ROBERT C. BYRD MINER SAFETY AND HEALTH ACT OF 2010

Sec. 1-- Short Title, Table of Contents. The Act may be cited as the "Robert C. Byrd Miner Safety and Health Act of 2010."

Sec. 2—References. Except in Title VII or otherwise expressly provided, an amendment will be considered made to the Federal Mine Safety and Health Act of 1977.

Title I – Additional Inspection and Investigation Authority

Sec. 101. – Independent Accident Investigations. Requires independent investigations of any mine accident involving 3 or more deaths, or for other severe accidents as designated by the HHS Secretary. The HHS Secretary appoints a 5-member Panel which is chaired by a representative from National Institute for Occupational Safety and Health's (NIOSH) Office of Mine Safety Research. The Panel must include members with expertise in accident investigations, mine engineering, or mine safety and health; and include one individual who represents mine operators and one representative of a labor organization that represents miners. The Panel is charged with investigating and preparing a report on the causes and contributing factors of the accident, including acts or omissions by MSHA itself. The report must identify the strengths and weaknesses in MSHA's accident investigation, and include recommendations to prevent recurrence. Within 90 days of enactment, the Secretary of HHS must establish procedures to ensure the consistency and effectiveness of these investigations, and enter into a Memorandum of Understanding with the Secretary of Labor to facilitate coordination and provide access for Panel members to MSHA's investigative activities, interviews and information. The Committee urges that this Memorandum be made public.

Sec. 102. – Subpoena Authority and Miner Rights During Inspections and Investigations. Provides MSHA the authority to subpoena documents and testimony in carrying out inspections and investigations. MSHA lacks authority to subpoena witnesses or documents, except when it is conducting an accident investigation through a public hearing. Clarifies that MSHA (or a DOL attorney) can interview mine employees and other individuals with relevant information privately without the presence, involvement, or knowledge of the operator, his agent, or attorney, provided that an individual may bring his own attorney to any interview.

Voluntary safety and health self-audits are conducted by some mine operators to identify violations or hazards and establish corrective actions plans. Effective July 28, 2000, the Occupational Safety and Health Administration issued a policy which provides that the agency will not routinely request self-audit reports at the initiation of an inspection, and the Agency will not use self audit reports as a means of identifying hazards upon which to focus during an investigation. In addition, where a voluntary self audit identifies a hazardous condition and the employer has corrected the violative condition prior to the initiation of any inspection and taken steps to prevent the recurrence of the condition, the Agency will refrain from issuing a citation. To encourage voluntary self audits and prompt corrective actions, the Secretary is urged to develop a similar policy with regards to the Mine Act.

Sec. 103. – Designation of Miner Representative. Provides that, if a miner is trapped in a mine or is otherwise prevented as a result of an accident to designate a representative, this Act authorizes the closest relative of the miner to designate such a representative (current law says only a miner can designate a representative). Authorizes a representative of miners to participate in accident investigations, including interviews, unless the Secretary in consultation with the Attorney General excludes such representatives from the investigation on the grounds that inclusion would interfere with or adversely impact a criminal investigation that is pending or under consideration.

Sec. 104. – Additional Amendments Relating to Inspections and Investigations. Clarifies that inspections are to be conducted by MSHA inspectors during all shifts and days of the week when miners are present.

Directs the Secretary of Labor to review the Secretary's most recent evaluation for a mine's pattern status with appropriate mine officials during a regular inspection, if so requested.

Requires that operators and contractors report occupational injuries, illnesses, deaths, and man-hours worked for miners in their employ or under their direction or authority for each mine, and requires that these reports or logs submitted to MSHA shall be signed and certified as accurate and complete by a knowledgeable and responsible person possessing a certification or other approval issued by MSHA or a state agency that issues miner certifications. Knowingly falsifying such records or reports shall be grounds for revoking such certification under standards established by MSHA for certifications issued by states or MSHA. In establishing mandatory certification standards for MSHA or the states under Section 118(b)(1), the section requires that one basis for revocation include knowing falsification of accident, injury, illness and man-hours reports required by the Secretary under Section 103 of the Mine Act.

Following an accident, authorizes MSHA to issue "control orders" under Section 103(k) of the Mine Act without having to be physically present. Current law requires MSHA to be physically present to issue such orders.

An operator's attorney is prohibited from representing both the operator and any other individual, including a miner, in an accident investigation unless there is a voluntary and knowing waiver of all foreseeable conflicts of interest by the individual. Authorizes the Secretary to petition a federal district court to disqualify such attorney as counsel to an individual, if the Secretary finds that such individual cannot be adequately represented due to conflicts of interest.

Title II – Enhanced Enforcement Authority

Sec. 201. – Technical amendment. Clarifies that the Secretary may cite an employer not only for violations of mandatory health and safety standards under Section 104(d), but also for any violations of the Mine Act, or regulations promulgated under the Mine Act.

Sec. 202. – Pattern of Recurring Noncompliance or Accidents. Mines with significantly poor compliance with health and safety standards that result in unsafe or unhealthy conditions shall be placed in "pattern status," if the mine has a pattern of:

1) citations for S&S violations;
2) citations and withdrawal orders caused by an unwarrantable failure to comply with mandatory health and safety standards;
3) withdrawal orders for imminent danger or withdrawal orders under any other section of the Act;
4) citations for flagrant violations; and
5) accidents or injuries; or
6) any combination of these citations, orders, accidents and injuries.

In establishing regulations to trigger pattern status, MSHA must consider the frequency and rates of citations, and the rates of reportable accidents and injuries within the preceding 180-day period, and assign weights to citations, orders, illnesses or injuries or other factors. In addition, MSHA may consider other factors, such as mine type, production levels, number of miners, hours worked, number of mechanized mining units, and the designation of representatives of miners at the mine, and the mine's history of noncompliance or rates of reportable incidents and injuries. Excluded from the orders counted towards pattern status are the so-called "control orders" under Section 103(j) or 103(k) of the Act, which MSHA issues after accidents to protect miners' lives and facilitate rescue and recovery.

Citations are the basis for placing a mine in pattern status—not final orders. MSHA is required to issue a final interim regulation that defines the threshold criteria that triggers pattern status and the performance benchmarks 120 days after enactment. A final rule is required 2 years after the date of enactment.

Not less than once every six months, MSHA must identify mines which meet the criteria to trigger pattern status.

MSHA has the discretion not to place an otherwise qualifying mine in pattern status if it certifies that there are mitigating circumstances wherein the operator has already implemented remedial measures which has eliminated any elevated risk to the safety and health of miners, and has taken sufficient measures to ensure that elevated risk will not recur. To provide transparency, MSHA must publish the written finding that there are mitigating circumstances that would preclude placing the mine on pattern status within 10 days on the web site for MSHA and provide copies to the House Education and Labor Committee and Senate HELP Committee.

Once a mine is placed in pattern status, MSHA is required to:

1) Notify the mine operator that it must withdraw all miners from the mine; and
2) Issue a remediation order tailored to conditions at the particular mine within 3 days.

The remediation order may require additional training, an effective health and safety management program, the employment of safety professionals, certified persons or adequate number of personnel to implement the remediation plan, increased reporting, and a timetable for completion. MSHA is authorized to communicate with miners (outside the presence of operators) about conditions in the mine, and also to advise them of their rights under the Act. MSHA may reinstate a withdrawal order if an operator fails to comply with the remediation order while in pattern status. MSHA can modify the remediation order or extend deadlines, but only on a showing by the operator that the operator took all measures to comply with the order and only if it was prevented from doing so by factors outside its control.

The mine-wide withdrawal order is lifted when the Secretary verifies that all violations or conditions have been or are being fully corrected as outlined in the remediation order (or if other plans or orders have unfulfilled requirements) and the operator has completed specific requirements in the remedial order that are prerequisites for reopening the mine.

Once in pattern status, the mine is on probation for at least 1 year, during which the mine is subject to double the number of regular inspections: For underground mines that means 8 regular inspections per year instead of 4. MSHA will assess and collect fees from each mine in pattern status for the cost of these additional inspections. MSHA will issue a fee schedule through a rule within 120 days of enactment.

Once a mine is on pattern status, MSHA will review a mine's performance every 90 days to determine whether it has met "performance benchmarks." Within 90 days, a mine must improve to the point that it has during the previous 90 day period:

- Reduced the rate of citations for S&S violations by 70% (provided that the rate is not greater than the mean for mines of similar size and type), or
- the mine has reduced its rate of S&S violations so that it is in the top performing 35th percentile for all mines of similar size and type.
- Reduced the rate of accidents and injuries so that it is in the top performing 35th percentile for mines of similar size and type, and
- Has been issued no withdrawal orders, imminent danger orders, or citations for flagrant violations during this period.

If a mine fails to meet these benchmarks within any 90 day period, the Secretary may issue another withdrawal order to remedy conditions that led to pattern status, and may modify the remediation order. Section 301(b) provides that, if after 180 days on pattern status, the mine fails to meet these benchmarks, penalties for violations shall be doubled.

A mine can be removed from pattern status if, for a 1-year period:

- The mine reduced the rate of citations for S&S violations by 80% (provided that the rate is not greater than the mean for mines of similar size and type), or
- reduced its rate of S&S violations so that it is in the top performing 25th percentile for all mines of similar size and type.

- The mine's rate of accidents and injuries are in the top performing 25th percentile for all mines of similar size and type, and
- The mine has been issued no withdrawal orders, imminent danger orders, or citations for flagrant violations during this period.

If a mine operator fails to meet these performance benchmarks, MSHA must extend the mine's placement in pattern status until the benchmarks are achieved for a 1 year period. If a withdrawal order was issued as a result of factors entirely beyond the operator's ability to prevent or control (such as seal leakage due to rapid change in barometric pressure), and no citation was issued in connection with such withdrawal order, such withdrawal order shall not be counted as a disqualifying factor for purposes of removing an operator from pattern status.

Mine operators can obtain an expedited review by the Federal Mine Safety and Health Review Commission (Review Commission). MSHA must establish and maintain a publically available, easily searchable electronic database with the information the Secretary uses to establish pattern status and make publically available mines placed in pattern status within 7 days of such placement, and provide guidance to assist operators and the public in assessing each mine's performance relative to criteria set forth in regulations.

Sec. 203. Injunctive Authority. — Provides the Secretary of Labor with the authority to seek an injunction to close a mine for a "course of conduct" which, in the judgment of the Secretary, constitutes a continuing hazard to the health and safety of miners, including violations of the law or health and safety standards or regulations. Course of conduct means a pattern of conduct composed of 2 or more acts.

Sec. 204. Revocation of Approval of Plans.— Authorizes the Secretary to revoke a plan which is based upon inaccurate information or that circumstances have materially changed from the time that the plan was approved and continued operation under such plan constitutes a hazard to miners. The Secretary is authorized to issue a withdrawal order upon such revocation, until the operator has submitted and the Secretary has approved a new plan.

Sec. 205. Challenging a Decision to Approve, Modify, or Revoke a Coal or other Mine Plan. — Codifies an "arbitrary and capricious" standard of review for the Review Commission or courts to decide appeals regarding the Secretary's decision to approve, modify, or revoke a mine plan.

Sec. 206. GAO Study on Mine Plan Approval. – Directs the Government Accountability Office to assess factors that contribute to delays in MSHA's approval of required plans for underground coal mines, and to make recommendations for improving timeliness of plan review and for achieving prompt decisions.

Title III – Penalties

Sec. 301. Civil Penalties. — Operators in pattern status will be assessed double penalties for any violations, if the mine fails to improve enough to meet performance benchmarks after 180 days in pattern status. Fines may not exceed the maximum statutory penalty.

Operators who violate the anti retaliation provisions in Section 105(c) the Mine Act shall be assessed a civil penalty of between $10,000 and $100,000 for the first violation, and between $20,000 and $200,000 for repeat offenses within a 3-year period. This penalty is in addition to remedies afforded to miners or employees under Section 105(c).

Sec. 302. Civil and Criminal Liability of Officers, Directors and Agents. — Clarifies that Section 110(c) the Mine Act extends the civil and criminal liability of directors, officers, or agents to all types of operators regardless of the legal form of business organization. To eliminate ambiguity, the legislation replaces the term "corporate operator" with the term "operator" to ensure that all types of operators are covered without regard to form of their business organization. This change will eliminate any question that limited liability corporations, partnerships and other forms of business organization are covered operators. Actions covered in this section are expanded to cover any officer or director who knowingly authorizes or carries out a policy or practice that resulted in a violation of a standard or failure or refusal to comply with an order.

Sec. 303. Criminal Penalties.-- For violations of mandatory health and safety standards, the intent standard for criminal conduct in Section 110(d) of the Mine Act is changed from a "willful" to a "knowing" violation. "Knowing" remains the criminal standard for an operator who violates, fails to or refuses to comply with an order.

The Mine Act's current criminal misdemeanor is retained for an operator who knowingly violates a mandatory health and safety standard, or violates or fails or refuses to comply with any order. Unchanged is the current fine of not more than $250,000 for the first instance, or 1 year in prison, or both. For a subsequent knowing violation of the same mandatory health and safety standard or order, the fine for a conviction is increased from $500,000 to $1,000,000, and but the legislation retains the existing felony provisions of up to 5 years imprisonment, or both.

New felony provisions are established for instances where the operator knowingly violates a mandatory health and safety standard or violates, or fails or refuses to comply with an order, and knowingly exposed miners to a significant risk of serious injury or illness or death. In the first instance, such violation is punishable. For a subsequent conviction of the same violation, punishment shall be by a fine of not more than $2,000,000, or by imprisonment for not more than 10 years, or both. An additional category of felony is added if an operator knowingly tampers with or disables a required safety device which exposes miners to a significant risk of serious injury or illness or death, punishment shall be by a fine of not more than $2,000,000, or by imprisonment for not more than 10 years, or both.

Retaliation.— Authorizes criminal penalties against any person who engages in retaliation that is directly or indirectly harmful to any person, including action that interferes with lawful employment or livelihood of any person, because that person has provided any information related to a violation of mine safety and health violations or an unhealthful or unsafe condition, policy or practice under the Mine Act to MSHA, a federal law enforcement officer or a state mine safety agency. The penalties include a fine of up to $250,000 for an individual and up to 10 years imprisonment, or both, and up to $500,000 for an organization.

Advance notice of Inspection.—Authorizes criminal penalties for any person who knowingly gives, causes to give, or attempts to give or cause to give, advance notice of any inspection with the intent to impede, interfere with, or adversely affect the results of any inspection. Penalties are increased from a misdemeanor to a felony with 5 years/maximum or $250,000 for an individual, and $500,000 for an organization. Requires operators to post a notice, in a form and manner to be prescribed by the Secretary, stating that such advance notice is unlawful and sets forth maximum penalties for a violation.

Sec. 304. – Commission Review of Penalty Assessments. Requires the Review Commission to assess penalties using the same methodology used by MSHA to calculate proposed fines, however, the Review Commission can use the statutory penalty criteria when there are extraordinary circumstances, or the type of penalty is not based on an MSHA regulation in place (currently regulations do not specify a methodology for special assessment). Currently, MSHA uses a formal system of points to calculate penalty amounts based on statutory factors. Currently, Review Commission and its administrative law judges can apply their own discretion using statutory criteria under Section 110(i) of the Mine Act, but are not bound to use MSHA's penalty formula.

Sec. 305. Delinquent Payments and Prejudgment Interest.-- Provides for prejudgment interest on contested fines and penalties based on IRS interest rates. Operators who fail to pay finally-adjudicated penalties within 180 days face a withdrawal order until they pay their overdue fines or make timely payments on a payment plan.

Title IV – Worker Rights and Protections

Sec. 401. – Protection from Retaliation. If the nation's mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. If miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. This provision strengthens anti retaliation provisions in Section 105(c) of the Mine Act by prohibiting any person from discharging or taking adverse action against a miner, other employee, or applicant for employment because that person has 1) complained about any unsafe condition in a mine; 2) instituted any proceeding related to this Act, or testified or is about to testify in any such proceeding, or exercised any right provided by this Act; 3) testified or is about to testify to Congress or any federal or state proceeding related to safety or health in a mine, or has reported an injury or illness to an operator or agent; 4) refused to violate any provision of this Act (including a mandatory health and safety standard, a regulation, an order or a plan); or 5) such

miner is the subject to a medical evaluation and potential transfer. In addition, a miner or other employee cannot be retaliated against for refusing to work if the employee has a "good-faith and reasonable belief" that performing his duties would pose a safety or health hazard to himself or any other miner or employer.[1]

This section extends the statute of limitations for filing a complaint from 60 to 180 days. Within 15 days of receipt of a complaint, the Secretary is required to begin an investigation and make a determination whether or not the complaint was frivolously brought. Under current law, if the Secretary finds the complaint was not frivolously brought, she shall, on an expedited basis, apply to the Review Commission or an order of immediate reinstatement of the miner. The Secretary must complete the investigation, and if she finds retaliation, must immediately file a complaint with the Review Commission along with a proposed order for permanent relief. If the Secretary finds that a violation has not occurred, the miner (or applicant) has the option of filing a complaint with the Review Commission. A complainant alleging discrimination has the burden of proving that protected activity was a "contributing factor" to the adverse action. The employer can overcome this by demonstrating by clear and convincing evidence that the employer would have taken the same adverse action in the absence of such conduct.

Under this section, the Review Commission's existing authority to order make whole remedies is expanded to provide for exemplary damages. This legislation does not alter Review Commission precedent in *Moses v Whitley Development Corporation,* 4 FMSHRC 1475 (1982) , that adverse action taken against a miner because of the mistaken suspicion or belief that the miner had engaged in protected activity nonetheless violates Section 1o5(c) of the Mine Act.

Sec. 402 -- Protection from Loss of Pay. Retains the existing provision of Section 111 of the Mine Act which provides payments to miners who are idled due to an MSHA withdrawal order for the balance of their shift and for 4 hours on the next working shift, including orders issued under Sections 103, 104, 107, 108, or 110 of the Mine Act. However, after the 2nd working shift, the operator shall pay miners their full pay who are idled for up to 60 days, provided that miners are idled due to an order issued under Sections 104, 107 (in connection with a citation), 108 or 110. Payments shall be made regardless of the result of any review of such order. This section authorizes payments to miners who are idled for up to 60 days when the operator closes the mine in anticipation of an MSHA withdrawal order, except in those circumstances when the operator promptly withdraws miners due to a hazard and notifies MSHA, if required, within the prescribed time period. This is intended to ensure that mine operators, who try to game the system by keeping miners exposed to a hazard until just before MSHA issues a withdrawal order will have to pay miners who are idled. However, if a mine operator promptly withdraws miners rather than continue to expose them to a hazard, and notifies MSHA where required, and MSHA subsequently issues an order, the mine operator will not be liable for the pay of idled miners. The section provides for an expedited proceeding and decision before the Review Commission using

[1] Good faith belief means honest belief that a hazard exists. The purpose of this requirement to remove the Act's protection work refusals involving fraud or other forms of deception [such as] lying about the existence of an alleged hazard, deliberately causing one or otherwise acting in bad faith. See: Secretary of Labor on behalf of Robinette v United Castle Coal Co. The belief must be based on what a "reasonable person" would conclude confronted with the same circumstances. The miner or other employee, when practicable, is required to communicate or attempt to communicate the concern to the operator and have not received a response that allays the concern.

the same time frames as are provided for the review of emergency response plans. If a miner or other employee is not paid, current law provides that he can file a complaint with the Review Commission which can order payment, and authorizes reasonable attorney fees and costs to a miner who prevails in whole or in part. Further, this section authorizes the Secretary to close a mine which fails to pay its miners by the next regular payroll period.

Sec. 403 Underground Coal Miner Employment Standard.-- For three years after an underground coal mine is placed on pattern status, hourly workers at an underground coal mine cannot be discharged except for "good cause," which is defined as "failure to satisfactorily perform job duties, including compliance with this Act… or other legitimate business reason," following an employee's probationary period not to exceed 6 months. A miner who is discharged without good cause has a private right of action to federal district court within 1 year. If the miner prevails, a court can take action to further the purposes of this Act, including ordering reinstatement with back pay and compensatory damage, and shall award reasonable attorney's fees and costs to a prevailing miner.

Title V – Modernizing Health and Safety Standards

Sec. 501. Pre-shift review of Mine Conditions.-- Requires implementation of a communication program to ensure that each miner is made aware of the current conditions of the mine at the start of his shift. This is accomplished by requiring oral communication between incoming and outgoing miners and shall include a description of both general conditions and any specific hazardous conditions or health and safety violations identified where the miner will be working or traveling. The intent of this section is for the content of these communications to be recorded in a log.

Sec. 502. Rock Dust Standards.-- Increases the percentage from 65% to 80% of the amount of rock dust that needs to be mixed with coal dust in all working areas of underground bituminous coal mines in order to prevent coal dust explosions. Currently 80% incombustible content is required in the return entries, but only 65% is required for intakes and neutral areas of the mine. This standard was based on research conducted in the 1920s. However, with the advent of modern mining machinery, coal dust is much finer today and this fine float dust presents a greater explosive risk. NIOSH has conducted experiments on coal dust from every region of the country and recommended that the law be changed to require 80% total incombustible content in all entries and returns and neutral areas.

This section also requires operators to take accurate samples of dust in active working areas of coal mines to ensure that dust is kept below explosive levels. Sampling will have to be done using direct reading monitors once the Secretary of Health and Human Services (HHS) HHS has certified that they are commercially available and MSHA has approved them as permissible for use in an underground mine. Currently, samples have to be sent to a lab and results can take 2 weeks.

Section 502 requires the Secretary of Labor and the Secretary of HHS to submit a report to the House and Senate labor committees within 2 years of enactment on whether direct reading

devices are sufficiently reliable and accurate to be used for enforcement of the rock dust standard. If the report determines that direct reading devices are sufficiently reliable and accurate, the Secretary must promulgate a final rule authorizing the use of direct reading devices for enforcement purposes. However, measurements taken by operators or MSHA using the direct reading devices cannot be used in enforcement actions under this Act, until after such final rule is promulgated.

Sec. 503 Atmospheric Monitoring Systems. -- Requires NIOSH to issue recommendations within 1 year about how atmospheric monitoring systems could be used in underground coal mines to improve safety. NIOSH is urged to consult with a technical working group, and work in partnership with operators, vendors, state mine safety agencies and labor on opportunities to install continuous atmospheric monitoring to detect methane, CO and air flow. Following such report, DOL is required to promulgate regulations within 1 year requiring operators to install such systems consistent with NIOSH's recommendations.

Sec. 504 Technology Related to Dust.--Requires DOL to promulgate regulations requiring operators to use environmental controls to give miners the maximum feasible protection from respirable dust, including coal and silica dust.

Sec. 505 Refresher Training on Miner Rights and Responsibilities.-- Requires operators to provide miners with 9 hours of training every 12 months, including one hour of training on their statutory rights and responsibilities. Currently the Mine Act only requires instruction in statutory rights and responsibilities for new miners, and there is no refresher training requirement. Training on miners' rights and responsibilities must be conducted by MSHA or an MSHA-approved trainer independent from the operator, to ensure miners receive an unbiased explanation of their rights. Requires that MSHA mandated safety training program must include distribution of information to miners regarding miners' rights under the Act, and a toll free hotline telephone number at MSHA to be used for reporting unsafe conditions or retaliation. Durable wallet cards with the toll free hotline number shall also be distributed.

Sec. 506. Authority to Mandate Additional Training.-- Gives the Secretary authority to require an operator to provide additional training beyond what is normally required if the mine has experienced a fatal accident or has injury, accident, S&S citation, or withdrawal order rates that are above the average for mines of similar size and type.

Sec. 507. Certification of Personnel.-- Sets minimum requirements for states to certify, recertify, and decertify certain mine personnel. If a state does not meet the minimum standards for such procedures or cover certain mine classifications (e.g., mine superintendants), MSHA's certification processes will apply in that state. Many states do not have laws covering mandating recertification; others lack decertification procedures. The Secretary is authorized to assess and collect a fee from operators to cover the costs for testing and certification of a miner. MSHA must establish a data base of individuals whose certification, registration or qualification has been revoked, and to make such information accessible to states. Section 104 of this legislation (additional amendments relating to inspections and investigations) requires that knowingly

falsifying a report under Section 103 of the Mine Act related to accidents, injuries, illnesses and man-hours worked is grounds for revoking a certification under this section.

Title VI -- Additional Mine Safety Provisions

Sec. 601. – Definition of "Operator."-- Expands the definition of the term "operator" to include those who directly or indirectly "control" management decisions which impact health and safety at a mine. This expanded definition will subject entities who do not directly "operate" a mine, but have control over managerial decisions, to be subject to civil and criminal enforcement.

Sec. 602 Assistance to States. --Expands MSHA's state grant program to allow grants for upgrading states' miner certification programs to meet the new requirements established in this Act. Increases state grant program authorization from $10 million to $20 million annually.

Sec. 603. Medical Examination Reports.-- Requires operators to provide claimants who are required by the mine operator to submit to a medical examination in connection with a claim under the Black Lung Program with a complete copy of the examining physician's report within 14 days, without the need for the claimant to request the report.

Sec. 604.—Special Rules of Application of Certain Provisions to Surface Mines.-- Section 604 limits the applicability of titles I through VI to all underground coal mines (including surface facilities and impoundments connected to such mines) and other underground mines which are "gassy." Gassy mines emit methane or other flammable gases and can catch fire or explode. Examples include gilsonite mines in Utah, trona ore mines in Wyoming, and salt mines in salt domes in Louisiana The Belle Isle Salt mine in Franklin, Louisiana caught fire in 1968, killing 21 workers undergound. In June 2010, the Weeks Island salt mine was evacuated due to a fire.

Surface metal/non metal mines and non-gassy underground metal/non metal mines are exempted from the changes made to the Mine Act by the Robert C. Byrd Miner Safety and Health Act of 2010, including stone, sand and gravel mines, limestone mines, cement mines and surface coal mines and coal processing facilities (except for those surface facilities physically connected to an underground coal mine). The existing provisions of the Mine Act will continue to apply to these surface and subsurface non-gassy mines. Nothing is intended to impact the authority of the Secretary to promulgate or modify regulations pursuant to her authority under the Mine Act as in effect prior to the enactment of the Robert C. Byrd Miner Safety and Health Act of 2010 with respect to surface and non gassy underground mines, nor should this section be construed alter or modify any precedent with regards to the Review Commission or courts.

Title VII – Amendments to the Occupational Safety and Health Act

Sec. 701 Enhanced Protections from Retaliation. – Employee's protected activity is expanded under the anti-retaliation provisions contained in Section 11(c) of the OSH Act to cover: an employee's refusal to perform work he/she reasonably believes would result in serious injury or illness or to violate the Act; an employee's reporting of injuries, illnesses, or unsafe conditions; and an employee testifying before Congress.

This section extends the statute of limitations from 30 to 180 days. OSHA must order preliminary reinstatement to individuals where OSHA has found reasonable grounds that the claimant was discriminated against. Where DOL declines to investigate, employees can request a *de novo* hearing before an Administrative Law Judge (ALJ).

A complainant alleging discrimination has the burden of proving that protected activity was a "contributing factor" to the adverse action. The employer can overcome this by demonstrating by clear and convincing evidence that the employer would have taken the same adverse action in the absence of such conduct. When an ALJ finds a violation of the law, she can order reinstatement, preservation of seniority, back pay with interest, exemplary damages (as appropriate), attorney's fees, and expungement of adverse information in the employee's record. Claimants or respondents can seek administrative appeal within the DOL within 30 days of receipt of an ALJ decision. Such appeal shall be decided in 90 days. Judicial review is provided in the Court of Appeals. The employer's history of violating OSHA's anti retaliation provisions will be a factor considered by the Occupational Safety and Health Review Commission when assessing penalties.

If the Labor Department does not investigate, adjudicate, hear appeals and decide the claim in a timely manner (330 days), the claimant is allowed to "kick out" and file suit in federal district court for a *de novo* review of the matter. Claimants employed by employers in OSHA state-plans, can elect to file their claim with the state OSHA or with federal OSHA, if a claim is filed with federal OSHA, federal OSHA must investigate and adjudicate the claim, and may not send the claim back to the state to have it investigated or adjudicated.

Sec. 702. Victim's Rights-- OSHA must inform family members of workers killed (or incapacitated from a job related injury) or victims about OSHA's investigation before final decisions are made about whether to issue any citations. Victims include workers who suffered an injury which is the subject of an OSHA inspection or investigation,

OSHA must provide a copy of any citations or reports related to the investigation to families or victims at the same time the employer receives them. OSHA is required to notify families or victims about formal or informal settlements and provide families or victims with an opportunity to meet with OSHA or submit statements prior to reaching any agreement. OSHA must establish a family liaison in each area office to keep families and victims informed and assist them in asserting their rights.

Families and victims must be notified of employer contests; notified of time and date of any proceeding before the OSHA Review Commission; be provided copies of all pleadings and decisions; and be provided an opportunity to appear and make a statement before the Commission. The Commission must provide due consideration to statements and information provided by families.

Sec. 703. Correction of Serious, Willful or Repeated Violations Pending Employer Contest and Procedures for a Stay— Requires employers to correct serious, willful, and repeat violations while they are contesting citations for OSHA violations. The OSHA Act allows employers to postpone abatement while they litigate, which puts workers in harm's way. This

forces OSHA to eliminate penalties or downgrade citations in order to secure correction of the violation.

Provides employers with the right to seek a temporary stay of OSHA's abatement order through an expedited proceeding before an Occupational Safety and Health Review Commission (OSHRC) ALJ while the merits of the citation are litigated. To obtain a stay, the employer must show it is likely to succeed in challenging the underlying the merits of the citation or in challenging the length of the abatement period, and a stay will not harm the health and safety of workers. Unions can intervene as a party. Decisions on a request for a stay must be rendered within 30 days. Any party can appeal to the full OSHRC, and if the OSHRC declines to act, or act in a timely manner, parties can appeal to the Court of Appeals.

Sec. 704. Conforming Amendment.-- Allows DOL to assess a civil penalty up to $7,000 for each day an employer fails to correct or abate a serious, willful, or repeat violation by the date established by DOL for correction, unless the OSHRC has issued a stay.

Sec. 705. OSHA Civil Penalties.-- OSHA's civil penalties have not been adjusted for inflation since 1990, due to an exemption in the Federal Civil Penalties Inflation Adjustment Act. Section 705 increases civil penalties to account for inflation, and establishes higher penalties when workers are killed due a willful or serious violation. A reduced penalty is established for small businesses where workers are killed due to a willful or serious violation. OSHA must adjust civil penalties for inflation at least once every 4 years, beginning January 1, 2015 (see Chart #1).

Chart 1-- OSHA Civil Penalties

Category of Violation	**OSHA Current Civil Penalty**		**Proposed Increase in Civil Penalty In HR 5663**	
	Minimum	**Maximum**	**Minimum**	**Maximum**
Willful or Repeated	$5,000	$70,000	$8,000	$120,000
Willful of Repeated, resulting in a fatality	Not in law		$50,000; $25,000 for a small business[a]	$250,000
Serious	$0	$7,000	$0	$12,000
Serious, resulting in a fatality	Not in law		$20,000; $10,000 for a small business[a]	$50,000
Other than serious	$0	$7,000	$0	$12,000
Failure to correct (abate) a safety or health hazard	$0	$7,000/day	$0	$12,000/day
Failure to post	$0	$7,000	$0	$12,000

[a]A small business is defined in this section as an employer with 25 or fewer employees.

When assessing penalties for repeat violation, Section 705 also authorizes OSHA and the Review Commission to consider the history of similar violations in state-plan states as well as federal OSHA states. Currently, federal OSHA must overlook violations in 21 different states when assessing an employer's past history with respect to repeat violations.

Consistent with the objective of addressing repeat violations across multi-establishments employers, the Committee urges the Secretary, when bringing enforcement actions against multi-establishment employers to assess whether there is a potential for the same or similar violations to be repeated at the employer's other establishments. As part of such assessment, the Secretary should use its authority under the Act to obtain data on injury and illnesses across all similar establishments. For employers receiving a "high-severity" violation from OSHA as part of OSHA's Severe Violator Enforcement Program, the Secretary should consistently evaluate all of the employer's similar establishments to determine whether the violation exists at such establishments and certify to OSHA that the hazards were abated or that the violation does not exist at any comparable establishment. This policy can and should be achieved through improvements to the Field Operations Manual.

Sec. 706. OSHA Criminal Penalties.-- Section 706 increases the criminal penalty and modifies the intent standard for a violation that causes a worker's death. Penalties are increased from a misdemeanor to a felony (see Chart #2). Under this section, knowing violations which cause or contribute to the death of a worker are designated as felonies with a maximum fine of $250,000 for individuals and $500,000 for organizations, or a 10-year prison term, or both. Knowing violations which cause "serious bodily harm" are subject to maximum fine of $250,000 for individuals and $500,000 for organizations or a 5-year prison term, or both. Serious bodily harm is defined as an injury or illness that involves a substantial risk of death, protracted unconsciousness, obvious physical disfigurement, or loss or impairment (either permanent or temporary) of the function of a bodily member, organ or mental facility." While corporations and sole proprietors are liable under the OSHA Act, officers and directors of corporations are immune from criminal liability. Section 706 adds officers and directors as parties who can be prosecuted for criminal violations.

Section 706 also updates the OSH Act with regards to unauthorized advance notice of inspections. Strict liability provision in existing law is replaced with a requirement that a person must knowingly provide advance notice with the intent to impede, interfere with or adversely affect the result of an inspection. Current law provides that advance notice of inspections by any person is a misdemeanor. Penalties are increased from a misdemeanor to a felony with 5 years/maximum or $250,000 for an individual, and $500,000 for an organization.

Nothing preempts state or local law enforcement agencies from conducting criminal prosecutions in accordance with state or local laws.

Sec. 707. Prejudgment Interest—Authorizes prejudgment interest from the date of contest to the date of final order at the rate charged by the IRS. Post judgment interest is already authorized, and this legislation sets an 8% interest rate, the same as the Mine Act.

Sec. 708. Review of State Occupational Safety and Health Plans.-- Authorizes the Secretary of Labor to assert concurrent enforcement authority over a state OSHA plan, if she determines

that there is a failure by the state plan to comply substantially with any provision of a state plan. Such amendment provides states with an opportunity for a hearing regarding an initial determination by the Secretary, provided such request is made within 10 days of such initial determination. If the Secretary affirms such determination following a hearing, the Secretary may inspect and enforce OSHA standards or under the general duty clause. Requires GAO to conduct a study every 5 years to assess: whether a sample of state plans are at least as effective as federal OSHA, whether federal OSHA's oversight of state plans is effective, whether the Secretary is adequately investigating Complaints About State Plan Administration, and to whether the funding formula for state plans is fair and adequate.

Sec. 709. Health Hazard Evaluations by the National Institute for Occupational Safety and Health.—Modifies Section 20 of the Occupational Safety and Health Act of 1970 to expand the list of those individuals who can request that NIOSH conduct a Health Hazard Evaluation (HHE). This section authorizes representatives of former workers, physicians, another federal agency, or a state or local health department to request an HHE, in addition to employers and employee representatives who are already authorized to make such requests. It also expands the issues that can be covered in a HHE to go beyond toxic substances to include physical agents, equipment, or working conditions. Such expanded authority already exists for NIOSH to cover physical agents for miners.

Sec. 710. Authorization of cooperative agreements by NIOSH Office of Mine Safety and Health.— Amends Section 22(h)(3) of the Occupational Safety and Health Act of 1970 to authorize the National Institute for Occupational Safety and Health through its Office of Mine Safety and Health to enter into cooperative agreements with international institutions to improve mine safety and health through new interventions.

Sec. 711. Effective Date.-- Title VII **t**akes effect not more than 90 days after being enacted, with the exception of state-plan states, which have 1 year from the date of its enactment to implement its requirements. In addition, DOL may extend the 1-year period for up to 12 additional months if a state-plan state's legislature is not in session during the 12-month period after enactment.

Chart 2—OSHA Criminal Penalties

Category of Violation	Current Maximum OSHA Criminal Penalty	Criminal OSHA Penalty in H.R. 5663
Knowing, resulting in a fatality	$10,000; misdemeanor with a 6 mo max prison term	For an individual - $250,000; felony with a 10 yr max prison term For an organization - $500,000; felony
Knowing, repeat, resulting in a fatality	$20,000; misdemeanor with a 1 yr max prison term	For an individual - $250,000; felony with a 20 yr max prison term For an organization - $500,000; felony
Knowing, resulting in serious bodily harm	Not in law	For an individual - $250,000; felony with a 5 yr max prison term For an organization - $500,000; felony
Knowing, resulting in serious bodily harm	Not in law	For an individual - $250,000; felony with a 10 yr max prison term For an organization - $500,000; felony
Advance notice of inspection	$1,000; misdemeanor with a 6 mo max prison term	For an individual - $250,000; felony with a 5 yr max prison term For an organization - $500,000; felony
False statements	$10,000; misdemeanor with a 6 mo max prison term	For an individual - $250,000; felony with a 5 yr max prison term For an organization - $500,000; felony