



Statement of the U.S. Chamber of Commerce

ON: PROTECTING AMERICA'S WORKERS ACT: EXPANDING
VICTIM'S RIGHTS

TO: THE HOUSE SUBCOMMITTEE ON WORKFORCE
PROTECTIONS OF THE COMMITTEE ON EDUCATION AND
LABOR

BY: DENNIS J. MORIKAWA

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The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 105 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

**STATEMENT OF DENNIS J. MORIKAWA
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**HEARING ON PROTECTING AMERICA'S WORKERS ACT:
EXPANDING VICTIM'S RIGHTS**

April 28, 2010

Good morning, Chairwoman Woolsey, Ranking Member McMorris Rodgers and members of the Subcommittee. My name is Dennis J. Morikawa and I am a Partner with the Philadelphia office of Morgan, Lewis & Bockius LLP. I appreciate the opportunity to appear before you at this hearing to address the victim's rights provisions in Section 306 of the latest draft of the Protecting America's Workers Act legislation (HR 2067; S 1580). My testimony will largely focus on these provisions but I would be happy to answer questions on any of the important issues raised by this proposed legislation.

I am testifying today on behalf of the U.S. Chamber of Commerce, the world's largest business federation with over three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. Critical to the issues that I will be discussing this morning, approximately 96% of the Chamber's members are small businesses employing 100 or fewer employees. I have been a participant in activities of the Chamber's Labor Relations Committee and have appeared before and participated in meetings of the OSHA Subcommittee. My testimony and comments are not intended to represent the views of Morgan, Lewis & Bockius LLP or any of our clients.

BACKGROUND AND EXPERIENCE IN OCCUPATIONAL SAFETY AND HEALTH LAW

I have been with Morgan, Lewis & Bockius LLP since 1974. In the 36 years that I have practiced law, I have devoted a significant part of my practice to labor and employment matters, specifically focused on workplace safety and health, including matters arising under the Occupational Safety and Health Act ("OSH Act") and OSHA state plans. I am past Management Co-Chair of the American Bar Association Committee on Occupational Safety and Health Law and have participated in numerous panels and symposiums on OSHA Law with representatives from OSHA, the Occupational Safety and Health Review Commission, leading trade associations and labor unions as well as leading practitioners in this field.

Morgan Lewis's OSHA Practice Group, which I lead, has a combined total of more than 100 years of experience and includes among others, the former Acting Assistant Secretary of Labor and Deputy Assistant Secretary for OSHA, Jonathan L. Snare, as well as the past Solicitor of Labor, Howard M. Radzely. Throughout my years of practice, I have represented numerous

clients in a wide variety of industries, such as oil refineries, construction, manufacturing, electrical utilities, retail, shipping, shipbuilding, meat packing and poultry processing, supermarkets, healthcare, chemical manufacturing, steelmaking and auto making.

Over the course of my career, I have represented clients in every conceivable type of OSHA-related activity including rulemaking, advice and counseling, strategic planning and handling OSHA inspections and citations. On the enforcement side of my practice, I have participated in all stages of the contested case process before the Occupational Safety and Health Review Commission (“Commission” or “OSHRC”), as well as with OSHA’s state plan partners, from the initial contest decision, through discovery and trial, as well as appeals, and including numerous settlement negotiations and mediations. On the compliance side of my practice, I have assisted clients in developing methods and strategies to comply with all applicable OSHA workplace safety and health rules and requirements.

In fact, the area of my OSHA practice in which I have been involved that has given me the greatest sense of achievement has been my work with OSHA compliance and cooperative programs and, in particular, the Electrical Contractors Transmission and Distribution (“ET&D”) Strategic Partnership for Safety, a coalition of six of the largest union and non-union electrical transmission construction contractors in the United States representing over 70% of the employees in that industry. In August of 2004, these contractors, along with OSHA, the International Brotherhood of Electrical Workers (IBEW), the National Electrical Contractors Association (NECA) and the Edison Electric Institute (EEI) created the ET&D Strategic Partnership whose principal purpose was to change the safety culture of their industry in order to reduce injuries and fatalities involving industry workers.

In the six years since the ET&D Partnership was created, there have been dramatic reductions in injuries and fatalities with fatality rates of the Partners being reduced by almost 80% and the Lost Workday Injury Rates of Partners reduced to a remarkable .89 (less than one injury per 100 workers) in an industry which has long been regarded by OSHA as a “high hazard industry.” In our view, the ET&D Partnership represents a prototype 21st century model for effective management of workplace safety and health which places the greatest emphasis on the prevention of injuries and fatalities rather than focusing only on OSHA violations. In my view and based on my experience during my 36 years of legal practice, the vast majority of employers do take safety seriously and many employers have made extraordinary efforts to bring about positive changes in their industries as evidenced by the ET&D Partnership.

COMMENTS ON THE PROTECTING AMERICA’S WORKERS ACT VICTIM’S RIGHTS PROVISIONS

At the outset, let me be clear that the brief comments I am offering this morning are not intended to focus on the broad issues set forth in the PAWA discussion draft, but are limited to the issue of Victim’s Rights as set forth in draft Section 306. As you may be aware, on

March 16, 2010, my Partner, Jonathan Snare, testified with respect to the broad scope of PAWA and its subparts and I do not intend to reiterate the points that he made at that time. Rather, I have been asked today to speak to the issue of what rights should be accorded to a victim or the representative of a victim, either in matters before OSHA or in contested matters pending before the Commission.

While we have some questions, we understand the discussion draft as saying that an employee who has sustained a work-related injury, or a family member on behalf of that employee (because the employee dies on the job or is physically incapacitated and unable to exercise his or her rights under this Section), would be able to meet with the Secretary regarding the inspection or investigation prior to the time that the Secretary has made a decision to issue a citation or to take no action. Thereafter, the victim or his/her representative is entitled to receive copies of any citation or reports issued as a result of the inspection or investigation, to be informed of any Notice of Contest or addition of parties to the proceedings and finally to be provided notification of the date and time of any proceedings, service of pleadings or other relevant documents, as well as to be informed of his/her rights in a proceeding under Section 10(c).

With respect to matters pending before the Commission, it is our understanding that the victim or representative of the victim will, in addition to being notified of the time and dates of any proceedings before the Commission, receive pleadings and any decisions related to the proceedings and will be provided an opportunity to appear and make a statement in accordance with the rules prescribed by the Commission. In addition to the above, Section (c) "Modification of Citation" provides that, before entering into any agreement to withdraw or modify a citation, the Secretary must notify the victim or the victim's representative and provide such person the opportunity to appear and make a statement before the parties conducting settlement negotiations.

The provisions of Section 306 basically codify provisions of OSHA's Field Operations Manual ("FOM") which provides in Chapter 11-12(G) that OSHA must contact the family members of employees who have been involved in fatal or catastrophic occupational accidents or illnesses and provide them with information regarding OSHA's activities with respect to any inspection and citation which may result from the fatal or catastrophic occupational accident or illness. Indeed, Chapter 11-12(G)(4) of the FOM provides that contact persons on behalf of the family should be kept up-to-date on the status of the investigation and OSHA will provide family members or their representatives with a copy of all citations, subsequent settlement agreements or Commission decisions that are issued as a result of the investigations and citations. In compliance with the Freedom of Information Act ("FOIA"), case files and other confidential investigative information assembled by OSHA as part of its investigation and citation are not made available to the family or their representatives until after the litigation has been completed.

As evidenced by the FOM provisions, OSHA has for many years provided to victims or the families of victims' information that is very similar to that which is provided for in

Section 306. However, as set forth in the FOM, the procedures for notifying family members with respect to the status of investigations have never required face-to-face meetings with OSHA to discuss possible citations or settlements or opportunities to appear and make statements to the parties prior to any settlement of the citations. Nor have the Commission's rules included the rights of victims to appear at proceedings before the Commission. To that end, we fully concur with the comments of Assistant Secretary of Labor for OSHA, Dr. David Michaels, at this Subcommittee's March 16, 2010 hearing on PAWA, that further clarification needs to be made because provisions for face-to-face meetings and the making of public statements could present logistical challenges which could delay resolution of the citations and, in Dr. Michaels' words, "hurt the victim in the long run." (Michaels Statement at p. 14)

Another issue which needs further clarification is what is intended by the use of the term "representative of the victim." (Section 306, of the discussion draft adding Section 9A(a) to the OSH Act.) The term "victim" is defined in Section 9A(f) to include a "family member" "if" (and thus only if) the victim is deceased or incapacitated and thus cannot appear. The term "representative" is not defined and could be read to include yet another person in the proceedings. Because the structure of Section 9A(f) provides that a representative in the form of a family member may only appear when the victim is deceased or incapacitated, the term "representative of the victim" should be clarified to include only family members. Any broader reading of the term "representative" would fundamentally change the impact of the provision.

For example, a "representative of the victim" could be interpreted to include a private attorney who is involved in third-party litigation related to the matter. The involvement of an attorney could create the potential for further delays as envisioned by Dr. Michaels in his March 16, 2010 testimony (Michaels Statement at p. 14) and exacerbate the settlement process. Further, involving a private attorney in settlement meetings at any level could have a "chilling effect" on those settlement meetings by discouraging the parties from engaging in the candid discussions which are necessary in order to accomplish the settlement of OSHA cases. Because OSHA is committed in the first instance to enforcing OSHA laws and standards *on behalf of employees*, it stands to reason that OSHA must have the prosecutorial discretion with respect to its investigation to determine what actions it needs to take to enforce OSHA standards, consistent with its resources and priorities, without interference and/or delays related to meetings with outside parties. (Michaels Statement at p. 14) In our view, providing information directly to victims or the victims' families is fully consistent with past practice as set forth in the FOM and has been proven to be a manageable and non-disruptive method for involving victims or victims' families in the OSHA enforcement process.

This discussion of representation at settlement meetings raises another issue in the draft version of PAWA requiring clarification. In my many years of experience I have found that settlements, particularly in the types of complex cases that arise following a fatality, require several meetings to reach settlement. Often the first meeting is an Informal Conference with OSHA. Thereafter, for any contested case before the Commission with penalties over \$100,000, such case is assigned to Mandatory Settlement Proceedings including a meeting with an assigned Settlement Judge. Section 9A(c) of the discussion draft provides in the singular that a victim

may make “a statement.” However, the discussion draft version of PAWA does not address when that statement will be made except that the opportunity must be provided prior to entering into an actual agreement. Thus that version of PAWA is unclear on whether the victim must be provided an opportunity to appear at a particular proceeding or, when there are multiple meetings, whether the victim must be provided the opportunity to appear at multiple proceedings. Consistent with the structure of the discussion draft version of PAWA, the opportunity to appear at a single meeting to make a statement would be consistent with the goals of the legislation and would not be disruptive. On the other hand, requiring that victims, or their representatives, be included in all settlement proceedings would create scheduling difficulties and likely delay proceedings.

By these comments we do not mean to diminish in any way the tragedy of employee injuries and fatalities which have occurred, particularly those in recent weeks. Our thoughts and prayers are with the victims and their families. We are fully supportive of the right of victims or their families to be kept fully informed as to OSHA’s inspections, citations and subsequent enforcement actions with respect to any accident or other catastrophe that may have caused serious injuries or death to these employees. However, we are also mindful of the need for OSHA to have the ability to make reasoned and independent prosecutorial decisions with respect to the nature and manner of their investigations and whether, and to what extent, citations should be issued with respect to these investigations. Similarly, decisions related to settlements or litigation of matters must continue to be within the exclusive province of those entities which are statutorily mandated to enforce the Occupational Safety and Health Act and to act as the “representative” of the employee in terms of assuring that employees are provided with a safe and healthy workplace.

CONCLUSION

Accordingly, for all of the reasons I have outlined above, I believe further clarification of the rights, duties and responsibilities of the entities covered under discussion draft Section 306, which purports to address Victim’s Rights, is necessary to truly advance the interests of safety and health in the workplace. Indeed, as I previously mentioned, we all agree that employees who are injured on the job and families who have lost a loved one due to workplace accidents should be an important part of this process, and we all deeply sympathize with all such employees and their families. In fact the most important goal of any OSHA legislation that this Subcommittee considers, including the Section 306 that we have discussed here today, is whether it will result in the prevention of workplace injuries and fatalities. Preventing injuries and fatalities would reduce the number of injured employees, as well as families of employees who lost their lives, who need to rely upon the victim’s rights provisions in Section 306 of PAWA. This should be our ultimate objective.

Thank you for providing this opportunity for me to discuss these important issues with you today, and I would be happy to answer any questions that you may have.