

**Testimony of Lynn Rhinehart
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**Before the
Committee on Education and Labor,
U.S. House of Representatives**

On

H.R. 5663, the Miner Safety and Health Act of 2010

July 13, 2010

Thank you for the opportunity to testify today in support of H.R. 5663, the Miner Safety and Health Act of 2010. On behalf of the AFL-CIO, a federation of 56 national and international unions representing more than 11.5 million working women and men across the United States, I want to convey our strong support for this legislation and to urge that it be enacted into law without delay. We appreciate the Committee holding this hearing, and its steadfast efforts to strengthen the job safety laws and protect worker safety and health.

Stronger safety and health protections for America's workers – its miners and other working men and women -- are urgently needed. Forty years after the passage of the Occupational Safety and Health Act and the Coal Mine Health and Safety Act, the sad fact is that too many workers are still being killed, injured, and diseased on the job. Tragedies like the recent blast at Massey's Upper Big Branch mine, where 29 workers died, the explosions at the Tesoro Refinery in Washington State and the Kleen Energy plant in Connecticut, which claimed 13 more lives, and the recent explosion on the BP/Transocean Deepwater Horizon oil rig in April, which killed 11 workers, are vivid and painful illustrations of the need for stronger measures to protect workers' lives. But these fatalities are just the tip of the iceberg. In 2008, more than 5,200 workers were killed on the job by job hazards – an average of 14 workers each and every day. Millions of workers suffered injuries. The devastation and hardship these fatalities and injuries cause to workers and their families are incalculable. The direct cost of

these injuries to employers in terms of medical and lost wage payments is more than \$52 billion each year. When indirect costs such as lost productivity are added in, the annual costs skyrocket to \$156-312 billion.¹ Clearly, more needs to be done to reduce this toll and bring about greater attention to worker safety and health.

In his testimony, United Mine Workers of America President Cecil Roberts has described why the improvements in H.R. 5663 are needed to bring about stronger safety and health protections for our nation's miners. The AFL-CIO strongly supports these measures and the reforms sought by the Mine Workers. My testimony will focus on the provisions of H.R. 5663 that amend the Occupational Safety and Health Act of 1970 (OSH Act), our nation's primary worker safety law.

There is no question that the OSH Act has made a tremendous difference in bringing greater attention to workplace safety and in preventing countless fatalities, injuries, and illnesses. But since its passage 40 years ago, the law has never been significantly updated or strengthened, and as a result, the law is woefully out of date. The OSH Act's penalties are weak compared to other laws, the government's enforcement tools are limited, and protections for workers who raise job safety concerns are inadequate and far weaker than the anti-retaliation provisions of numerous other laws. The law simply does not provide a sufficient deterrent against employers who would cut corners on safety and put workers in harm's way.

H.R. 5663 would address several major shortcomings in the OSH Act by (1) strengthening both the civil and criminal penalty provisions in the law, (2) improving anti-discrimination protections for workers who raise job safety concerns or otherwise exercise their rights under the OSH Act, (3) requiring employers to fix hazards to ensure that workers are protected while litigation over citations is pending, and (4) giving victims and family members more rights to participate in the enforcement process. These provisions, which are drawn from

¹ AFL-CIO, Death on the Job: The Toll of Neglect (April 2010) (citing data from Liberty Mutual Insurance).

the Protecting America's Workers Act (PAWA), H.R. 2067 – legislation that has been introduced in the last several Congresses and has already been the subject of numerous Congressional hearings – will greatly improve worker protections by updating and strengthening key provisions of the law. PAWA contains other important measures to address shortcomings in the OSH Act and improve worker safety and health, such as extending OSHA coverage to millions of state and local public employees who are not (and have never been) covered by the law, and enhancing worker and union rights in the enforcement process. We continue to support the additional measures contained in PAWA, and we urge their adoption.

I will now address each of the four major OSH Act provisions in H.R. 5663.

1. Stronger Civil and Criminal Penalties for Violations of the Law

The OSH Act gives employers the responsibility to comply with health and safety standards and protect workers from harm. Because OSHA's inspection and enforcement resources are so limited, the system largely relies on employers taking their responsibilities seriously and complying on their own. Unlike the Mine Act, there are no mandatory inspections under the OSH Act, even for the most dangerous industries or workplaces. At current funding levels, federal OSHA only has enough inspectors to inspect each of the nation's 8 million workplaces once every 137 years.

Given how infrequently inspections occur, in order to provide a strong incentive for employers to comply with the law and deter violations, it is essential that there be strong enforcement when workplaces are inspected and violations are found. But that is simply not the case. Current OSHA penalties are too low to deter violations. The average penalty for a serious violation of the law – defined as a violation that poses a substantial probability of death or serious physical harm to workers – was just \$965 in FY 2009. The statute authorizes up to \$7,000 for these violations.

Even in cases of worker fatalities, the median initial total penalty in FY 2009 was a paltry \$6,750, with the median penalty after settlement just \$5,000. Many of these are fatalities caused by well-recognized hazards: trench cave-ins, failure to lock-out dangerous equipment, and lack of machine guarding. To cite just a few examples:

- In January 2009, Andrew Keller was killed in a trench cave-in in Freyburg, Ohio. Keller was 22 years old. The company, Tumbusch Construction, was cited for three serious violations and penalized \$6,300. The penalties were later reduced to \$4,500. Six months later, in June 2009, OSHA found similar violations at another jobsite of Tumbusch Construction. This time the company was cited for both serious and willful violations with a total of \$53,800 in penalties proposed. The company has contested the violations.
- A July 2009 fatality case in Batesville, Texas, where one worker was killed and two workers injured when natural gas was ignited during oxygen/acetylene cutting on a natural gas pipeline. The employer – L&J Roustabout, Inc. – was cited for three serious violations with \$3,000 in penalties. The case was settled for \$1,500.
- In August 2009, Andrea Taylor, age 28, was killed on the job at Affordable Electric in Lamar, South Carolina. South Carolina OSHA cited the company for five serious violations of electrical and lock-out standards with a proposed penalty of \$6,600. In an October 2009 settlement, three of the violations were dropped and the penalties were reduced to \$1,400.
- In August 2009, at SMC, Inc. in Odessa, Texas, a worker was caught in the shaft of a milling machine and killed. The company was cited for one serious violation. The \$2,500 proposed penalty was reduced at settlement to \$2,000.

These are not meaningful penalties – they are a slap on the wrist. Penalties of this sort are clearly not sufficient to change employer behavior, improve workplace conditions, or deter future violations.

The OSH Act's civil penalties were last increased by Congress in 1990 (the only time they have ever been raised). Unlike all other federal enforcement agencies (except the IRS), the OSH Act is exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 40 percent. For OSHA penalties to have the same value as they did in 1990, they would have to be increased to \$11,600 for a serious violation and to \$116,000 for a willful violation of the law.

H.R. 5663 would strengthen the civil penalty provisions in the OSH Act in several ways. First, the bill would increase civil penalties to account for inflation since the last increase, and would index penalties to inflation in the future. Second, the legislation would add a mandatory minimum penalty of \$20,000 (\$10,000 for employers of 25 or fewer employees) for violations that involve a fatality, and authorize penalties of up to \$50,000 for these violations. These provisions would merely update the OSH Act's civil penalty provisions for inflation and ensure that at least a minimum penalty is assessed when the violation leads to a worker fatality. Third, the legislation would make clear that an employer's history of violations in states with state OSHA plans would be considered by the Secretary of Labor in deciding whether to issue a citation for a "repeat" violation, which carries higher penalties. These are modest measures, but they are much needed and long overdue.

Criminal Penalties

The criminal penalty provisions of the OSH Act are exceedingly narrow and weak. Under the OSH Act, criminal penalties for violations of the law are limited to cases where a willful violation results in a worker's death, and even then, the maximum jail term is six months – a misdemeanor. (The Act also authorizes prosecutions for false statements and for giving advance notice of an OSHA inspection, with a maximum six month jail term for each).

By contrast, both the Coal Mine Health and Safety Act and environmental laws authorize prosecutions with more significant penalties for knowing violations of the law, and they do not require that a fatality or other harm occur as a precondition of prosecution. The environmental laws also authorize prosecutions for “knowing endangerment” – knowing violations of the law that put others at imminent danger of death or serious harm – which carry far greater penalties (15 years) than does the OSH Act (6 months for willful violations that cause a fatality).

Compare, e.g., 42 U.S.C. 6928(e) and (f) (knowing endangerment under the Clean Air Act) *and* 33 U.S.C. 1319(c)(3) and (6) (knowing endangerment under the Clean Water Act) *with* 29 U.S.C. 666(e) (OSH Act). The six month maximum penalty under the OSH Act for willful violations that result in a worker fatality are even weaker than the one-year maximum penalty under the Wild Free-Roaming Horses and Burros Act for maliciously harassing a wild horse or burro on public lands. 16 U.S.C. 1338. My point here is not in any way to denigrate strong criminal enforcement provisions for violations of wildlife and environmental protection laws, but rather to say that the weakness of the OSH Act’s penalties when compared to these laws sends a terrible message about the value the law places on workers’ lives, and undermines strong and credible enforcement of the job safety law.

Because the OSH Act’s criminal penalty provisions are so weak, very few cases are prosecuted by the Department of Justice. Given its limited resources, DOJ understandably focuses on prosecuting felonies with meaningful sanctions, not misdemeanors. As best as we can tell from available records, in the 40 years since the passage of the OSH Act, only 79 cases have been prosecuted under the OSH Act, with defendants serving a total of 89 months in jail. By comparison, in FY 2009 alone, there were 387 criminal enforcement cases initiated under federal environmental laws and 200 defendants charged, resulting in 76 years of jail time and \$96 million in penalties. In other words, there were more prosecutions, penalties, and jail time in

one year for violations of environmental laws than have occurred for violations of the OSH Act in OSHA's entire 40-year history.

To illustrate this disparity between the criminal provisions of the OSH Act and environmental laws, take the prosecution of BP after an explosion at its Texas City, Texas oil refinery in 2005. That explosion killed 15 workers and injured 170 others. OSHA issued citations and civil penalties against BP, and settled for \$21 million. (OSHA recently announced the largest fine in OSHA's history against BP for the company's failure to abate hazards as promised in the earlier settlement).² The Justice Department prosecuted BP, and BP pleaded guilty and agreed to a \$50 million fine, *not* to violations of the OSH Act but for violations of the Clean Air Act. The OSH Act and its misdemeanor penalty was simply not part of the equation.

H.R. 5663 would begin to correct this disparity and bring the OSH Act's criminal provisions more in line with other laws. It is important to point out that even as amended by H.R. 5663, the OSH Act's provisions would still be narrower and weaker than the Mine Act and environmental laws. Under H.R. 5663, criminal violations of the OSH Act would be made a felony, instead of a misdemeanor, and maximum jail terms would be increased to 10 years. Criminal prosecution would be authorized for knowing violations that lead to serious bodily harm, in addition to those that lead to deaths. Corporate officers and directors could be held personally criminally liable for violations, as is the case under the Mine Act and the environmental laws. These provisions would begin to make the criminal provisions of the OSH Act a more meaningful deterrent to violations that cause death or serious harm. These reforms are sorely needed and are long overdue.

2. Improved Anti-Retaliation Protections

There is universal agreement about the importance of workers being involved in addressing safety and health hazards at the workplace. Workers see first-hand the hazards posed

² Steven Greenhouse, "BP to Challenge Fine for Refinery Blast", N.Y. Times, (October 31, 2009)

by their jobs and their workplaces, and they are an important source of ideas for addressing these hazards. But in order for workers to feel secure in bringing hazards to their employer's attention, they must have confidence that they will not lose their jobs or face other types of retaliation for doing so. All too often, fear of retaliation for "rocking the boat" leads workers to stay quiet about job hazards, sometimes with tragic results, as we saw with the Massey mine explosion in April.³

Unfortunately, the anti-retaliation protections under the OSH Act for workers who raise job safety concerns or exercise their other rights under the law are woefully inadequate and fall far short of the protections offered under many other anti-retaliation laws – including, ironically enough, laws enforced by OSHA. The U.S. Government Accountability Office (GAO) surveyed seventeen whistleblower statutes enforced by OSHA and found that the OSH Act contains much weaker whistleblower provisions than these other federal laws.⁴

Four weaknesses are particularly problematic: (1) the OSH Act's short statute of limitations for filing whistleblower complaints (30 days); (2) the absence of preliminary reinstatement while cases are proceeding through the system; (3) the lack of an administrative process for hearing cases; and (4) the absence of a private right of action for workers to pursue their own cases before the agency or in federal court in situations where the Secretary of Labor fails or chooses not to act, which all too often is the case.⁵ These statutory shortcomings leave

³ Dan Barry, et al., "2 Mines Show How Safety Practices Vary Widely", N.Y. Times (April 22, 2010). *See also* Peter Kilborn, "In Aftermath of Deadly Fire, a Poor Town Struggles Back," N.Y. Times (Nov. 25, 1991) (workers at the Imperial Food chicken processing plant, where 25 workers died in a fire, did not raise safety complaints because they feared losing their jobs).

⁴ Government Accountability Office, **Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency** 50-65 (Jan. 2009).

⁵ According to data provided by OSHA, in FY 2009, federal OSHA received 1,280 section 11(c) discrimination complaints, and completed action on 1,173 cases. Only 15 of these cases were recommended for litigation and another 246 settled. Eight hundred thirty-four of these cases were dismissed by the agency, of which 104 were appealed by complainants to the OSHA National Office. Of these 104 were remanded back to the regions for rehearing. Of the cases that are found meritorious by investigators, few are actually litigated by the Solicitor of Labor (SOL). In FY 2009, four of the 15 cases recommended for litigation went to court. Since FY 1996, only 32 lawsuits were filed out of 467 cases referred by OSHA to SOL for litigation.

workers with little or no recourse when they face retaliation for reporting hazards or injuries or exercising their other rights under the law. This undermines the OSH Act's encouragement of full and active worker involvement in workplace safety and health.

H.R. 5663 would correct these shortcomings and bring the OSH Act's anti-retaliation provisions into the mainstream of other whistleblower laws. The bill extends the statute of limitations for filing complaints from 30 days to 180 days, putting the OSH Act on par with the Surface Transportation Act and other major anti-retaliation laws. The bill establishes an administrative process for handling retaliation cases, similar to other whistleblower laws, so that the Secretary of Labor is not required to go to court to pursue these cases but can handle them administratively. The bill establishes timeframes for processing cases, and gives workers the right to pursue their cases before an administrative law judge or court if the Secretary of Labor delays action or chooses not to pursue the case. The bill makes clear that the anti-retaliation protections apply to the reporting of an injury or illness, which is important given the chronic underreporting problem and the prevalence of employer practices and policies to discourage reporting.⁶ And, H.R. 5663 codifies workers' right to refuse hazardous work, a long-established right that was upheld by the U.S. Supreme Court decades ago. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

Workers who raise safety and health concerns or report injuries should be protected against retaliation for doing so. H.R. 5663 will update and strengthen the anti-retaliation provisions in the OSH Act and bring these protections up to par with other anti-retaliation laws. Again, this is a much-needed change that is long overdue.

3. Abatement of Hazards During Litigation

Under the OSH Act, when OSHA issues a citation to an employer, OSHA sets a date by which the employer must correct the violation, i.e., correct the problem that led to the citation.

⁶ See GAO, Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data (Oct. 2009).

The vast majority of employers fix the problem and do not challenge OSHA's citation. But if the employer does challenge the citation, the abatement period is tolled while the case is pending, which can take years. In the meantime, unless the employer decides to correct the problem on its own, workers continue to be exposed to the hazard, putting them at risk of harm.

Under the Mine Act, mine operators are required to abate violations even if they challenge the citation itself. The same is true under the state OSHA program in the state of Oregon. To our knowledge, these provisions have worked smoothly, and employers have been able to comply with these requirements without significant hardship.

H.R. 5663 would incorporate this abatement requirement into the OSH Act. Except for violations that are designated "other than serious," the period for abating the hazard would begin to run upon issuance of the citation, and would *not* be tolled in situations where an employer decided to challenge the citation before the Occupational Safety and Health Review Commission. This provision will better assure that workers are protected from hazards while litigation is ongoing.

The legislation provides a safety valve for those situations where employers believe the abatement requirement would cause great hardship. H.R. 5663 establishes an expedited procedure through which employers may seek a stay of the abatement requirement before the Review Commission. The Commission is authorized to stay the abatement requirement in those instances where employers are able to demonstrate a substantial likelihood that they will succeed in challenging the citation, that worker health and safety will not suffer in the interim, and that the employer will suffer irreparable harm absent a stay. These factors are comparable to the factors for obtaining a stay under the Federal Rules of Civil Procedure. They provide a fair and expedited process for employers to have their day in court, while ensuring that workers are protected from possible harm.

Amending the OSH Act to require employers to abate hazards during litigation is a significant improvement over the current law. This provision will enhance worker protections while providing employers due process to seek a stay in appropriate circumstances. We strongly support this provision and urge its adoption.

4. Victims and Family Members Rights

H.R. 5663 enhances the right of victims and family members to participate in the OSHA enforcement process. Victims and family members would have the right to meet with OSHA investigators, receive copies of any citations, and to be heard before any settlement is reached. We believe these measures are important and appropriate. Victims and family members have a keen interest in the OSHA proceedings surrounding workplace injuries and fatalities, and they deserve information and the right to be heard.

CONCLUSION

The improvements to the OSH Act in H.R. 5663 are urgently needed to strengthen the job safety law and protect workers from harm. The bill will help deter violations of the law, bring about greater compliance, and better protect workers who expose job hazards and exercise their rights. We urge the Committee and the Congress to approve the legislation without delay. Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.

Federal OSHA and State OSHA Plan Inspection/Enforcement Activity, FY 2009

	<u>FEDERAL</u> <u>OSHA</u>	<u>STATE PLAN</u> <u>OSHA</u>
Inspections	39,057	61,310
Safety	33,256	48,221
Health	5,801	13,089
Complaints	6,675	8,612
Programmed	24,336	39,676
Construction	23,952	26,245
Maritime	338	47
Manufacturing	7,312	9,998
Other	7,455	25,020
Employees Covered by Inspections	1,332,583	3,011,179
Average Case Hours/Inspection		
Safety	18.5	16.1
Health	34.8	27.0
Violations – Total	87,491	129,289
Willful	395	171
Repeat	2,750	2,046
Serious	67,439	55,090
Unclassified	10	14
Other	16,697	71,456
FTA	200	512
Penalties - Total (\$)	94,981,842	59,778,046
Willful	13,537,230	3,466,130
Repeat	10,644,022	3,594,205
Serious	65,072,944	43,018,854
Unclassified	128,000	131,500
Other	3,907,648	7,390,658
FTA	1,691,998	2,176,699
Average Penalty/Violation (\$)	1,086	462
Willful	34,271	20,270
Repeat	3,871	1,757
Serious	965	781
Unclassified	12,800	9,393
Other	234	103
FTA	8,460	4,251
Percent Inspections with Citations Contested	7.1%	13.1%

Source: OSHA IMIS Inspection Reports, FY 2009

State	Number of OSHA Fatality Investigations Conducted, FY 2009 ¹	Total Penalties ¹ (\$)	Average Total Penalty Per Investigation (\$)	Median Initial Penalty ² (\$)	Median Current Penalty ² (\$)	State Fatality Prevention
Alabama	20	298,010	14,901	12,250	6,900	FE
Alaska	5	21,900	4,380	4,200	2,975	S
Arizona	17	164,995	9,706	16,500	10,500	S
Arkansas	15	166,675	11,112	5,500	5,500	FE
California	160	1,640,385	10,253	11,655	9,260	S
Colorado	11	278,400	25,309	15,000	12,000	FE
Connecticut	8	42,475	5,309	10,000	6,300	FE
Delaware	3	42,040	14,013	4,000	2,520	FE
Florida	81	643,166	7,940	7,500	6,400	FE
Georgia	43	376,205	8,749	11,300	7,000	FE
Hawaii	6	28,625	4,771	2,938	2,938	S
Idaho	5	54,350	10,870	7,500	7,500	FE
Illinois	52	129,315	2,487	4,625	4,500	FE
Indiana	42	172,913	4,117	6,000	5,250	S
Iowa	21	246,900	11,757	5,175	3,000	S
Kansas	12	178,550	14,879	7,400	7,000	FE
Kentucky	31	125,275	4,041	3,250	2,000	S
Louisiana	48	99,215	2,067	3,625	2,750	FE
Maine	6	14,160	2,360	3,750	2,500	FE
Maryland	20	90,676	4,534	6,763	4,073	S
Massachusetts	23	148,200	6,444	11,750	7,000	FE
Michigan	28	142,090	5,075	6,300	5,400	S
Minnesota	14	260,600	18,614	26,600	26,200	S
Mississippi	14	106,360	7,597	10,150	6,780	FE
Missouri	20	117,125	5,856	8,838	5,250	FE
Montana	5	13,000	2,600	2,500	2,500	FE
Nebraska	16	312,737	19,546	12,550	7,875	FE
Nevada	11	93,100	8,464	9,100	5,950	S
New Hampshire	3	3,500	1,167	17,000	17,000	FE

New Jersey	39	201,567	5,168	3,000	3,000	FE
New Mexico	6	23,200	3,867	7,800	7,800	S
New York	53	625,632	11,804	5,400	4,800	FE
North Carolina	54	171,245	3,171	4,650	4,063	S
North Dakota	4	27,962	6,991	5,825	5,063	FE
Ohio	39	134,895	3,459	7,000	5,175	FE
Oklahoma	25	281,150	11,246	10,000	6,000	FE
Oregon	25	79,250	3,170	5,000	5,000	S
Pennsylvania	43	262,315	6,100	5,850	4,888	FE
Rhode Island	4	7,900	1,975	11,025	10,075	FE
South Carolina	17	13,745	809	3,000	2,375	S
South Dakota	3	7,605	2,535	4,200	2,730	FE
Tennessee	42	195,920	4,665	5,400	5,400	S
Texas	167	1,562,851	9,358	6,000	5,000	FE
Utah	14	21,600	1,543	2,750	1,250	S
Vermont	2	5,250	2,625	5,250	5,250	S
Virginia	36	678,652	18,851	14,000	10,000	S
Washington	32	77,625	2,426	1,600	1,600	S
West Virginia	10	242,880	24,288	5,400	4,450	FE
Wisconsin	23	110,045	4,785	5,550	3,820	FE
Wyoming	8	33,156	4,145	4,625	4,250	S
National Median State Plan States				6,338	5,000	
National Median Federal States				6,750	5,000	
Total or National Average⁴	1,450	11,118,267	7,668			

¹OSHA IMIS Fatality Inspection Reports, FY 2009. Report was issued on January 7, 2010.

²Median initial and median current penalties on FY 2009 fatality investigations provided by OSHA on April 14, 2010.

³Under the OSHA Act, states may operate their own OSHA programs. Connecticut, Illinois, New Jersey and New York have state programs covering state and local employees only. Twenty-one states and one territory have state OSHA programs covering both public-and private-sector workers.

⁴National average is per fatality investigation for all federal OSHA and state OSHA plan states combined. Federal OSHA average is \$8,152 per fatality investigation; state plan OSHA states average is \$7,032 per fatality investigation.

COMPARISON OF ANTI-RETALIATION PROVISIONS

Statute	Statute of Limitations	Preliminary Reinstatement	Right to Get Hearing before ALJ or Court
Federal Railroad Safety Act (amended 2007)	180 days	Yes	Yes
Consumer Product Safety Improvement Act (2008)	180 days	Yes	Yes
Surface Transportation Assistance Act (1982, amended 2007)	180 days	Yes	Yes
Aviation Investment And Reform Act (2000)	90 days	Yes	Yes
Sarbanes-Oxley (2002)	90 days	Yes	Yes
Patient Protection and Affordable Care Act (2010)	180 days	Yes	Yes
Clean Air Act (1977)	30 days	Yes	Yes
Mine Safety and Health Act (1977)	60 days	Yes	Yes
OSH Act (1970)	30 days	No	No