable opportunity to obtain that relief. This bill would permit the Commission to grant relief in rather narrow circumstances – when the default is due to "mistake, inadvertence, surprise, or excusable neglect." That language is taken directly from Federal Rule of Civil Procedure 60(b), which has long been interpreted by the Commission and the courts to permit relief if there is a legitimate reason.

For that reason, the change brought about by this bill will be modest. Under the bill, comparatively few employers will qualify for relief from default. The effect on OSHA's enforcement program will be small. But small employers will notice it. They will know that under the OSH Act they can at least have a shot at justice. Why is a shot at justice important? Because the consequences of being unable to appeal an OSHA citation can be severe and far-reaching. They include:

• Payment of proposed penalties. Penalties can range up to $7000 for "serious" and non-serious violations, from $0 to $70,000 for each "repeated" violation, and $5000 to $70,000 for each "willful" violation.

• Inclusion of the citation on the employer's "history of previous violations," which raises subsequent penalties, and which is available to the public to see on the Web.

• Exposure to subsequent "repeated" or "willful" violations, even if the subsequent violation occurred at a different workplace or years later.

• Disqualification in some jurisdictions from bidding on public construction contracts. E.g., CAL. GOV'T CODE § 14661(d)(2)(B)(vi)(II).

• Use of the citation against the employer in civil litigation.

• A requirement to abate the cited condition. This might require that a factory be rebuilt or a construction method be abandoned. It might require that a machine be modified to meet specifications in an inapplicable standard. See, e.g., Losli, Inc., 1 BNA OSHC 1734 (OSHRC 1974), where a failure to contest a citation meant that a metal shear had to be modified to meet inapplicable specifications for power presses – a nonsensical result.

Moreover, there is more than one way that small employers can innocently fail to timely contest a citation, aside from losing a mail envelope. For example, a notice of contest sent to the wrong agency – to the Review Commission rather than OSHA – is ineffective. Legislation to permanently fix this problem should be introduced.

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Thank you for permitting me to participate in this afternoon's panel. I look forward to answering any questions that you may have.