105TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 105–731

SELF-AUDIT PROMOTION ACT OF 1998

SEPTEMBER 18, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 2869]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 2869) to amend the Occupational Safety and Health Act of 1970 to exempt safety and health assessments, audits, and reviews conducted by or for an employer from enforcement action under such Act, 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 out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Self-Audit Promotion Act of 1998".

SEC. 2. EMPLOYER SAFETY AND HEALTH ASSESSMENTS, AUDITS, AND REVIEWS.

Section 8(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657(b)) is amended by adding "(1)" before "In making" and by adding at the end the following: "Records, reports, or other information obtained or prepared in connection with safety and health assessments, audits, or reviews conducted by or for the employer shall not be required to be disclosed in any inspection, investigation, or enforcement proceeding pursuant to this Act, except as provided in paragraph (2). Such records, reports, or other information may be disclosed in the course of an inspection, investigation, or enforcement proceeding to the extent that the owner or operator of the facility expressly authorizes the disclosure.

"(2) Such records, reports, or other information may be required to be disclosed to the extent that—

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"(A) the record, report, or information is sought as part of a criminal proceeding; or

"(B) the record, report, or information is sought for purposes of establishing the cause of, or an employer's actual knowledge of, a particular alleged violation, but only if—

"(i) the Secretary establishes, on evidence independent of such records, reports, or information, that a condition or practice of the employer is not in compliance with the requirements of this Act; and

"(ii) the employer has not undertaken good faith efforts to address items identified in the assessment, audit, or review, or initiated a process to abate hazards or potential hazards identified in the assessment, audit, or review.

"(3) For purposes of this subsection, the term 'health and safety assessments, audits, or reviews' means an evaluation of 1 or more processes, operations, or facilities or of management systems related to such processes, operations, or facilities that is designed to identify and prevent noncompliance with this Act and hazards or potential hazards to employees. The records, reports, and information subject to paragraph (1) do not include medical records or records of employee exposure to potentially toxic materials or harmful physical agents, or records of work-related deaths, injuries, and illnesses required to be maintained under this section.".

PURPOSE

The purpose of H.R. 2869 is to amend the Occupational Safety and Health Act (OSH Act) to establish criteria for access by the Secretary of Labor to certain employer records of audits and assessments relating to safety and health.

LEGISLATIVE ACTION

The Subcommittee on Workforce Protections held a series of three hearings in 1997 on the subject of the Occupational Safety and Health Administration's (OSHA's) reinvention plans. Those hearings were the basis of several bills introduced by Representative Cass Ballenger on November 7, 1997, including H.R. 2869.

The first hearing was held on June 24, 1997, to learn the views and perspective of OSHA in its effort to "reinvent" the agency. The Acting Assistant Secretary for OSHA, Greg Watchman, testified at the hearing.

The second hearing was held on July 23, 1997, to examine OSHA's reinvention project, hearing testimony from a variety of individuals who have either studied or had recent experiences with OSHA. The witnesses included Mr. Ronald D. Schaible, Director, Global Safety, AMP Incorporated, Harrisburg, Pennsylvania, testifying on behalf of the National Association of Manufacturers; Ms. M. Kathleen Winters, Corporate Manager, Environmental Health and Safety, Mack Printing Company, Easton, Pennsylvania, testifying on behalf of Printing Industries of America, Inc.; Dr. Gary Rainwater, President, American Dental Association, Dallas, Texas; Mr. James J. Gonzalez, Attorney-at-Law, Holland & Hart LLP, Denver, Colorado; Mr. Richard S. Baldwin, Safety and Health Director, BE & K Engineering and Construction Company, Birmingham, Alabama, testifying on behalf of Associated Builders and Contractors; Professor John Mendeloff, Graduate School of Public and International Affairs, University of Pittsburgh, Pittsburgh, Pennsylvania; Ms. Lee Anne Elliott, Executive Director, Voluntary Protection Programs, Participants' Association, Falls Church, Virginia; and Mr. Michael J. Wright, Director, Health, Safety and Environment, United Steelworkers of America, Pittsburgh, Pennsylvania.

The third hearing was held on September 11, 1997, to hear from individuals with a first-hand knowledge of OSHA's reinvention program and on changes that should occur as OSHA moves into the 21st century. The following witnesses testified: Mr. Gerald V. Anderson, President, Anderson Construction Company, Inc., Fort Gaines, Georgia, testifying on behalf of the Associated General Contractors of America; Mr. James L. Abrams, Attorney-at-Law, Denver, Colorado; Mr. Frank A. White, Vice President, Organization Resources Counselors, Inc., Washington, DC; Mr. Michael C. Nichols, Vice President, Management Development/Human Resources, SYSCO Corporation, Houston, Texas; Mr. Norbert Plassmeyer, Vice President and Director of Environmental Affairs, Associated Industries of Missouri, Jefferson City, Missouri; and Nicholas A. Ashford, Ph.D, J.D., Professor of Technology and Policy, Massachusetts Institute of Technology, Cambridge Massachusetts.

The Subcommittee on Workforce Protections held two legislative hearings in 1998 on several bills amending the OSH Act, including H.R. 2869.

The first hearing on legislative proposals to amend the OSH Act was held on March 27, 1998. The following witnesses testified: Ms. Claudia Brumm, Director, Risk Management, Borg Warner Automotive, Inc., Chicago, Illinois, testifying on behalf of the Labor Policy Association; Mr. Linwood O. Smith, Vice President, Risk and Safety Management, T.A. Loving Company, Goldsboro, North Carolina, testifying on behalf of the Associated General Contractors of America; Mr. James "Mike" McMichael, The McMichael Company, Central, South Carolina, testifying on behalf of the National Association of Home Builders; Mr. Ronald W. Taylor, Attorney-at-Law, Venable, Baetjer & Howard, Baltimore, Maryland, testifying on behalf of the United States Chamber of Commerce; Mr. Jerry Hartman, President, Reese Press, Inc., Baltimore, Maryland, testifying on behalf of the Printing Industries of America, Inc.; and Ms. Margaret M. Seminario, Director, Occupational Safety and Health Department, American Federation of Labor-Congress of Industrial Organizations (AFL–CIO), Washington, DC.

The second hearing on legislative proposals to amend the OSH Act was held on April 29, 1998. The following witnesses testified at the hearing: Mr. Charles N. Jeffress, Assistant Secretary for Occupational Safety and Health, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC; Mr. George R. Salem, Attorney-at-Law/Partner, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC, testifying on behalf of the National Association of Manufacturers; Mr. Richard E. Schwartz, Attorney-at-Law/Partner, Crowell & Moring LLP, Washington, DC, testifying on behalf of the American Iron & Steel Institute; Mr. John W. Bishop, President, Gurnee Heating & Air Conditioning Corporation, Closter, New Jersey, testifying on behalf of Associated Builders and Contractors; Mr. David G. Sarvadi, Attorney-at-Law, Keller and Heckman, Washington, DC; and Mr. Thomas J. Meighen, Safety & Risk Manager and Vice President, Stromberg Sheet Metal Works, Inc., Beltsville, Maryland, testifying on behalf of the Mechanical Electrical Sheet Metal Alliance.

The Subcommittee on Workforce Protections approved H.R. 2869 by voice vote on May 14, 1998, and ordered the bill favorably reported to the Full Committee. The Committee on Education and the Workforce approved H.R. 2869, as amended, by voice vote on June 10, 1998, and ordered the bill favorably reported to the House.

COMMITTEE VIEWS

NEED FOR LEGISLATION

This quote, in a nutshell, describes the need for H.R. 2869: [1]

> A fundamental principle of the "New OSHA" is that its enforcement resources should be aimed at those employers that have demonstrated a lack of commitment to providing a safe and healthful workplace to their workers. A common objective of virtually all of OSHA's reinvention initiatives is to provide incentives to employers to develop and improve their safety and health programs, a basic element of which is the performance of hazard assessments and system reviews that collectively may be referred to as "safety and health audits." Yet remarkably and inexplicably, OSHA's policies and practices with respect to safety and health audits have the net effect of discouraging rather than encouraging effective auditing programs by employers, especially those that may for the first time be considering adopting such programs.

The importance of safety and health audits to the safety and health of workers is widely recognized. Effective audits and assessments for safety and health, like audits and assessments conducted for other purposes, are not only critical for trying to maintain compliance with complex laws and regulations, but are also helpful for identifying potential problems and conditions that could increase the likelihood of future accidents and violations. [2]

OSHA, too, has recognized the importance of safety and health audits. In 1989, OSHA issued voluntary guidelines for safety and health program management.[3] The guidelines "advised and encouraged" all employers to institute programs for safety and health in their workplaces which include "worksite analysis * * * to identify not only existing hazards but also conditions and operations in which changes might occur to create hazards." [4] OSHA continues to use the 1989 guidelines as the model for effective safety and health management.

In 1991, then-Secretary of Labor Lynn Martin wrote to over 500 chief executive officers of large companies to encourage them to "take a hard look at the health and safety of your company" by regularly conducting and reviewing safety and health audits of com-

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[1] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, Hearing to Examine the Occupational Safety and Health Administration's Reinvention Project, 105th Cong., 1st sess., ser. no. 105-25. Testimony of Mr. Frank A. White, Vice President, Organization Resources Counselors, Inc., Washington, DC, September 11, 1997.

[2] See, e.g,. Ernest Jorgenson, "Safety and Health Auditing," Professional Development, April 1998, pp. 29-31.

[3] 54 F.R. 3904-3916.

[4] Ibid, at 3909.

pany facilities.[5] Secretary Martin's letter urged that safety and health audits be considered a critical part of corporate management: "As you do with financial audits, report the results of safety and health audits to your Board of Directors. Being mindful of worker safety and health is as much a part of management's commitment to upholding corporate responsibility as striving to maintain shareholder value."

While the Department of Labor's policy statements, such as the 1989 voluntary guidelines and the Secretary of Labor's 1991 letter to corporate executives, have urged companies to conduct safety and health audits, OSHA's enforcement policies and practices are having the opposite effect. In the absence of either legal limitations or self-imposed restrictions, OSHA may, and does, demand full access to company records, including records and documents related to a company's own safety and health audits and assessments, in the course of an inspection or investigation. OSHA may use the employer's own records to identify potential violations or as evidence of violations, or as evidence it can use against an employer to prove that a violation is "willful."[6] As a result, the more thorough the employer's audits and assessments are, the more potential risk of legal liability that employer assumes.[7]

There currently exist few legal limitations on OSHA's access to an employer's records relating to safety and health, including records of safety and health audits.[8] An employer may insist that OSHA obtain an administrative subpoena to review the employer's records.[9] The test for such a subpoena, however, is not very demanding:[10]

> The requirements for enforcement of an administrative subpoena are not onerous. In order to obtain judicial backing the agency must prove that (1) the subpoena is issued for a congressionally authorized purpose, the information sought is (2) relevant to the authorized purpose, (3) adequately described, and (4) proper procedures have been

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[5] A copy of the Secretary's letter is attached to the written statement of Gerard Scannell, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, who testified before a hearing of the House Committee on Education and Labor on November 21, 1991 (102nd Cong., 1st sess.).

[6] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, Review of the Occupational Safety And Health Act, 105th Cong., 2nd sess. (April 29, 1998). Testimony of Testimony of Mr. George R. Salem, Attorney-at-Law/Partner, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC.

[7] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, Review of the Occupational Safety And Health Act, 105th Cong., 2nd sess. (March 27, 1998). Testimony of Ms. Claudia Brumm, Director, Risk Management, Borg Warner Automotive, Inc., Chicago, Illinois. See also, "The Dangers of 'Speculative' Safety Audits," Occupational Hazards, November 1997, pp. 14-15.

[8] In recent years OSHA has demanded access not only to an employer's own safety and health audit records, *Secretary of Labor* v. *Hammermill Paper Division,* 15 OSHC 1849 (S.D. Ala, 1992) and *Reich* v. *Hercules, Inc.,* 857 F.Supp. 367 (D.NJ, 1994), but also to such other records as operation log books and records of employee disciplinary records, *Reich* v. *Montana Sulphur & Chemical Co.,* 32 F. 3d 440 (9th Cir, 1994) and records of production quotas, incentive plans and payments, and employee task completion times. *Reich* v. *Sturm, Ruger & Co.,* 903 F.Supp. 239 (D.NJ 1995).

[9] Most courts have held that the Fourth Amendment protection against unreasonable search and seizure requires OSHA to obtain a warrant or subpoena to conduct a nonconsensual review of an employer's records regardless of whether the records involved are required to be maintained by OSHA regulations. See *McLaughlin* v. *Kings Island,* 849 F. 2d 990 (6th Cir. 1988) and *Brock* v. *Emerson Electric,* 834 F.2d 994 (11th Cir. 1987). The Fourth Circuit has permitted inspection of required injury and illness records without a subpoena or search warrant, in *McLaughlin* v. *A.B. Chance Company,* 842 F. 2d 724 (4th Cir. 1988).

[10] *United States* v. *Sturm, Ruger & Company, Inc.,* 84 F.3d 1, 4 (1st Cir. 1996).

> employed in issuing the subpoena. See, *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 368–69 (1950); *Oklahoma Press,* 3227 U.S. 186, at 208, 66 S.Ct. 494, at 505; *United States* v. *Comley,* 890 F.2d 539, 541 (1st Cir. 1989). As long as the agency satisfies these modest requirements, the subpoena is per se reasonable and Fourth Amendment concerns are deemed satisfied. *Oklahoma Press,* 327 U.S. at 208, 66 S.Ct. at 505.

The case of *Secretary of Labor* v. *Hammermill Paper Division* dealt directly with the issue of OSHA's access to an employer's self audit records. In the course of an inspection, OSHA had demanded all of the company's safety compliance audits for the years 1989, 1990, and 1991. The U.S. District Court questioned the wisdom of OSHA's demand, but nonetheless found that the demand for the safety audit records was within OSHA's legal authority: [11]

> The secretary insists she is authorized, in her discretion, to require production of these records by subpoena. Notwithstanding the court's opinion that the Secretary of Labor should not undertake this action, this court does not have authority to control the exercise of discretion by the Secretary of Labor. The court is of the opinion, and finds that the Secretary of Labor has statutory authority to compel the present disclosure.

In the absence of legal limitations on OSHA's access to employer records of self audits and assessments, OSHA and the Department of Labor could nonetheless adopt internal policies to limit access to self audit records, given the importance of safety and health auditing to employee health and safety. Other government agencies, including the Environmental Protection Agency, have recognized the chilling effect that unfettered access to self audit records by a government enforcement agency has on the conduct of self audits.[12]

OSHA and the Department of Labor, however, have refused to adopt a policy to voluntarily limit its access to company records of safety and health audits and assessments.[13] This determination on the part of OSHA and the Department of Labor to use an employer's safety and health audits in enforcement proceedings is, in turn, discouraging the effective use of such audits, which thereby diminishes workers' safety and health. Testimony to this effect was presented during hearings before the Subcommittee on Workforce Protections:[14]

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[11] 15 OSHC at 1850.

[12] "Routine agency requests for voluntary audit reports could inhibit auditing in the long run, decreasing both the quality and quantity of audits conducted." (Environmental Protection Agency's 1986 Environmental Auditing Policy Statement, 51 F.R. 25,007). In addition, at least 20 states have enacted laws limiting government access to environmental audits.

[13] Employers have also sought protection for safety and health audits under various common law privileges. See testimony of Ms. Claudia Brumm, Director, Risk Management, Borg Warner Automotive, Inc., Chicago, Illinois, before the Subcommittee on Workforce Protections, March 27, 1998. Such efforts have not generally been successful in protecting audits from disclosure to OSHA, see *Reich* v. *Hercules, Inc.,* 857 F.Supp. at 244, and to the extent the employer attempts to "fit" the criteria of common law privileges the usefulness and effectiveness of the audit process is undermined. See, testimony of Ms. Claudia Brumm during hearing of March 27, 1998.

[14] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, Review of the Occupational Safety And Health Act, 105th Cong., 2nd sess. (April 29, 1998). Testimony of Mr. George R. Salem, Attorney-at-Law/Partner, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC.

Completeness and candor are essential to the success of any safety and health auditing program. The program must encourage critical self-analysis and open, internal disclosure of deficiencies in order to assure full evaluation, prioritization and timely corrective action. Even for companies with sophisticated safety and health auditing programs, OSHA's position on the treatment of such audits for enforcement purposes has, in many cases, directly resulted in or contributed to the implementation of practices and procedures that detract from the candor, timeliness and ultimately, the use of the audits. These include precautions for assuring that the language in audit reports is sanitized (i.e., identifying a condition or practice for follow-up action without describing it as a violation), and often cumbersome and costly arrangements with outside legal counsel to protect the audit information from disclosure through reliance on the attorney-client privilege.

It must be recognized that in seeking to achieve important corporate goals and objectives—particularly those involving regulatory obligations such as improved employee safety and health—companies will at the same time institute business practices designed to control or minimize perceived risks of legal liability. Thus, OSHA's position has operated to encumber the auditing process and dilute its effectiveness, even in the many companies that are committed to maximizing worker safety and health and that understand the benefits of safety and health audits.

For companies that do not have well-developed safety and health programs and may be for the first time considering implementation of an auditing program, OSHA's position serves as an even more powerful disincentive. On the one hand, OSHA claims to be giving the highest priority to the development of incentives for companies to implement effective safety and health programs. On the other, the agency is turning its back on removing perhaps the single biggest inhibitor to the development of the critical auditing component of such programs: the threat of using audits in enforcement proceedings.

EXPLANATION OF LEGISLATION

H.R. 2869 provides partial protection against nonconsensual disclosure of records and documents related to safety and health assessments, audits, and reviews. H.R. 2869 applies only to disclosure of such records and documents to OSHA in the context of an OSHA inspection, investigation, or enforcement proceeding. It does not affect disclosure to any party other than OSHA, for example, in civil litigation not involving OSHA enforcement.

H.R. 2869 provides two exceptions to the protection for nonconsensual disclosure of records and documents related to an employer's safety and health assessments, audits, and reviews.

First, the protection against nonconsensual disclosure does not apply when the record or report is sought as part of a criminal proceeding.[15]

Second, the protection against nonconsensual disclosure does not apply if the record, report, or document is sought for the purpose of establishing the cause of, or the employer's actual knowledge of, a particular violation. However, the bill sets two preconditions on OSHA's access to the documents for these purposes: (1) OSHA has independently established evidence that a condition or practice of the employer is not in compliance with OSHA's standards or the OSH Act, and (2) the employer has not undertaken good faith efforts to address items in the audit or has not initiated a process to abate hazards identified in the audit.[16]

H.R. 2869 provides this limited protection to "records, reports, or other information obtained or prepared in connection with safety and health assessments, audits, or reviews conducted by or for the employer." "Safety and health assessments, audits, or reviews" includes any evaluation of a company's processes, operations, or facilities, or the management systems related to those processes, operations, or facilities, that is conducted for the purpose of identifying and preventing noncompliance with the OSH Act and hazards or potential hazards to employees. The bill specifically exempts from its coverage employee exposure and medical records and records of injuries and illness required to be maintained by the employer under section 8(c) of the OSH Act.

As noted above, OSHA has demanded access to an employer's own audit records for three purposes: in a "fishing expedition" to try to identify potential or actual violations of OSHA standards; to investigate potential causes of accidents; and as a basis for establishing employer knowledge in order to classify a violation as "willful."

H.R. 2869 is intended to prohibit in all cases the nonconsensual use of an employer's own audits and assessments for OSHA to use in a "fishing expedition" to try to find potential or actual violations of OSHA requirements. The bill requires that as a precondition to nonconsensual disclosure that OSHA has already established that the alleged violation for which the record is sought exists. The Assistant Secretary for Occupational Safety and Health has agreed that OSHA should not use an employer's audit records for a "fishing expedition" for violations, or as a road map to identify potential or actual citations.[17]

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[15] Criminal penalties are authorized under the OSH Act in two circumstances: (1) in the case of a willful violation of an OSHA standard which caused death to an employee (29 U.S.C. Section 666(e)) and (2) for knowingly making a false statement, representation, or certification in an application, record, report, plan or other document required by OSHA (29 U.S.C. Section 666(g). As noted above, H.R. 2869 does not apply to any non-OSHA proceeding, including a criminal investigation involving charges under another statute.

[16] These preconditions would have to be met before an administrative subpoena for production of the records could be enforced. In order to gain enforcement of the subpoena for records of audits and assessments covered by H.R. 2869, OSHA must show by independent evidence that a condition or practice of the employer does not comply with OSHA standards or the OSH Act. Assuming such evidence, the employer who is resisting the subpoena may then show that he or she has undertaken good faith efforts to address items in the audit or initiated a process to abate the hazards identified in the audit or assessment. Rule 45 of the Federal Rules of Civil Procedure allows for in camera review by the court when a subpoena is resisted on grounds that the information sought is protected from disclosure.

[17] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, Review of the Occupational Safety And Health Act, 105th Cong., 2nd sess.

H.R. 2869 does permit OSHA access to nonconsensual review of an employer's records related to audits and assessments for other purposes, to identify the causes of an alleged violation or an employer's actual knowledge of a violation, but only if the employer has not undertaken good faith efforts to address items identified in the employer's audit or assessment, or initiated a process to abate any hazards or potential hazards that have been identified in the audit or assessment process.

In testimony before the Subcommittee on Workforce Protections, the Assistant Secretary for Occupational Safety and Health expressed opposition to H.R. 2869, and stated three reasons for the Department of Labor's opposition to the legislation.[18] According to the Assistant Secretary, the bill (1) would harm employers by preventing OSHA from reducing penalties on the basis of the employer's "good faith," (2) "would protect only bad actors—employers who have identified hazards, have failed to make good faith efforts to correct them, and wish to hide the evidence," and (3) would prevent OSHA access to critical information in investigating the causes of accidents.[19]

As noted above, H.R. 2869 addresses only nonconsensual disclosure of records and information to OSHA. It does not prohibit an employer from voluntarily disclosing the contents of any such records, including doing so for the purposes of establishing "good faith" in order to receive a reduction in penalties otherwise being proposed by OSHA. The Assistant Secretary's concern that H.R. 2869 would harm or disadvantage "good faith" employers is not well founded.

Similarly, the Assistant Secretary's claim that H.R. 2869's limited disclosure of an employer's audit records "would only protect bad actors" is rhetoric that reflects an unwillingness to consider the conflict that exists between safety and health policy, which encourages full and frank assessment of hazards and potential hazards, and the Department of Labor's desire to have as much enforcement "ammunition" as possible against an employer. So-called "bad actors"—employers who would use audits and assessments in order "hide the evidence"—are not likely to conduct such audits in the first place. Furthermore, those employers would not be protected by H.R. 2869 if they do not demonstrate "good faith" in addressing items identified in their audits and assessments.[20]

Finally, the Assistant Secretary's argument that any protection afforded to an employer's own safety and health audits and assessments would severely impede OSHA's ability to carry out enforcement is simply not convincing. As George Salem, a former Solicitor of Labor, told the Subcommittee on Workforce Protections:[21]

(April 29, 1998). Testimony of Assistant Secretary Charles N. Jeffress, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC.

[18] Ibid.

[19] Ibid.

[20] In fact, unlike OSHA's current policy on employer safety and health audits, which does not distinguish between employers who conduct audits and "do nothing" with them and employers who use them to systematically identify and correct ("close") problems and potential problems, H.R. 2869 establishes a policy of distinguishing between the two, based upon whether the employer has a process in place to close items identified in the audits.

[21] U.S., Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Review of the Occupational Safety And Health Act,* 105th Cong., 2nd sess.

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> It is easier to prove a case when you have access to these audits, and as a former solicitor I can understand that. It is easier also to prove a case if you don't have a privilege against self-incrimination; if you don't have due process; if you don't have any of the constitutional guarantees that this country provides.
>
> We have got to balance the public policy objective of encouraging voluntary promotion of safety and health; encourage employers to go above-and-beyond the requirements of the law, against the ability to prove a case. We've proved lots of cases. I've been involved both in the government and out in dozens of egregious cases including creation of the egregious policy, for heaven's sake. And in those cases [even] where there are fatalities you can prove your case. You don't have to have audits to do that * * *

Mr. Salem concluded—[22]

> OSHA's current position [on disclosure of safety and health audits] leads to the decreased use and effectiveness of a critical component of voluntary employer safety and health programs for the sake of access to a possible source of evidence of a violation or of an employer's willful behavior. OSHA's own investigatory process provides sufficient access to information necessary to determine whether violations have occurred and whether violators acted willfully. OSHA's insistence on retaining this mechanism, despite its already capable investigatory authority, leads to the inescapable conclusion that a legislative change is essential to the advancement of workplace health and safety.

SUMMARY

H.R. 2869 provides protection against routine disclosure of an employer's safety and health assessments, audits and reviews to OSHA. In order to obtain such audits and assessments against the employer's consent, OSHA must show that the employer has committed a violation of the OSH Act to which the employer's audit is relevant as to the cause or the employer's knowledge, and that the employer has failed to make "good faith" efforts or initiated a process to correct any hazards identified by the employer's audit. The bill also defines "safety and health assessments, audits or reviews" and provides an exception for employee medical and exposure records and injury and illness records maintained pursuant to OSHA regulations.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The title of the bill is the "Self-Audit Promotion Act of 1998".

(April 29, 1998). Testimony of Mr. George R. Salem, Attorney-at-Law/Partner, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC.

[22] *Ibid.*

Sec. 2. Employer safety and health assessments, audits, and reviews

This section amends section 8(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 657(b)) to provide protection, under certain circumstances, for reports and other information regarding an employer's safety and health assessments, audits and reviews against disclosure to OSHA during inspections, investigations, or enforcement proceedings.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch. This bill amends the Occupational Safety and Health Act (OSH Act) to establish criteria for access by the Secretary of Labor to certain employer records of audits and assessments relating to safety and health. The bill does not prevent legislative branch employees from receiving the benefits of this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

The Occupational Safety and Health Act and the amendments thereto made by this bill are within Congress's authority under Article I, section 8, clause 3 of the Constitution.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill amends the Occupational Safety and Health Act (OSH Act) to establish criteria for access by the Secretary of Labor to certain employer records of audits and assessments relating to safety and health. As such, the bill does not contain any unfunded mandates.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 2(l)(3)(A) of Rule XI 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.

STATEMENT OF OVERSIGHT FINDINGS OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

With respect to the requirement of clause 2(l)(3)(D) of Rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 2869.

COMMITTEE ESTIMATE

Clause 7 of Rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 2869. However, clause 7(d) 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 403 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 2(l)(3)(B) of Rule XI of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 2(l)(3)(C) of Rule XI of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2869 from the Director of the Congressional Budget Act:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 14, 1998.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the Workforce, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2869, the Self-Audit Promotion Act of 1998.

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

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 2869—Self Audit Promotion Act of 1998

H.R. 2869 would enable employers to withhold from the Secretary of Labor records and reports obtained during a occupational safety and health review conducted by or for the employer. Disclosure of such information could be required if it is sought as part of a criminal proceeding. Disclosure could also be required for the purposes of establishing the cause or employer's knowledge of a particular violation, but only if the Secretary established that the employer was not in compliance with the act and if the employer had not undertaken good faith efforts to address items identified by the employer's review.

Under current law, access to an employer's self audit report provides information that facilitates the Occupational Safety and Health Administration's (OSHA) determination of the extent to which a workplace complies with regulations and to which an employer has made efforts to put the workplace in compliance. Enactment of H.R. 2869 would increase the time and effort required to determine the extent of compliance. According to OSHA authori-

ties, the extent to which access to employer self-audit reports aids an investigation cannot be measured. Therefore, the costs that OSHA would incur if it no longer had access to this information cannot be determined.

H.R. 2869 would not affect direct spending or receipts; therefore pay-as-you-go procedures would not apply. The legislation does not contain any intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budget of state, local, or tribal governments.

The federal cost estimate was prepared by Cyndi Dudzinski, the impact of this legislation on state, local, and tribal governments was determined by Marc Nicole, and the impact on the private sector was determined by Kathryn Rarick. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 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 (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 8 OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 8. (a) * * *

(b)*(1)* In making his inspections and investigations under this Act the Secretary may requite the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof. *Records reports, or other information obtained or prepared in connection with safety and health assessments, audits, or reviews conducted by or for the employer shall not be required to be disclosed in any inspection, investigation, or enforcement proceeding pursuant to this Act, except as provided in paragraph (2). Such records, reports, or other information may be disclosed in the course of an inspection, investigation, or enforcement proceeding to the extent that the owner or operator of the facility expressly authorizes the disclosure.*

(2) Such records, reports, or other information may be required to be disclosed to the extent that—

(A) the record, report, or information is sought as part of a criminal proceeding; or

(B) the record, report, or information is sought for purposes of establishing the cause of, or an employer's actual knowledge of, a particular alleged violation, but only if—

(i) the Secretary establishes, on evidence independent of such records, reports, or information, that a condition or practice of the employer is not in compliance with the requirements of this Act; and

(ii) the employer has not undertaken good faith efforts to address items identified in the assessment, audit, or review, or initiated a process to abate hazards or potential hazards identified in the assessment, audit, or review.

(3) For purposes of this subsection, the term "health and safety assessments, audits, or reviews" means an evaluation of 1 or more processes, operations, or facilities or of a management systems related to such processes, operations, or facilities that is designed to identify and prevent noncompliance with this Act and hazards or potential hazards to employees. The records, reports, and information subject to paragraph (1) do not include medical records or records of employee exposure to potentially toxic materials or harmful physical agents, or records of work-related deaths, injuries, and illnesses required to be maintained under this section.

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MINORITY VIEWS

We strongly oppose the H.R. 2869 as reported by Committee. H.R. 2869 shields the disclosure in Occupational Safety and Health Administration (OSHA) inspections, investigations, or enforcement proceedings of any "records, reports, or other information prepared in connection with health and safety assessments, audits, or reviews conducted by or for the employer," unless the record, etc. are required by specific OSHA standards. By protecting employers who wish to hide the fact that they were aware of health and safety violations, and did nothing to correct those violations, this legislation seriously and senselessly jeopardizes the safety and health of workers.

We concur with the proponents of H.R. 2869 that employers should be encouraged to perform safety and health audits. However, while being aware of safety and health violations is, of course, a necessary first step, it is a pointless one unless the employer also acts to correct those safety and health violations. H.R. 2869 not only fails to require, or even encourage, employers to correct safety and health violations, it effectively rewards employers who fail to do so.

H.R. 2869 has two major flaws: (1) the information that is confidentially privileged by the fill is extremely broad; and (2) the confidentiality privilege is extended to situations that seriously jeopardize fact finding and enforcement proceedings. While the bill privileges almost all information collected by the employer related to health and safety, it fails to impose any corresponding responsibility upon the employer to act on the basis of that information.

H.R. 2869 extends a privilege to any "records, reports, or other information obtained or prepared in connection with safety and health assessments, audits, or reviews conducted by or for the employer." There is no definition of what constitutes an assessment, audit, or review. Therefore, any information generated by an employer that is at all related to safety and health would appear to be privileged.

H.R. 2869 also makes it virtually impossible for OSHA to prove a willful or criminal violation since any information the employer developed that would have shown he or she was aware of the hazard is privileged by H.R. 2869. The information remains privileged even where the failure of the employer to act on the information leads directly to the injury or death of a worker.

As reported, H.R. 2869 guarantees OSHA access to audit information in only two circumstances. The two exceptions to the confidentiality privilege, however, are effectively meaningless. The amendment provides for disclosure of audits in criminal proceedings. However, in order to begin a criminal proceeding, OSHA must first show there has been a willful violation of the Occupational Safety and Health Act. However, virtually any information gen-

erated by the employer that would show previous knowledge of the OSHA violation and, therefore, be relevant to determining whether there was a willful violation is, by virtue of H.R. 2869, privileged audit information. The exception that provides OSHA access to audit information in a criminal proceeding is, therefore, meaningless since H.R. 2869 would deny access to the information for purposes of establishing a willful violation.

H.R. 2869 also provides that OSHA may have access to the audit information for purposes of establishing the employer's actual knowledge of a violation. However, the information is only required to be disclosed where the Secretary of Labor independently establishes that a violation exists *and* that the employer has not made a good faith effort to address it. The audit information would typically be crucial toward determining whether or not the employer has made a good faith effort; but, once again, at this step the audit information remains privileged.

H.R. 2869 as reported is worse in significant respects than that bill as originally introduced. As introduced, H.R. 2869 specifically provided that safety and health audits required by specific OSHA standards would not be privileged. As reported, H.R. 2869 denies OSHA access to information employers are required by OSHA standards to develop. For example, both OSHA's chemical process safety standards and its lock-out tag-out standard require employers to perform hazard analyses. H.R. 2869 denies OSHA access to those hazardous analyses and thereby effectively renders the standards unenforceable.

As reported, H.R. 2869 guts cooperative compliance programs. Under these programs, employers must undertake initiatives to identify and correct hazards. The information developed by the employer is necessarily shared with OSHA to ensure compliance. Under this legislation, employers may no longer be required to share that information. As a consequence, OSHA would have no means of determining whether employers participating in cooperative compliance programs are, in fact, complying with the Occupational Safety and Health Act.

Supporters of this bill have repeatedly said that OSHA should have an audit program similar to that of the Environmental Protection Agency (EPA). Under EPA policy, businesses are required to self-report violations identified in their audits and are required to take steps to correct those violations. Under H.R. 2869, employers are permitted to hide the violations they find and OSHA's ability to enforce the law is effectively limited.

H.R. 2869 rewards, rather than sanctions, scofflaws. This bill provides no protection at all to a good employer who performs a safety and health audit and then acts on that information to correct hazards. Under current procedures, OSHA already considers such information to be indicative of good faith and reduces penalties accordingly. Instead, the protection afforded by this bill is to the bad employer who performs an audit, is made aware of a hazard, and then refuses to do anything about it. In effect, the legislation protects willful violations of the Occupational Safety and Health Act and, as a practical matter, makes it virtually impossible for OSHA to prove willful or criminal violations of the law by ex-

tending a confidentiality privilege to virtually any evidence the agency would otherwise use to establish its case.

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