

OCCUPATIONAL SAFETY AND HEALTH SMALL EMPLOYER  
ACCESS TO JUSTICE ACT OF 2005

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APRIL 18, 2005.—Ordered to be printed

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 742]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 742) to amend the Occupational Safety and Health Act of 1970 to provide for the award of attorneys' fees and costs to small employers when such employers prevail in litigation prompted by the issuance of a citation by the Occupational Safety and Health Administration, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 742, the "Occupational Safety and Health Small Employer Access to Justice Act of 2005," is to assist small businesses in defending themselves against government bureaucracy, specifically, less-than-meritorious cases brought against them by the Occupational Safety and Health Administration (OSHA). The bill provides that a small business (defined as a business with less than 100 employees and a net worth of no more than seven million dollars) may recover attorneys' fees when it prevails in an adjudicatory action brought by OSHA. The legislation is intended to prevent non-meritorious lawsuits from proceeding and to provide small employers the means to adequately represent themselves against actions brought by OSHA.

## COMMITTEE ACTION

## 109TH CONGRESS

H.R. 742, the “Occupational Safety and Health Small Employer Access to Justice Act of 2005,” was introduced by Congressman Charlie Norwood on February 10, 2005, and was referred to the Committee on Education and the Workforce and held at full committee. In light of the extensive legislative record developed with respect to substantively identical legislation in the 107th and 108th Congresses, the Committee held no hearings on the bill prior to markup.

On April 13, 2005, the Committee favorably reported the bill to the House of Representatives, without amendment, by a roll call vote of 27 to 18.

H.R. 742 is substantively identical to H.R. 2731 as passed by the House in the 108th Congress.

## 108TH CONGRESS

On April 3, 2003, comprehensive OSHA reform legislation, H.R. 1583, the “Occupational Safety and Health Fairness Act of 2003,” was introduced in the House. The Subcommittee on Workforce Protections held a hearing on H.R. 1583 on June 17, 2003.<sup>1</sup> At this hearing, the Subcommittee heard testimony from Mr. Brian Landon of Canton, Pennsylvania, testifying on behalf of the National Federation of Independent Businesses; Mr. John Molovich, Health and Safety Specialist, United Steelworkers of America, of Pittsburgh, Pennsylvania; Mr. Ephraim Cohen, a small business owner from New York; and Arthur Sapper, Esq., an attorney of the law firm McDermott, Will & Emery in Washington, DC, testifying on behalf of the U. S. Chamber of Commerce. Legislation incorporating section 6 of H.R. 1583 was subsequently introduced as H.R. 2731, the “Occupational Safety and Health Small Employer Access to Justice Act of 2003,” on July 15, 2003.

An additional legislative hearing on H.R. 2731 was held on September 17, 2003.<sup>2</sup> At that hearing, the Subcommittee heard testimony relating to the ability of small businesses to recover attorneys’ fees from OSHA from Mr. Lynn Robson, Robson’s Greenhouse, Belleville, Michigan, testifying on behalf of the American Farm Bureau; Mr. James Knott, Riverdale Mills, Northbridge Massachusetts, testifying on behalf of the National Association of Manufacturers; Mr. Scott Nelson, Public Citizen Litigation Group, Washington, DC; and Ms. Anita Drummond, Senior Director, Legislative and Regulatory Affairs, Associated Builders and Contractors, of Arlington, Virginia.

On May 5, 2004, the Committee on Education and the Workforce discharged the Subcommittee on Workforce Protections from further consideration of the bill, and proceeded to consider H.R. 2731. An amendment by Subcommittee Chairman Norwood in the nature

<sup>1</sup> See Hearing on H.R. 1583, “The Occupational Safety and Health Fairness Act of 2003,” before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session, Serial No. 108-20 (hereinafter “Hearing on H.R. 1583”).

<sup>2</sup> See Hearing on H.R. 2731, “The Occupational Safety and Health Small Employer Access to Justice Act of 2003,” before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, 108th Congress, First Session Serial No. 108-32 (hereinafter “Hearing on H.R. 2731”).

of a substitute was accepted by unanimous consent. The substitute: (a) changed the short title of the bill from the “Occupational Safety and Health Small Employer Access to Justice Act of 2003” to the “Occupational Safety and Health Small Business Day in Court Act of 2004;” and (b) raised the net worth threshold for a small businesses to be able to recover attorneys’ fees under the bill from one million dollars to seven million dollars. The Committee ordered H.R. 2731, as thus amended, favorably reported to the House of Representatives by a roll call vote of 24 yeas and 20 nays.

On May 18, 2004, H.R. 2731 passed the House of Representatives as amended by a vote of 233 yeas and 194 nays.<sup>3</sup>

#### SUMMARY

H.R. 742 demonstrates that Congress understands the plight of the small business owner who feels that there is no merit to an OSHA inspector’s citations, but who has limited financial resources to defend the company against a well-financed, well-represented government agency. This burden is hardest on small businesses that would be better served by reinvesting financial resources into the company and its employees rather than fighting non-meritorious citations. Small businesses should be focused on what they do best, creating jobs for working Americans, rather than draining their resources fighting government bureaucracy.

The Occupational Safety and Health Small Employer Access to Justice Act of 2005 would amend the Occupational Safety and Health Act (OSH Act) to provide that businesses of 100 or fewer employees and seven million dollars or less in net worth can recover attorneys’ fees and expenses paid to successfully defend against a meritless OSHA citation. This would ensure that small businesses have the incentive to adequately represent themselves against OSHA, a government agency with vastly superior legal funds and legal resources. It is further intended that H.R. 742 will provide an incentive to OSHA to examine carefully the cases it brings against small businesses to ensure that they are truly meritorious.

#### COMMITTEE VIEWS

In 1980, Congress passed the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 et seq., to enable small enterprises who successfully challenge government enforcement actions to recover their legal fees. In so doing, Congress recognized the disproportionate burden on small businesses when they engage in a legal challenge against the federal government. As Senator Pete Domenici stated upon introduction of EAJA in the Senate, “[S]mall businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. In many cases the government can proceed in expectation of outlasting its adversary.”<sup>4</sup>

<sup>3</sup>Pursuant to the rule providing for its consideration, H. Res. 645, the bill was deemed amended to address a technical error relating to the bill’s short title upon adoption of the rule. Further to the provisions of H. Res. 645, upon approval of the bill it was enrolled with four other bills (H.R. 2728, H.R. 2729, H.R. 2730, and H.R. 2432) and thus transmitted to the Senate.

<sup>4</sup>125 Cong. Rec. 1437 (1979) (statement of Sen. Pete V. Domenici upon introduction of EAJA).

A review of EAJA applications filed at the Occupational Safety and Health Review Commission (OSHRC) demonstrates that very few employers actually avail themselves of this fee-shifting program. In Fiscal Year 2003, only three applications were filed (with only one party granted a paltry \$3,100), despite an annual average of 80,000 violations issued by OSHA in almost 40,000 workplace inspections conducted. Over time, the chart below demonstrates that a miniscule amount of employers are availing themselves of the opportunity to recover legal fees:

## EAJA APPLICATIONS AT OSHRC, FISCAL YEARS 1981-2003

Fiscal Year	Number of applications			Amount of fees and expenses awarded
	Filed	Decided	Granted	
1981	0	0	0	0
1982	2	2	0	0
1983	4	4	0	0
1984	2	2	1	\$2,969
1985	6	6	0	0
1986	4	4	1	8,392
1987	6	6	3	14,533
1988	4	4	3	18,831
1989	5	5	3	5,461
1990	4	4	2	12,423
1991	8	8	5	40,678
1992	1	1	1	10,281
1993	2	2	1	14,158
1994	5	5	0	0
1995	5	5	3	5,583
1996	2	2	0	0
1997	6	6	2	28,876
1998	4	4	2	5,000
1999	12	5	3	36,671
2000	2	2	2	54,347.34
2001	3	3	1	19,443.20
2002	8	7**	1	5,224.49
2003	3	3	1*	3,100.00
2004	4	6+	3++	11,185.29
Total	112	106	38	\$297,156.32

\* Settled

+ Denial in 1 case pending in review

\*\* Denials in 4 cases pending in review

++ 2 of the 3 are settlements

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H.R. 742 strengthens and enforces the ability of a small employer to recover fees from OSHA under EAJA by making two significant changes to current law and practice under EAJA.

First, H.R. 742 specifically targets its relief to small businesses who may be particularly vulnerable to legal harassment by OSHA. While EAJA establishes a threshold for recovery by a prevailing small business of 500 or less employees and a net worth of seven million dollars, H.R. 742 targets relief by creating a smaller pool of applicants, defining the size standard as less than 100 employees and seven million dollars or less net worth.

A review of small business size standards indicates that there is no standard definition in the federal government for a "small business." In fact, the Small Business Administration's North American Industry Classification System (NAICS) consists of 37 different size standards covering 1,151 industry activities. These size standards vary in the measure of small business to include annual receipts or number of employees, thus offering no single or ready definition. In that light, and based on the record evidence before it, the Committee determines that the size standard in H.R. 742 covers a reasonable number of small enterprises that could benefit from access to attorneys' fees if successful in fighting OSHA.

Second, under EAJA, an employer may not recover attorneys' fees if the agency can show that its actions were "substantially justified." As discussed in more detail below, this provision has significantly hindered the ability of employers to recover attorneys' fees from OSHA, and has had a deterrent effect on attempts to do so. Accordingly, H.R. 742 provides that with respect to recovery from OSHA, this EAJA requirement shall not apply.

#### THE ECONOMIC PRESSURE ON EMPLOYERS TO SETTLE WITH OSHA

With respect to adjudicatory actions under OSHA, testimony before the Workforce Protections Subcommittee repeatedly demonstrated that companies settled with OSHA rather than fighting to clear their name (and avoid paying fines and penalties) simply because settling was more cost efficient than pursuing even a valid legal appeal to its conclusion. The testimony received by the Subcommittee indicated that OSHA consistently negotiates penalties downward to avoid litigation even though they may be wrongly pursuing a case. Small businesses do not have the resources to actively engage in costly litigation when a much smaller settlement is being offered. OSHA and its attorneys, backed by the national fisc, is an unfair opponent for a small business with limited resources, even if truth is on the business' side.

Witnesses before the Committee stressed the need for relief. For example, Ms. Anita Drummond, Senior Director of Legislative and Regulatory Affairs for the Associated Builders and Contractors, urged passage of this legislation because:

In the OSHA environment there is a 90 percent settlement rate. Well, the reason there is a 90 percent settlement rate is because of the issues that have been discussed. When the agency continually says, well, we will settle, we will cut your fees, it is easier for small business.

It can easily cost \$20,000 to litigate a defense on a citation that is for \$8,400? [sic] The math is pretty simple.<sup>5</sup>

In the Committee's view, it is inappropriate for the government to force a small business owner to admit wrong doing or pay a fine simply because a cost benefit analysis determines that settlement is more cost effective than pursuing justice. The lack of relief is even more onerous when small business owners readily admit that attempting to fight costs too much money. As Mr. Lynn Robson, testifying before the Subcommittee on Workforce Protections, acknowledged:

I have talked about getting a lawyer. I learned it would cost far less to just pay the fine and be done with it. But I don't think I've done anything wrong and it cuts against the grain to pay a fine when I feel I am innocent. I have also asked whether I should try to recover my legal fees. Why shouldn't OSHA have to pay if I'm proven innocent?<sup>6</sup>

OSHA CAN AVOID AN AWARD OF FEES BY ARGUING THAT ITS POSITION WAS "SUBSTANTIALLY JUSTIFIED"

A second concern heard by the Committee is that under current EAJA law, OSHA is too readily able to avoid an award of fees by arguing that its position was "substantially justified"—a legal term of art that, as a practical matter, represents a very low threshold for OSHA to meet and thus preclude an award of fees under EAJA. With a cadre of specialized lawyers backed by the federal treasury, it is far too easy for OSHA to come up with some purported justification for its bringing the case, thus tying the employer up in a second round of litigation as to whether OSHA's actions were "substantially justified." As testimony before the Subcommittee on Workforce Protections evidenced:

[I]t is difficult and expensive to prove that OSHA's position was not "substantially justified" even if it was [sic]. 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.<sup>7</sup>

The Committee agrees with the witnesses that small business owners are placed in an untenable situation when trying to argue against a federal government entity. This concern is particularly acute in the context of OSHA litigation, given the complex body of law surrounding the OSH Act, which includes statutory, regulatory and interpretive law, and interpretive disagreements among OSHA and OSHRC, all of which make it more difficult for a small concern to seek relief under EAJA.

Congress made clear that small businesses should be given more leverage in all judicial proceedings through the enactment of EAJA. H.R. 742 reinforces this position and addresses concerns specific to

<sup>5</sup> Testimony of Anita Drummond, Hearing on H.R. 2731, at 19.

<sup>6</sup> Testimony of Lynn Robson, Hearing on H.R. 2731, at 7.

<sup>7</sup> Testimony of Arthur G. Sapper, Esq., Hearing on H.R. 1583, at 68.



OSHA and the OSH Act, by providing an effective and meaningful tool with which small businesses can defend themselves.

#### CONCLUSION

The twenty-six year history of EAJA demonstrates that small businesses are not getting equal access to justice. Current law and practice under EAJA, particularly in the context of OSH Act litigation, has proven ineffective in leveling the playing field as Congress intended. H.R. 742 is a targeted bill that seeks relief for a narrow segment of businesses in this particular litigation context. By allowing employers with 100 or fewer employees and seven million dollars or less of net worth to recover attorneys' fees if they successfully challenge an adverse ruling from OSHA, the Occupational Safety and Health Small Employer Access to Justice Act of 2005 implements this much-needed balance and ensures that the law works as Congress intended.

#### SECTION-BY-SECTION: H.R. 742

##### SECTION 1. SHORT TITLE

This act may be cited as the "Occupational Safety and Health Small Employer Access to Justice Act of 2005."

##### SECTION 2. AWARD OF ATTORNEYS' FEES AND COSTS

This section amends the Occupational Safety and Health Act of 1970 by adding a new section 32 and renumbering sections 32 through 34 as 33 through 35. The new section 32 provides that an employer who is the prevailing party in an adversary adjudication under the OSH Act, which at the time the action was initiated had not more than 100 employees and a net worth of not more than \$7,000,000 shall be awarded attorneys' fees pursuant to the section 504 of title 5 of U.S. Code irrespective of whether the position taken by OSHA was "substantially justified."

#### EXPLANATION OF AMENDMENTS

No amendments were adopted by the Committee.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. H.R. 742 amends the Occupational Safety and Health Act (OSH Act) to provide that a small business (defined as a business with less than 100 employees and a net worth of no more than seven million dollars) may recover attorneys' fees when it prevails in an adjudicatory action brought by OSHA. Section 215 of the CAA applies certain requirements of the OSH Act, to the legislative branch. The Committee intends to make the provisions of this bill available to legislative branch employees and employers in the same way as it is made available to private sector employees and employers under this legislation.

## UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget & Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. The Committee received a letter regarding unfunded mandates from the Director of the Congressional Budget Office and as such the Committee agrees that the bill does not contain any unfunded mandates. See *infra*.

**ROLLCALL VOTES****COMMITTEE ON EDUCATION AND THE WORKFORCE**

ROLL CALL 1 BILL H.R. 742 DATE April 13, 2005

H.R. 742 was ordered favorably reported by a vote of 27 – 18

SPONSOR/AMENDMENT Mr. McKeon / motion to report the bill to the House with the recommendation that the bill do pass

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. BOEHNER, Chairman	X			
Mr. PETRI, Vice Chairman	X			
Mr. McKEON	X			
Mr. CASTLE	X			
Mr. JOHNSON	X			
Mr. SOUDER	X			
Mr. NORWOOD	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. TIBERI	X			
Mr. KELLER	X			
Mr. OSBORNE	X			
Mr. WILSON	X			
Mr. PORTER	X			
Mr. KLINE	X			
Mrs. MUSGRAVE	X			
Mr. INGLIS	X			
Ms. McMORRIS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. JINDAL	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mrs. DRAKE	X			
Mr. KUHL	X			
Mr. MILLER				X
Mr. KILDEE		X		
Mr. OWENS		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY				X
Mr. KIND		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. DAVIS				X
Ms. McCOLLUM		X		
Mr. DAVIS		X		
Mr. GRIJALVA				X
Mr. VAN HOLLEN		X		
Mr. RYAN		X		
Mr. BISHOP		X		
Mr. BARROW		X		
<b>TOTALS</b>	<b>27</b>	<b>18</b>		<b>4</b>

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF  
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII 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.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST  
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 742 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, April 15, 2005.*

Hon. JOHN A. BOEHNER,  
*Chairman, Committee on Education and the Workforce,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 742, the Occupational Safety and Health Small Employer Access to Justice Act of 2005.

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

Sincerely,

ELIZABETH M. ROBINSON  
(For Douglas Holtz-Eakin, Director).

Enclosure.

*H.R. 742—Occupational Safety and Health Small Employer Access  
to Justice Act of 2005*

Summary: H.R. 742 would amend the Occupational Safety and Health Act to permit small employers with 100 or fewer employees and net worth of not more than \$7 million to be awarded attorney fees and expenses if they prevail against the Occupational Safety and Health Agency (OSHA) in administrative or court proceedings.

CBO estimates that implementing H.R. 742 would cost \$4 million in 2006 and \$39 million over the 2006–2010 period, subject to the availability of appropriated funds. H.R. 742 would not affect direct spending or revenues.

H.R. 742 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 742 is shown in the following table. The costs of this legislation fall within budget function 550 (health).

	By fiscal year, in millions of dollars—					
	2005	2006	2007	2008	2009	2010
SPENDING SUBJECT TO APPROPRIATION						
OSHA Spending Under Current Law:						
Estimated Authorization Level .....	464	478	491	505	519	533
Estimated Outlays .....	467	471	484	498	512	526
Proposed Changes:						
Estimated Authorization Level .....	0	9	9	9	9	10
Estimated Outlays .....	0	4	7	9	9	10
OSHA Spending Under H.R. 742:						
Estimated Authorization Level .....	464	487	500	514	528	543
Estimated Outlays .....	467	475	491	507	521	536

<sup>1</sup>The 2005 level is the amount appropriated for that year for the Occupational Safety and Health Agency. The amounts for 2006 through 2010 are baseline projections that assume annual increases for anticipated inflation.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted in the fall of 2005, that the estimated amounts will be appropriated for each year, and that outlays will follow historical spending patterns for similar activities authorized under the Equal Access to Justice Act (EAJA).

H.R. 742 would amend the Occupational Safety and Health Act to allow employers with 100 or fewer employees and less than \$7 million in net worth to be awarded reasonable attorney fees and expenses if they prevail in an adversarial adjudication or a court proceeding in which they contest a citation made by OSHA. Under the EAJA, the payment of fees and expenses would be made from the agency's discretionary appropriations. CBO estimates that implementing H.R. 742 would cost \$4 million in 2006 and \$39 million over the 2006–2010 period, subject to the availability of appropriated funds.

Currently under the EAJA, a prevailing party with fewer than 500 employees and less than \$7 million in net worth may recover their legal expenses, but only when it is found that the action brought by the United States is not substantially justified or when special circumstances would make an award unjust. In practice, OSHA actions (that is, citations pursuant to the Occupational Safety and Health Act) have nearly always met those standards. (Only a handful of employers with 100 or fewer employees were awarded fees and expenses after prevailing against OSHA in 2003.) Regardless of whether OSHA's actions were substantially justified or the award unjust, OSHA would be required, under H.R. 742, to pay fees and expenses of small employers who prevail in administrative or court proceedings.

According to data from the agency, each year OSHA issues citation in about 28,000 cases across all employer groups. Employers with fewer than 101 employees accounted for about 70 percent of that caseload. (Most small employers cited by OSHA are construction-related firms.) Only about 7 percent of the citations made to small firms are contested, or about 1,400 cases per year. Of these contested cases, CBO estimates that about 400 would involve either adjudication in an administrative proceedings or judicial review, based on the percentage of all contested cases that reached these levels over the past two years.

In addition, CBO assumes that small employers would prevail against OSHA on at least one count in over half of the cases that reach the required administrative or judicial level. This assumption is based on the historical rate at which all employers prevail when

they contest OSHA citations. In 2006, CBO assumes OSHA would reimburse small employers about \$40,000 in legal costs, on average, when they prevail in overturning OSHA actions. That assumption is based on a survey of OSHA awards to small employers in 2003 and the expectation that the awards will grow with inflation. CBO assumed the average award under H.R. 742 would be 50 percent higher than under current law because reductions for substantial justification would be removed.

Intergovernmental and private-sector impact: H.R. 742 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Tom Bradley. Impact on State, Local, and Tribal Government: Leo Lex. Impact on the Private Sector: Peter Richmond.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause (3)(c) of House Rule XIII, the goal of H.R. 742 is to provide that a small business (defined as a business with less than 100 employees and a net worth of no more than seven million dollars) may recover attorneys' fees when it prevails in an adjudicatory action brought by OSHA. The Committee expects the Department of Labor to implement the changes to the law in accordance with these stated goals.

#### CONSTITUTIONAL AUTHORITY STATEMENT

H.R. 742 amends the Occupational Safety and Health Act, and thus falls within the scope of Congressional powers under Article I, section 8, clause 3 of the Constitution of the United States to the same extent as does the OSH Act.

#### COMMITTEE ESTIMATE

Clause 3(d)(2) 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. 742. However, clause 3(d)(3)(B) 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 402 of the Congressional Budget Act.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) 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 (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

#### OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

\* \* \* \* \*

## AWARD OF ATTORNEYS' FEES AND COSTS

## SEC. 32.

## (a) ADMINISTRATIVE PROCEEDINGS.—An employer who—

(1) is the prevailing party in any adversary adjudication instituted under this Act, and

(2) had not more than 100 employees and a net worth of not more than \$7,000,000 at the time the adversary adjudication was initiated,

shall be awarded fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Secretary was substantially justified or special circumstances make an award unjust. For purposes of this section the term “adversary adjudication” has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

## (b) PROCEEDINGS.—An employer who—

(1) is the prevailing party in any proceeding for judicial review of any action instituted under this Act, and

(2) had not more than 100 employees and a net worth of not more than \$7,000,000 at the time the action addressed under subsection (1) was filed,

shall be awarded fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) of this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.

## (c) APPLICABILITY.—

(1) COMMISSION PROCEEDINGS.—Subsection (a) shall apply to proceedings commenced on or after the date of enactment of this section.

(2) COURT PROCEEDINGS.—Subsection (b) shall apply to proceedings for judicial review commenced on or after the date of enactment of this section.

## SEPARABILITY

SEC. [32] 33. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

## APPROPRIATIONS

SEC. [33] 34. There are authorized to be appropriated to carry out this Act for each fiscal year such sums as the Congress shall deem necessary.

## EFFECTIVE DATE

SEC. [34] 35. This Act shall take effect one hundred and twenty days after the date of its enactment.

## MINORITY VIEWS

### H.R. 742 WILL SEVERELY LIMIT THE ABILITY OF THE OCCUPATIONAL HEALTH ADMINISTRATION TO PROTECT WORKERS

H.R. 742 is a blatant attempt to chill OSHA's exercise of statutory responsibility to enforce the OSH Act, by penalizing the agency for every instance in which it attempts to do so unsuccessfully. Instead of encouraging cooperation between employers and OSHA, H.R. 742 encourages defendants to litigate matters with OSHA, resulting in fewer settlements, lengthier litigation, and ultimately delaying compliance with the OSH Act. Enactment of H.R. 742 would put the safety and health of hundreds of thousands of workers at risk.

H.R. 742, the "Occupational Safety and Health Small Employer Access to Justice Act" seeks to reverse the American Rule, under which each party to litigation pays its own costs, in a single class of cases, namely, those in which the Occupational Safety and Health Administration (OSHA) does not prevail in administrative or judicial proceedings against an employer or labor organization with not more than 100 employees and a net worth of not more than \$7 million. Workers have no private right of action under the Occupational Safety and Health Act (OSH Act). Consequently, workers rely on OSHA to protect their rights to a safe and healthful workplace. If OSHA is deterred from bringing cases it is not guaranteed to win, workers' rights and their health and safety will be severely eroded.

The Majority has failed to provide any evidence that OSHA has abused its statutory authority in issuing and prosecuting complaints. The Majority has also failed to show that the Equal Access to Justice Act provides insufficient redress to respondents who prevail in proceedings before the Occupational Safety and Health Review Commission (OSHRC).

Proponents of H.R. 742 do not attempt to suggest that the costs imposed by H.R. 742 would be offset by additional appropriations to the Department of Labor. As a consequence, the additional costs imposed by H.R. 742 must ultimately come at the expense of agency efforts to deter and remedy violations of the law. Furthermore, H.R. 742 requires taxpayers to underwrite the expense of employer violations. H.R. 742 requires OSHA to pay employers' attorney's fees for any part of a case it does not win. As such, if an employer loses ten claims, but wins one, an employer may claim entitlement to payment as a prevailing party and taxpayers would be responsible for the bill.

Congress has previously considered legislation similar to H.R. 740. In the 105th Congress, the Committee reported H.R. 3246 which, among other provisions, would have required the National Labor Relations Board (NLRB) to pay the attorney's fees and costs



of employers or unions with not more than 100 employees and a net worth of not more than \$1.4 million if the agency did not prevail. H.R. 3246 very narrowly passed the House on a 202–200 vote and died in the Senate. In the 106th Congress, the Committee reported H.R. 1987 which required the NLRB and OSHA to pay attorney’s fees and costs in any case in which they do not prevail to employers (exclusively in the case of OSHA) and unions with not more than 100 employees and a net worth of not more than \$7 million. H.R. 1987 was reported by Committee on a party-line vote and was scheduled for floor consideration, but ultimately was never brought up on the floor. H.R. 2731 was considered in the House in the last Congress.

This type of legislation has come to be known as “loser pays” legislation, but that is a misnomer. Under H.R. 740, as was the case with the previous bills, there is only one set of losers. If OSHA does not prevail, no matter how reasonable its case, the taxpayers pay the employer’s costs. The reverse does not also hold true, however. If OSHA wins the case, the employer is not required to pay OSHA’s costs, no matter how weak the employer’s case nor how blatant or egregious the employer’s violation was. In other words, the loser under “loser pays” legislation is the taxpayer.

#### H.R. 742 IS NOT LIMITED TO SMALL BUSINESSES

H.R. 742, despite its stated intent to apply to “small businesses,” achieves far broader coverage with its enlarged net worth and employee requirements. Bureau of Labor Statistics data for the first quarter of 1998 show that there were over 6.5 million private sector establishments with 99 or fewer employees, employing 55 million workers, 54% of the private sector workforce. These establishments comprise the vast majority of American businesses—about 97%.<sup>1</sup> In contrast, Congress traditionally defines “small business” for the purpose of establishing coverage under a wide range of employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have “twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”<sup>2</sup> Similarly, the Americans with Disabilities Act covers employers with fifteen or more employees,<sup>3</sup> as does Title VII of the Civil Rights Act of 1964.<sup>4</sup> Thus, the Majority’s definition of “small business” in H.R. 2731 serves a rhetorical purpose only; in practice, it achieves nearly-universal coverage.

#### H.R. 742 IS UNSUPPORTED BY THE EVIDENCE

There is no evidence to justify this radical departure from the American Rule, under which each party to litigation bears its own costs. The Majority has come forward with nothing to demonstrate that OSHA’s prosecutorial discretion should be changed in this

<sup>1</sup> See U.S. Census Bureau, Statistics of U.S. Businesses, internet: <http://www.census.gov>.

<sup>2</sup> 29 U.S.C. 630(b).

<sup>3</sup> 42 U.S.C. 2111(5).

<sup>4</sup> 42 U.S.C. 2000e(b).

manner. Indeed, the statistics demonstrate otherwise. As was stated in 2000:

OSHA statistics also undermine the contention that OSHA has engaged in a practice of prosecutorial abuse. Accordingly to the Majority's views, out of nearly 77,000 total violations cited in fiscal year 1998, only 2,061 inspections resulted in citations that were contested. Once again, the facts have condemned the Majority's case. In FY '98, Federal OSHA conducted more than 34,000 inspections, 16,396 of which resulted in citations at workplaces with fewer than 100 employees. Sixty percent of these citations were settled between OSHA and the employer in informal conferences. Employers contested 1,275 or 8% of the citations before the Occupational Safety and Health Review Commission. Moreover, in FY '98 nineteen (19) OSHA enforcement cases were decided by Federal appellate courts. OSHA won a total of 77 percent of these cases (Most of which had originated several years before FY '98)<sup>5</sup> These numbers suggest that OSHA neither issues citations nor enters into litigation against employers in a capricious manner. Since OSHA either settles or wins the vast majority of enforcement cases, there is no justification for assuming that employers need to be protected against an overzealous prosecutorial agency. Instead of encouraging cooperation between employers and OSHA, H.R. 742 encourages defendants to litigate. Fewer settlements and lengthier litigation would delay compliance with the OSH Act. This would come at a time when OSHA's commitment to the protection of millions of American workers has had a tremendous impact on reducing occupational injuries, illnesses and death. As such, attempting to alter the agency's prosecutorial discretion could prove to be extremely counterproductive and disastrous to millions of workers.

#### SMALL EMPLOYERS ARE ALREADY ENTITLED TO RECOVERY OF LEGAL FEES UNDER EAJA

Not only is there a total lack of evidence of OSHA abuses that would warrant this unprecedented shifting of fees in OSHA litigation, but there is already a remedy for parties that prevail in litigation involving the Board, namely the Equal Access to Justice Act (EAJA).<sup>6</sup> We are unaware of any concerns expressed by the Government Reform or Judiciary Committees, the Committees that have responsibility for assessing the law, which EAJA is failing to achieve Congressional intent. Nor is there any evidence that EAJA works differently at OSHA than it does in any other agency. Indeed, a GAO report that the Majority cited extensively to justify earlier legislation similar to H.R. 742 clearly indicated that OSHA's EAJA record is typical. The Majority contends, as have the proponents of this legislation in previous Congresses, that EAJA has been underutilized, that it has been judicially interpreted contrary to congressional intent, and that it has failed.

H.R. 742 penalizes a government agency, an agency coincidentally charged with protecting workers' rights, every time it loses regardless of how meritorious the action of the agency was. Under

<sup>5</sup> See Data From The Office of the Solicitor For Records, U.S. Department of Labor, 1998. See also H. Rpt. 106385, To Accompany H.R. 1987, Minority Views.

<sup>6</sup> 5 U.S. at 504 (EAJA).

EAJA, the government must pay the prevailing party's fees and costs only in those situations in which the government's position was not "substantially justified," or where "special circumstances" would make fee-shifting unjust.<sup>7</sup> Thus, Congress has never seen fit simply to shift the financial burdens of litigation to the government when it does not prevail, without regard to the merits of the government's position. Nor can it conjure up any reason whatsoever to single out proceedings involving OSHA for imposition of such a rule.

Furthermore, there is no data to back the characterization that small businesses have underutilized EAJA with respect to administrative and judicial actions under the OSH Act. According to a 1999 GAO study, the Department of Labor ranked fifth out of 15 Federal agencies, in the number of judicial decisions issued with respect to EAJA applications in FY '94. Specifically, OSHA awarded approximately \$192,494 in EAJA fees during fiscal years 1987–1997, in 28 cases. This amounts to an average EAJA award of \$6,874, a statistic which hardly demonstrates that employers, small or large, have spent huge sums of money in defense of frivolous suits under the OSH Act.

#### IMPLEMENTATION OF H.R. 742 WILL FURTHER FRUSTRATE THE ABILITY TO PROTECT THE RIGHTS OF WORKERS

This legislation punishes OSHA for bringing actions that are substantially justified but which the agency fails to win in whole. Coincidentally, the agency that H.R. 742 chooses to so punish is an agency charged with protecting the rights of workers. H.R. 742's chilling effect on the willingness of OSHA to bring actions on behalf of workers is obvious. This is particularly troubling in light of the fact that the OSH Act does not afford workers a private right of action. Thwarting the ability of OSHA to bring actions on behalf of workers is, therefore, tantamount to denying workers any recourse in the law.

We strongly believe that workers should have an enforceable right to a secure and healthy workplace. H.R. 742 impedes that objective. By leaving workers with the legal claim of the right to a safe and healthy workplace, while denying workers a meaningful ability to enforce that claim, H.R. 742 invites disrespect for the law and for the institutions that make and enforce the law. H.R. 742 does not simply undermine the rights of working men and women; it does a disservice to fundamental principles of law and justice.

#### H.R. 742 AND ERIC HO

The following exemplifies the kinds of injustices that H.R. 742 would perpetrate.<sup>8</sup>

Eric Ho purchased a defunct hospital and medical office building in Houston to develop as a residential property. Ho knew there was asbestos onsite, and knew that alteration to asbestos-containing materials was to be handled by personnel licensed and registered with the Texas Department of Health. Instead Ho hired two indi-

<sup>7</sup>Id. at 504(a)(1).

<sup>8</sup>The description of these events is derived, almost verbatim, from the court's decision in *Chao v. OSHRC [Ho]*, 5th Cir., No. 03–60958, 2/21/05.

viduals who in turn hired 11 illegal immigrants to do the alterations, including the asbestos removal. Work began in January 1998.<sup>9</sup>

At the most, the workers were occasionally given dust masks not suitable for protection against asbestos. Ho did not provide protective clothing. He did not provide a respiratory protection program, conduct medical surveillance, conduct asbestos monitoring, implement adequate ventilation or debris removal, inform workers of the presence and hazards of asbestos, or provide any training whatsoever. There is no dispute that Ho was aware of work site conditions.<sup>10</sup>

On February 2, 1998, a city inspector visited the worksite and issued a stop-work order citing the possibility of asbestos exposure, and requiring the city's approval be given before Ho resumed work. Ho began negotiating with a licensed contractor, but while negotiating with the contractor, Ho secretly resumed work on the site under the original unsafe conditions. Ho directed workers to work at night. Workers ate and some lived on site. They had no potable water and only one portable toilet. Workers were sometimes allowed to leave the property to use a restroom at a nearby commercial facility and food was purchased for them, with their money, and brought back to the worksite. Ho visited the worksite regularly and was aware of these conditions.<sup>11</sup>

On March 11, 1998, Ho directed that daytime work resume. Thinking he was tapping into a water line in order to wash out the building, Ho directed that an unmarked valve be tapped. It turned out to be a gas line and there was a subsequent explosion injuring one contractor and two workers. The following day, Ho summoned all the workers to his office where they were given releases to sign, acknowledging receipt of \$1000 as full payment for their work, and acknowledging receipt of \$100 to release Ho from any claims arising from the explosion and fire.<sup>12</sup>

After the explosion the Texas Department of Health notified Ho that the worksite showed levels of asbestos in excess of federal and state standards and that the site needed to be sealed by qualified personnel. Ho used the same workers he had used previously to install plywood over the windows and did not give them any protective equipment.<sup>13</sup>

OSHA conducted an investigation and cited Ho for 10 serious and 29 willful violations, including 11 willful violations for failing to provide respirators to 11 employees and 11 willful violations for failing to train the 11 employees on the hazards of asbestos and safety precautions.<sup>14</sup> OSHA proposed a penalty of \$1.48 million.<sup>15</sup>

Ho challenged the per-employee citations of the respirator and training violations and contended he did not violate the general duty clause of the OSH Act, or if he did, he did not do so willfully.<sup>16</sup>

<sup>9</sup> *Choa v. OSHRC [Ho]*, 5<sup>th</sup> Cir., No. 03-60958, 2/21/05, at 2.

<sup>10</sup> *Id.* at 2-3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> Yin Wilczek, "Fifth Circuit Affirms OSHRC in Split Decision Regarding Houston Man's Asbestos Violations," *Daily Labor Report* No. 35 (Feb. 23, 2005): A8.

<sup>16</sup> *Chao v. OSHRC [Ho]* 5<sup>th</sup> Cir., No. 03-60958, 2/21/05, at 5.

A divided Commission ruled that the violations of the respirator and training standards could not be cited on a per-employee basis because it felt the regulations plainly imposed a duty on employers to have a single training program and to provide respirators to employees as a group.<sup>17</sup>

The Commission increased all penalties for all of the confined citations to their maximum and fined Ho \$658,000.<sup>18</sup> A Fifth Circuit panel upheld the Commission decision 2–1.<sup>19</sup> Eric Ho was sentenced on August 27, 2003 to 21 months in prison, three years of supervised release, and fined \$20,000 for criminal violations of the Clean Air Act for the activities that resulted in the OSHA citations.<sup>20</sup> It is a measure of the limitations of enforcement of the Occupational Safety and Health Act compared to other laws, weaknesses that H.R. 742 would significantly exacerbate, that there was no criminal prosecution of Mr. Ho for directly threatening the health of his workers. Instead, he was only criminally prosecuted for indirectly threatening the health of the public.

The Secretary's contention that Eric Ho should have been cited for violating the respirator and training standards on a per employee basis was eminently justifiable. Indeed, by the Commission's reasoning, an employer who provides a faulty respirator to 11 employees will be liable for 11 citations while an employer who ignores its duty altogether and does not provide a respirator to any employee is liable for only a single citation. Nor can the Secretary be faulted for pursuing the issue through the appellate court. Therefore, it seems especially unfair that the Secretary and taxpayers should be punished for such actions. But that is exactly the effect of H.R. 742.

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<sup>17</sup> Id. at 6. The Commission affirmed that Ho's violation of the respirator and training standards were willful. A divided Commission ruled that such violations may only be cited on a per-incident rather than a per-employee basis, thus vacating all but two of the respirator and training citations. The Commission concluded that the Administrative Law Judge's (ALJ) finding that the corporate Ho respondents were liable and affirmed the ALJ's finding that the general duty violation committed by Ho was not willful.

<sup>18</sup> Yin Wilczek, "Fifth Circuit Affirms OSHRC in Split Decision Regarding Houston Man's Asbestos Violations," *Daily Labor Report* No. 35 (Feb. 23, 2005): A8.

<sup>19</sup> *Chao v. OSHRC* [Ho].

<sup>20</sup> Ohio Department of Health, *Asbestos Program Update*, Vol. 4, Issue 2, Winter 2003 ([http://www.odh.state.oh.us/ODHPrograms/Asbes1/asb\\_newsltr/winter03.pdf](http://www.odh.state.oh.us/ODHPrograms/Asbes1/asb_newsltr/winter03.pdf)).

Had H.R. 742 been enacted, despite the fact that the position of the Secretary was eminently justifiable while the conduct of Eric Ho was criminal, United States taxpayers would be required to pay Eric Ho's legal fees. H.R. 742 effectively rewards criminal activity on the basis of technicalities.

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