July 13, 2010

The Honorable George Miller
Chair
House Education and Labor Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Kline
Ranking Member
House Education and Labor Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Miller, Ranking Member Kline and Members of the Committee:

The Coalition for Workplace Safety (CWS) is a group of associations and employers, who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. CWS members are united in their desire to support policies that improve workplace safety. Unfortunately, the provisions in "H.R. 5663, Miner Safety and Health Act of 2010" that would amend the Occupational Safety and Health Act (OSH Act) will not produce such results, and the CWS, as represented by the signers below, opposes this bill.

This legislation, while primarily addressing issues with mine safety, would result in the most sweeping changes to the OSH Act since its inception. Unfortunately the provisions of this bill are not the right approach to assist both employers and employees in our shared goal of maintaining safe and healthful workplaces. According to the Bureau of Labor Statistics from 1994 to 2008 the total recordable case rates for workplaces injuries and illnesses have been cut in half (improved by 53.6 percent), and workplace fatalities are now at their lowest level ever.

H.R. 5663 is built around the theory that greater penalties and enforcement will yield safer workplaces. The CWS believes that instead of improving workplace safety, this bill will only increase the adversarial nature of the relationship between Occupational Safety and Health Administration (OSHA) and employers, and create more confusion leading to increased litigation and compliance costs. This bill contains no support or assistance for employers to help them implement better safety programs or understand better their obligations. Such compliance assistance is particularly necessary to help small businesses, who often cannot afford to maintain safety personnel or hire consultants to guide them through complicated OSHA regulations.

In particular, the CWS is concerned with the following provisions of Title VII of H.R. 5663 that would amend the Occupational Safety and Health Act:

Expansion of Whistleblower Rights (Section 701)—This provision would expand the ability of an employee to bring an action against their employer if they believe they have been inappropriately discharged or discriminated against because they reported an injury or unsafe condition, or participated in a proceeding related to safety and health before the Congress or any federal or state authority, or refused to violate any provision of the Occupational Safety and

Marc Freedman mfreedman@uschamber.com / Keith Smith ksmith@nam.org / Josh Ulman josh@ulmanpolicy.com
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Health Act. Current law (Section 11(c)) already provides employees with protections against such employer actions.

This provision is based on the belief that merely because the vast majority of current whistleblower complaints do not produce judgments in favor of the complainants, the system must be broken. In reality, the vast majority of complaints brought are not meritorious and no expansions of whistleblower rights are needed, nor will any expansions produce different results. The expansions will result, however, in excessive litigation and legal fees that will drain necessary resources from OSHA and employers. Section 701 simply promotes litigation and increases legal fees on employers, making OSHA's whistleblower system punitive and a pathway to litigation rather than a tool for improving workplace safety.

Furthermore, Section 701 would provide the employee a right to a federal court *de novo* review if either the Administrative Law Judge, or the administrative review board that hears appeals of such cases, do not issue decisions and orders within 90 days, regardless whether the complaint has any merits. According to testimony delivered by attorney and whistleblower expert Lloyd Chin at a hearing held in the Subcommittee on Workforce Protections on April 28, 2010, these deadlines will not be met, thereby giving employees the right to bring their case in a federal court which will result in lengthy, and resource intensive litigation.

Mandatory Abatement and Procedures for Obtaining a Stay (Section 703)—This section would force employers to begin any corrections (abatement) under a serious, willful or repeated citation immediately upon receipt of the citation. Current law allows employers to stay this requirement pending the completion of a challenge to the citation if they pursue one. While this section provides a process by which an employer could get a stay of this requirement, the criteria for that are unlikely to be satisfied, and while the employer is seeking this stay they will be required to be satisfying the abatement provisions set out by the OSHA inspector who may not have a good understanding of the workplace at issue.

Abatement is often a very costly, disruptive, and complicated process. While employers are prepared to correct hazards and make necessary improvements to their workplaces, whether they should have to spend the levels sometimes specified, and reconfigure their workplaces, or even cease certain operations or using certain machinery depends on whether OSHA has issued a valid citation. Just like any person accused of violating a law, employers have a right to due process before they can be forced to comply with costly and disruptive abatement measures specified by an OSHA inspector unfamiliar with the workplace, and this provision strips employers of that right to due process. While the process provided in this section purports to protect an employer's due process rights, it relies on the standard associated with seeking a preliminary injunction—a very difficult standard to meet. This represents an unreasonable burden for employers to overcome and is no substitute for current procedure that stays the abatement requirement while an employer exercises their rights to due process. In effect, the OSHA inspector will become the judge, jury, and executioner.

Nor is this provision necessary. At a hearing in the Subcommittee on Workforce Protections of the House Education and Labor Committee on March 16, OSHA Director of

Enforcement (now Deputy Assistant Secretary) Richard Fairfax made clear that OSHA can shut down a workplace "within an hour" if they find an imminent danger that requires such attention.

Increased Civil and Criminal Penalties (Sections 705, 706)—Perhaps the signature provisions of this bill are the increases in civil and criminal penalties, as well as other changes to how OSHA would impose these penalties. The CWS believes that increases in penalties do not yield improvements in workplace safety as penalties are never a proactive approach, they are merely reactive—they only apply after there has been a violation, accident, or fatality. The real impact of increasing civil and criminal penalties will be a significant surge in the number of citations employers choose to challenge as demonstrated by the increases in fines under MSHA, as a result of the MINER Act enacted after the Sago, WV mining tragedy. Since the MINER Act regulations took effect in 2007, the backlog at the Federal Mine Safety and Health Review Commission is 16,000 cases (worth $195 million), and expected to rise further as the current policy at MSHA is to not engage in settlements. This backlog has impacted safety in the mining industry by absorbing an unprecedented amount of MSHA resources which would otherwise be devoted to field and other activities.

Beyond the problems associated with the proposed increases, Section 706 also makes other objectionable changes. It specifies that the term "employer" also means "any officer or director" without any qualification or suggestion that such an officer or director had any role in the incident in question. This overly broad expansion of the definition for employer is unworkable, but more importantly would likely ensnare company officials that had no involvement in, or knowledge of, the incident giving rise to the citation and criminal penalty. Such a presumption raises serious substantive due process questions and contradicts well established legal principles of whether someone can be charged for something with which they had no connection. This provision would also create a very strong "chilling effect" on anyone taking a high level corporate job or seat on a board if they could find themselves facing criminal penalties because of the least responsible employee.

This section also introduces the new intent level for criminal penalties of "knowing" with no explanation or indication of how that new level is to be determined or limited. As used in environmental law, this term has come to be associated with a very low level of intent, a virtual "strict liability" standard where the party in question merely has to know that a given activity was taking place, not that there was a violation occurring or that environmental laws were being broken. To apply this in the OSHA context would not only seriously degrade a legitimate level of intent currently in place, but it would create tremendous confusion and guarantee that each time it was used, it would be challenged in court leading to massive new levels of litigation.

Pre-Final Order Interest Penalties (Section 707)--This section would impose interest penalties on employers, compounded daily, while they challenge a citation—in effect penalizing them for exercising their due process rights. This provision has no redeeming merit, nor can it be said to have any plausible connection to improving workplace safety.

The Coalition for Workplace Safety is committed to continually improving safety in the workplace. Unfortunately, we strongly believe that H.R. 5663, as introduced, will not improve safety but will instead create greater cost, litigation and hamper job creation.

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American Bakers Association
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Industrial Minerals Association – North America
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MEC IEC of Dayton
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National Electrical Contractors Association
National Industrial Sand Association
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Plumbing-Heating-Cooling Contractors-National Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
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Rio Grande Valley IEC, Inc.
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Society of American Florists
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Southern New Mexico IEC
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Tree Care Industry Association
Tri State IEC
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WECA IEC
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