

Legislative Bulletin.....July 30, 2010

Contents:

H.R. 5851 – Offshore Oil and Gas Worker Whistleblower Protection Act of 2010

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Order of Business: The bill may be considered on Friday, July 30, 2010 under a likely closed rule.

Summary: H.R. 5851 would create whistleblower protections for workers in the offshore oil and gas industry, and others that engage in work *related to* offshore oil work.

Definitions. A “**covered employee**” (referred to as an “employee” in the summary below) includes an individual performing services *on behalf of* an employer that is engaged in activities on or in waters above the Outer Continental Shelf *related to* “supporting, or carrying out exploration, development, production, processing, or transportation or oil or gas; or oil spill cleanup, emergency response, environmental surveillance, protection, or restoration, or other oil spill activities *related to* occupational safety and health; and includes an applicant for such employment.” (Emphasis added.)

An “**employer**” is defined as “individuals, partnerships, associations, corporations, trusts, unincorporated organizations, nongovernmental organizations, or trustees, and includes an agent, contractor, subcontractor, grantee or consultant of such employer.”

***Note: See conservative concerns below regarding the definitions of terms.**

Protections. The section states that no employer may discriminate against an employee if he or she:

- Provides information to the employer or a federal or state government official relating to any violation of any provision of the Outer Continental Shelf (OCS) Lands Act, any order, rule, regulations, standard, or prohibition under that Act;
- Testifies in a proceeding concerning such violation;
- Assists or participates in such a proceeding;
- Testifies before Congress on any matter covered by the Act;

- Reports an illness, injury, or unsafe condition related to the employer’s activities to the employer or state or federal government officials;
- Refuses to perform the duties if the employee had a *good faith belief* (see definition below) that performing such duties could result in injury to or impairment of the health of the employee or other employees or cause an oil spill;
- Objects to any activity that the employee reasonably believed to be in violation of any provision of the OCS Lands Act.

Per the bill, “**Good Faith Belief**” is when an employee believes that performing such duties would pose a health and safety hazard if a “reasonable person” (**not defined**) under circumstances would conclude there is such a hazard.

Process.

- An employee who believes he or she has been fired or discriminated against because of the above reasons may, no later than 180 days after the violation occurs, file a complaint with the Secretary of Labor alleging the discharge or discrimination and identifying the employer/s responsible. The Secretary must then notify the employers of the complaint.
- No later than 90 days after the complaint is filed, the Secretary shall begin an investigation. The employer has the opportunity to submit a written response to the complaint and to meet with a “representative of the Secretary.”
- No later than 30 days after the date of notification that the Secretary has found the complaint valid, the employer may file objections and request a hearing before an administrative law judge of the Department of Labor.
- The Secretary shall dismiss a complaint unless the complainant makes a prima facie showing that any of the reasons described in the *Protections* section above were factors in the complaint.
- The complainant must prove to the Secretary that the violation was a contributing factor in the “adverse action alleged by the complainant.”
- No investigation will occur if the employer demonstrates, by clear and convincing evidence, that the action would have taken place (e.g. the firing) regardless of whether or not the employee engaged in the behavior described above (in the *Protections* section).

Hearings. No later than 90 days after the receipt of a request for a hearing, the administrative law judge shall issue findings and order the relief or deny the complaint. There is also an option for a settlement with the Secretary, the complainant, and the employer.

Results of Hearing. If the judge determines that a violation has occurred, he/she shall order the employer who committed the violation to:

- Take action to end the violation;
- Reinstate the employee with compensation (including back pay and prejudgment interest); and

- Provide compensatory and consequential damages, and, as appropriate, exemplary damages to the employee.

Attorneys Fees. If the judge determines a violation has occurred, the Secretary, at the request of the complainant, shall assess against the employer a sum equal to all costs and expenses reasonably incurred by the complainant in connection with the complaint.

Bad Faith Claims. Frivolous claims will result in awarding \$1,000 from the complainant to the employer.

Administrative Appeal. No later than 30 days after the receipt of findings of fact, the employer may file an appeal with the Secretary, or the complainant may file an appeal, with objections. The Secretary has 90 days after receipt of an appeal to affirm or reverse the decision in whole or in part.

Action in Court. If the Secretary has not issued a final decision within 300 days after the filing of the complaint, the complainant may bring an action for review in a U.S. district court. (*See conservative concern below*). The Court shall be able to grant injunctive relief, compensatory and consequential damages including:

- Reinstatement with the same status that the employee would have had;
- Back pay;
- Exemplary damages; and
- Reasonable attorney fees.

Any person adversely affected by the final order may file a review in the U.S. Court of Appeals (*See conservative concern below*). If an employer fails to comply with an order, the Secretary may file a civil action in the U.S. district court where the violation was found to occur.

Disclaimers. Nothing in this bill preempts or diminishes any other safeguards against discrimination, discharge, harassment, etc. already provided by federal or state law. Nothing shall be construed to diminish the rights of employees under federal or state law or under any collective bargaining agreement.

Notice Posting. All employers must post a notice in a conspicuous location that explains employee rights and remedies.

Additional Background: On April 20, 2010, eleven oil rig workers were killed during the calamity on the Transocean's Deepwater Horizon rig. The destruction of this rig is what led to the current Gulf oil spill crisis. Subsequent reports suggested that these workers had concerns about the rig but were too afraid to voice them to their superiors.

In 1979, OSHA delegated oversight authority of oil rigs to the Coast Guard and Minerals Management Service (MMS). No whistleblower protections, however, were established.

As a result, there are currently no *clear* statutory whistleblower protections for offshore oil workers.

Potential Conservative Concerns:

- ***Overly Expansive Protections.*** A “covered employee” includes an individual performing services *on behalf of* an employer that is engaged in activities on or in waters above the Outer Continental Shelf. (See the definitions section above for more of a description.) This creates overly expansive coverage of individuals who may have never set foot on an offshore oil rig.
- ***New Federal Right-to-Sue.*** Any person adversely affected by the Secretary of Labor’s final order may file a review in the U.S. Court of Appeals. This is unprecedented and does not exist in current OSH Act safety and health cases.
- ***Creates a New, Untested Whistleblower Protection.*** The bill creates a new framework under which whistleblowers will be protected without an explicit description of who will enforce the program.
- ***Encourages Resolution in Court.*** The bill discourages resolution outside of court by creating a 300 day window in which the Department of Labor must issue a final decision on a complaint. Should DoL not issue a final decision within that window, the complaint will be sent to the appropriate U.S. district court. This is unprecedented and discourages DoL from acting efficiently – knowing the issue could be resolved in court. This will inevitably add costs, delay results for aggrieved workers, and feed into the hands of trial lawyers.
- ***Insignificant Recoup Fees for Frivolous Claims.*** Frivolous claims result in awarding \$1,000 from the complainant to the employer, which is a drop in the bucket compared to the cost that could be associated with the claim, of which there could be many. In fact, according to the [Center for Public Integrity](#), since Sarbanes-Oxley was passed in 2002, the DoL has “upheld 25 whistleblower claims under the law — and tossed out 1,066 claims, according to figures available through June 30.” That equates to a 2% rate of success.
- ***Process.*** Many conservatives may be concerned that there were no hearings in the Education and Labor Committee on this specific issue. Furthermore, there was no markup so members did not have the opportunity to offer amendments.

Committee Action: The bill was introduced on July 26, 2010 and referred to the House Committee on Education and Labor. No further public action was taken.

Administration Position: The Administration strongly supports House passage of H.R. 5851, the “Offshore Oil and Gas Worker Whistleblower Protection Act of 2010.” See the Statement of Administration Policy [here](#).

Cost to Taxpayers: No CBO score is available.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. The bill creates a new whistleblower program for workers on the Outer Continental Shelf.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: A committee reporting citing compliance with the rules regarding earmarks, limited tax benefits, or limited tariff benefits is not available.

Constitutional Authority: A committee report citing constitutional authority is unavailable.

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