THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 AND THE TRANSPORTATION INDUSTRY

BY

DENIS M. NEILL* AND HARRY A. RISSETTO**

The transportation industry has traditionally held a preeminent position in the development and implementation of safety procedures. In large part this has been the result of the public's interest in insuring that it could get from place to place with the minimum risk of injury. The regulation developed in a Balkanized fashion with each agency developing and applying standards for the mode under its jurisdiction. Only recently has the Secretary of Transportation established the position of Assistant Secretary of Transportation for Safety and Consumers Affairs[1] whose function it will be to develop intermodal safety standards.

This coordination of regulatory effort has come at an appropriate time, because the industry will soon be required to coordinate its safety efforts with those of a new agency whose jurisdiction extends to all areas of interstate commerce not presently regulated under existing safety standards. Consequently, there will be increasing legislative and administrative pressure in the transportation industry to insure that the standards implemented by the Bureau of Motor Carrier Safety, the Bureau of Railroad Safety, the Office of Merchant Marine Safety, the Federal Aviation Administration and the Hazardous Materials Regulations Board are at least as stringent as those currently being promulgated by the Occupational Safety and Health Administration of the Department of Labor.

While many companies have established safety programs that exceed the current requirements of their modal regulatory agencies, the Occupational Safety and Health Act (OSHA) standards will govern all employers whose employees' job functions are not presently the subject of safety standards.

As more fully explained below, the new job safety law *does apply* to the transportation industry. The purpose of this article is twofold: (1) to discuss the interrelationship of OSHA to existing transportation safety laws and regulations and (2) to discuss briefly the salient points of the new

* Associate, Morgan, Lewis & Bockius, Washington, D.C. A.B., *cum laude*, Saint Louis University, 1964; J. D., *cum laude*, Saint Louis University School of Law, 1967.

** Associate, Morgan, Lewis & Bockius, Washington, D.C. A.B., Fairfield University, 1965; J.D. Georgetown University Law Center, 1968.

1. 49 C.F.R. § 1.58, promulgated August 12, 1970, 35 Fed. Reg. 12763 (1970).

law. This discussion, then, is designed to introduce the new law rather than to analyze its every detail.

THE SCOPE OF THE ACT

The scope of the Act's application is as broad as Congress' power to regulate interstate commerce. The Act applies to every "employer" defined as "a person engaged in a business affecting commerce who has employees . . . ."[2] Consequently, the jurisdiction of the Department of Labor in enforcing this statute is as broad as the statutory jurisdiction of the National Labor Relations Board.[3] It is not, however, subject to the self-imposed limitations promulgated by the National Labor Relations Board to narrow its jurisdiction.[4]

The Act is applicable to employment performed in any state, the District of Columbia, the Commonwealth of Puerto Rico and various other United States possessions.[5]

OSHA and Existing Regulation

The relationship of OSHA to pre-existing federal safety legislation is not clearly delimited in the Act. The new safety law does not apply to "working conditions" of employees with respect to which other federal agencies (and state agencies acting under Section 274 of the Atomic Energy Act of 1954) exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.[6] Given its broadest possible interpretation, this section of the law would exclude industries regulated, as to safety, by the Bureau of Motor Carrier Safety and other federal agencies charged with safety responsibility.

The legislative history of the Act, however, indicates a Congressional intention to apply narrowly this statutory exclusion:

> The Senate Bill said the Act should not apply to working conditions with respect to which other federal agencies exercise statutory

2. Pub. L. No. 91-596, U.S. Code Cong. and Admin. News, 91st Cong., 2d Sess. 1852, § 3(5) (1970).

3. *Compare* Pub. L. No. 91-596, § 3(5) (1970) *with* 29 U.S.C. § 159(c)(1) *and* 29 U.S.C. § 160(a).

4. *See, e.g.*, 24 Ann. Rep. N.L.R.B. 114 (1959). In *Floridian Hotel*, 124 N.L.R.B. 261 (1959), the Board announced jurisdiction over nonresidential hotels and motels with a gross annual business of at least $500,000.

5. Pub. L. No. 91-596, § 4(a) (1970).

6. *Id.*, § 4(b)(1).

authority affecting occupational safety and health, while the House amendment excluded employees whose working conditions were so regulated. The House language had an additional exclusion relating to employees whose safety and health were regulated by state agencies acting under section 274 of the Atomic Energy Act of 1954. The House receded on the first point; the Senate receded on the second.[7]

The House Bill, if passed, would have created an employee-oriented exclusion and would have limited OSHA jurisdiction over transportation employees in almost the same manner as the Interstate Commerce Commission exemption from the Fair Labor Standards Act limited the jurisdiction of the Department of Labor over drivers.[8] If the House version had been enacted a convincing argument may have nevertheless been raised that OSHA jurisdiction would have been limited only with respect to employees over whom another federal agency *actually exercised* regulatory control,[9] whereas Fair Labor Standards Act jurisdiction is limited with respect to employees over whom another federal agency (I.C.C.) has power to establish regulation.

The Senate language, on the other hand, is oriented toward and creates an exemption only to the extent that other federal agencies exercise authority to regulate a working condition.[10] The argument that the exemption applies to working conditions over which another federal agency has unexercised regulatory power is a weak one, at best. The I.C.C. has general power to establish classifications of motor vehicles and to establish such rules as it deems necessary or desirable and in the public interest.[11] To exempt any working condition over which the I.C.C. has "power" to establish regulations would be to exempt the entire motor carrier industry. Such a jurisdictional division would result in OSHA having more limited authority than if the House language had been adopted. This is clearly contrary to the Congressional intent to apply the Act expansively.

The crucial jurisdictional question is this: "Does a federal agency actively exercise its statutory authority to prescrbe or enforce standards or

7. H.R. Rep. No. 91-1765, 91st Cong., 2d Sess. 32-33 (1970).

8. *Compare* H.R. 16785, 91st Cong., 2d Sess. § 25(b), as amended, (1970) *with* 29 U.S.C. § 213(b)(1).

9. 116 Cong. Rec. H11894 (daily ed. Dec. 17, 1970).

10. The Senate language was accepted by the conferees and became law. Pub. L. No. 91-596, § 4(b)(1) (1970).

11. 49 U.S.C. § 304(c).

regulations affecting occupational safety or health over the working conditions sought to be regulated by OSHA?"

OSHA and Transportation Regulation

An apt illustration of the interrelationship of OSHA to existing law and regulation is found in the trucking industry. Many separate working conditions of a motor carrier driver are the subjects of detailed regulations administered by the Bureau of Motor Carrier Safety, the Office of Highway Safety and the National Highway Traffic Safety Administration.

The driver's vehicle must meet the performance requirements of the Federal Motor Vehicle Safety Standards.[12] His vehicle must be properly equipped,[13] inspected and maintained;[14] and the driver himself be physically, mentally and morally qualifie.[15] His hours are regulated,[16] as is almost every other aspect of the actual operation of the vehicle.[17] If he hauls explosives or dangerous articles,[18] or if his cargo is hazardous,[19] further regulations apply.

Although it may appear that the motor carrier driver's every imaginable "working condition" is regulated as to safety and health, let us reflect briefly on what is not yet regulated—and thus subject to possible OSHA standards. What if the driver assists in loading his truck with cargo other than explosives, dangerous articles or hazardous materials? What if he *unloads* such cargo on the property of an employer regulated under the Longshoremen's and Harbor Workers' Compenstion Act?[20] What about the lunch room at the carrier's terminal? The locker room? The shower?

It is easy to see instances of actual OSHA regulation and many more examples of potential OSHA regulation over the working conditions of motor carrier drivers. Of course, OSHA applies far more extensively to the working conditions of nondriver personnel. Standards governing almost every aspect of warehousing,[21] including a specific standard

2. 49 C.F.R. § 571.21.
13. 49 C.F.R. §§ 393.1-393.96.
14. 49 C.F.R. §§ 396.1-396.9.
15. 49 C.F.R. §§ 391.1-391.65.
16. 49 C.F.R. §§ 395.1-395.13.
17. 49 C.F.R. §§ 392.1-392.68.
18. 49 C.F.R. §§ 397.01-397.1.
19. 49 C.F.R. §§ 177.800-177.861.
20. 33 U.S.C. § 901; 29 C.F.R. §§ 1504.1-1504.106.
21. OSHA Regs. §§ 1910.1-1910.331, 36 Fed. Reg. 10466-714 (1971).

regulating the handling and storage of materials,[22] have been promulgated. Safety programs should be redesigned to comply with these standards.

Similar tandem regulation exists in the other modes of transportation. While the Federal Aviation Administration regulates a great portion of the employees' working environment,[23] numerous work areas are unregulated and are thus the subject of OHSA regulation. Railroads owe an analagous twofold responsibility to both the Federal Railroad Administration (Department of Transportation)[24] and the Occupational Safety and Health Administration (Department of Labor).

In the maritime industry, dual safety regulation has been in existence for quite some time. Standards promulgated by the Bureau of Labor Standards (Department of Labor) regulate the safety and health in ship repairing, shipbuilding, shipbreaking, and longshoring.[25] Other regulatory authority is exercised by the Office of Merchant Marine Safety, U. S. Coast Guard (Department of Transportation).[26]

OSHA expressly centralizes the Labor Department's various safety functions under the jurisdiction of the Occupational Safety and Health Administration. The disparate safety standards promulgated pursuant to the Walsh-Healy Act,[27] the Longshoremen's and Harbor Workers' Compensation Act,[28] the Contract Work Hours Safety Standards Act,[29] the Service Contract Act of 1965,[30] and the National Foundation on Arts and Humanities Act[31] became OSHA standard on April 28, 1971, and will remain such until expressly superseded by other standards.[32] Until such other standards are promulgated, the industries covered by the prior legislation are subject to dual enforcement procedures, limited, however, by the application of the collateral estoppel and *res judicata* doctrines.[33]

The Act expressly preserves existing employee remedies under

22. OSHA Regs. §§ 1910.176-1910.184, 36 Fed. Reg. 10612-29 (1971).
23. These safety regulations are scattered throughout Chapter I of Title 14, C.F.R.
24. 49 C.F.R. § 1.49; 49 C.F.R. §§ 211.1-240.3.
25. 29 C.F.R. §§ 1501.1-1504.106. These standards became OSHA standards, effective April 28, 1971. Pub. L. No. 91-596, § 4(b)(2).
26. These safety regulations are scattered throughout Chapter I of Title 46, C.F.R.
27. 41 U.S.C. §§ 35, 38; 41 C.F.R. §§ 50-204.1-50-204.78.
28. 33 U.S.C. §§ 901, 941; 29 C.F.R. §§ 1501.1-1504.106.
29. 40 U.S.C. § 333; OSHA Regs. §§ 1518.1-1518.1051, 36 Fed. Reg. 7340-7410, 8311, 9423 (1971).
30. 41 U.S.C. §§ 351, 353; 29 C.F.R. §§ 1516.1-1516.3.
31. 20 U.S.C. §§ 951, 954; 29 C.F.R. §§ 505.1-505.7.
32. Pub. L. No. 91-596, § 4(b)(2); 36 Fed. Reg. 10466 (1971).
33. 36 Fed. Reg. 10466 (1971); H. R. Rep. No. 91-1765, 91st Cong., 2d Sess. 53 (1970).

workmen's compensation laws and common law, and further preserves the many statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of, employment.[34] This provision is consistent with the intent of Congress to rectify the condition rather than to remedy any injury that might result from the condition. Thus, OSHA exists independently from statutorily provided remedies for employment injuries.

STANDARDS

The heart of the Occupational Safety and Health Act is its delegation of authority to the Secretary of Labor to establish standards governing the working conditions of employers under its jurisdiction. OSHA provides for three types of standards: (1) interim standards that are based on existing federal standards and national consensus standards; (2) permanent standards that would replace or supplement the interim standards; and (3) temporary emergency standards that could be issued immediately when new health and safety findings indicate that employees are exposed to serious dangers.

Interim Standards

Between April 28, 1971 and April 27, 1973, the Secretary of Labor is authorized to promulgate as occupational safety and health standards any national consensus standard or any established federal standard.[35] In the event of a conflict among existing standards, the Secretary is required to promulgate the standard that assures the greatest protection of the safety or health of the affected employees.[36]

These initial standards are not subject to the rule-making provisions of the Administrative Procedure Act and may go into effect, at the discretion of the Secretary, immediately upon publication in the *Federal Register.* An established federal standard is one which has been promulgated by another federal agency; national consensus standards are the result of work by a standards-setting organization such as the American National Standards Institute, Inc., or the National Fire Protection Association.

34. Pub. L. No. 91-596, § 4(b)(4).

35. Once promulgated, an interim standard will continue in effect until rescinded or superseded by the Secretary of Labor. The April 27, 1973 date is merely a deadline for the *issuance* of interim standards.

36. Pub. L. No. 91-596, § 6(a).

National consensus standards are themselves subject to narrow statutory restrictions: (1) they must have been adopted and promulgated by a nationally recognized standards-producing organization; (2) procedures used must be such that the Secretary can determine that persons interested and affected by the scope of the standards have reached substantial agreement on their adoption; (3) they must have been formulated in a manner which afforded an opportunity for diverse views to be considered; and (4) they must have been designated as such standards by the Secretary after consultation with other appropriate federal agencies.[37] The guidelines governing the adoption of national consensus standards are designed to afford the affected parties substantial input into the formulation of the occupational safety standards by which they are to be governed.

The Secretary may not modify an existing federal standar or a national consensus standard without following the administrative procedures utilized to develop permanent standards. The Act establishes the same statutory procedures for modifying or revoking *any* standard as it does for promulgating permanent standards.[38]

Many interim standards have already been promulgated.[39] These standards consist of both national consensus standards and standards previously promulgated pursuant to other federal legislation. Interim or "initial" standards cover walking-working surfaces; means of egress; powered platforms, manlifts and vehicle-mounted work platforms; occupational health and environmental control; hazardous materials, personal protective equipment; general environmental controls; medical services and first aid; fire protection; compressed gas and compressed air equipment; materials handling and storage; machinery and machine guarding; hand and portable powered tools and other handheld equipment; welding, cutting and brazing; and electrical equipment and materials.[40] Although the basic effective date is August 27, 1971, additional compliance periods, of up to 180 days beyond that date, have been provided for certain standards requiring substantial modification of equipment or procurement of safety devices. An example of such an extension of time is that afforded by the regulation requiring fork lift trucks to be equipped with overhead guards.[41]

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37. *Id.*, § 3(9).
38. *Id.*, § 6(b).
39. 36 Fed. Reg. 10466 (1971).
40. OSHA Regs. §§ 1910.21-1910.254, 1910.308 - 1910.331, 36 Fed. Reg. 10469-669, 10699-714 (1971).
41. OSHA Reg. § 1910.182, 36 Fed. Reg. 19629 (1971).

Temporary Emergency Standards

Section 6(c) of the Act provides for the promulgation of emergency standards which are not subject to the processes of the Administrative Procedure Act.[42] In order to promulgate an emergency standard, the Secretary must determine: (1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or from new hazards, and (2) that such emergency standard is necessary to protect employees from such danger. An emergency standard will remain in effect for six months after publication. Immediately upon publishing the emergency standard, it is incumbent upon the Secretary to commence a proceeding designed to result in a permanent standard.[43]

Permanent Standards

The procedures of section 6(b) of the Act provide the Secretary with a great deal of flexibility in developing and promulgating permanent standards. Whenever the Secretary concludes that a permanent standard is appropriate, he has one of two options. He may either directly publish the standard for comment in the *Federal Register* or he may appoint an advisory committee to analyze the standard and report its recommendations.

The appointment of an advisory committee is discretionary[44] and will consist of not more than fifteen members and shall include in that number, one or more persons designated by the Secretary of Health, Education and Welfare. Additionally, it shall include equal numbers of employer and employee experts, as well as one or more representatives of the state health and safety agencies.[45] If the Secretary elects to use an advisory committee, he must afford the committee between 90 and 270 days to make its findings.[46] Within 60 days after the submission of the advisory committee's report or within 60 days after the expiration of its time to report, the Secretary must publish the proposed standard in the *Federal Register.*[47]

If the proposed standard differs substantially from an existing national consensus standard, the Secretary must publish, with the proposed

42. 5 U.S.C. § 551.
43. Pub. L. No. 91-596, § 6(c)(3).
44. *Id.*, § 6(b)(1).
45. *Id.*, § 7(b).
46. *Id.*, § 6(b)(1).
47. *Id.*, § 6(b)(2).

standard, a statement of the reasons why the proposed rule, if adopted, will better effectuate the purposes of the Act than the national consensus standard.[48]

Interested parties will be afforded 30 days to comment on the proposed standard and to request, at their option, a public hearing. If an interested party requests a hearing, an informal rulemaking proceeding (without record) will be conducted.[49] Within 60 days after the expiration of the comment period, or within 60 days after the hearing, the Secretary must either issue a rule containing the new standard or make a determination that a rule should not be issued. However, he may delay its implementation for up to 90 days to afford the affected employers an opportunity to adapt to the new standard.[50]

Judicial Review

Any person who is adversely affected by any standard may challenge the standard in a United States court of appeals within 60 days after it is promulgated. Unless otherwise ordered by the court, the filing of a challenge will not stay the operation of a standard. The standard will be affirmed on review if it is supported by substantial evidence in the record considered as a whole.[51]

VARIANCES

An employer faced with an onerous standard may seek a variance from the standard. The Secretary of Labor is authorized to issue either temporary or permanent variances, depending upon the needs of the employer and his ability to protect his employees adequately.

Temporary Variances

There is some ambiguity regarding the application of temporary variances to other than permanent standards. The interpretation that temporary variances apply solely to permanent standards is based on the location of the temporary variance provision within the statute. The first

48. *Id.*, § 6(b)(8).

49. *Id.*, § 6(b)(3). The absence of a record may find judicial resistance in subsequent court review.

50. Pub. L. No. 91-596, § 6(b)(4). The permanent standards procedures are potentially cumbersome. If an advisory committee is appointed, it can take as long as a year and a half to put a standard into effect.

51. Pub. L. No. 91-596, § 6(f).

three subsections of section 6 cover standards: § 6(a) deals with interim standards, § 6(b) deals with permanent standards, and § 6(c) deals with emergency standards. The temporary variance provisions appear as part of subsection (b).[52] Apparently, because of its position as a subparagraph of the permanent standard subsection, some commentators have reasoned that the temporary variance rules apply only to variances from a permanent standard.[53]

It is our opinion, however, that the provision for temporary variances applies to interim and emergency as well as to permanent standards. We base this interpretation on two arguments:

First, the language of the subparagraph 6(b)(6)(A) is clear and unequivocal.

> "(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this *section.*" [Emphasis added.]

If the Congress had intended the temporary variance procedure to apply only to permanent standards it would have undoubtedly used the term "subsection" (referring to subsection (b)) rather than "section". That Congress certainly realized the distinction between the two terms is illustrated by its use of the term "subsection" in § 6(b)(7) which states, in pertinent part, "any standard promulgated under this *subsection* shall prescribe the use of labels or other appropriate forms of warnings as are necessary . . ." [Emphasis added.] The studied differences in the statutory language appearing in two successive paragraphs of the statute supports our interpretation.

Second, common sense dictates that because the interim standards are intended to have a degree of permanency, they should be subject to temporary variances. Although interim standards may be promulgated only during the initial two years of the Act, they will remain in effect until rescinded or modified.[54] Consequently, there is no logical basis for distinguishing between interim and permanent standards in determining the authority of the Secretary to issue a temporary variance.

The existence or absence of the right to obtain a temporary variance from the operation of an interim standard will be of practical importance. The Secretary is given substantial flexibility in authorizing a temporary

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52. *Id.*, § 6(b)(6)(A).

53. BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY AND HEALTH ACT OF 1970, at 39 (1971).

54. The Act contains no termination date or limiting duration for interim standards. See note *35, supra.*

variance. Section 6(b)(6) provides that an employer may obtain a temporary variance if he establishes that: (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to comply with the standard or because necessary construction or alteration of facilities cannot be completed on the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with this standard as quickly as practicable.

Permanent Variances

In order to obtain a permanent variance, the employer must show "that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees *which are as safe and healthful as those which would prevail if he complied with the standard.*"[55] [Emphasis added.] It is reasonable to expect that permanent variances will be much more difficult to obtain than temporary variances.

National Defense Exemptions and Variances

The law also provides that the Secretary, "to avoid serious impairment of national defense," may issue reasonable variations, tolerances and exemptions from any or all provisions of this Act.[56] The first sentence of Section 16 provides that the Secretary may provide reasonable limitations and may make rules and regulations allowing reasonable variations after notice and an opportunity for a hearing on the record. This would seem to imply that the interested parties have an opportunity to appear and give evidence before the variation or tolerance is granted. However, the last sentence of the section reads as follows: "Such action shall not be effective for more than six months without notification to affected employees and an opportunity being afforded for a hearing." The last sentence appears to contradict the first sentence. The regulatons promulgated by the Secretary support an interpretation that gives precedence to the first sentence. They require that each application for a national defense exemption include a description of how affected employees had been informed of "their right to petition the Assistant Secretary for a hearing."[57]

55. Pub. L. No. 91-596, § 6(d).
56. *Id.*, § 16.
57. OSHA Reg. § 1905.12(b)(6), 36 Fed. Reg. 12292 (1971).

Variance Application Regulations

The Secretary of Labor has promulgated regulations governing applications for variances.[58] Applications for temporary variances are required to contain ten specific items, including a showing of inability to comply, a demonstration of interim measures to meet safety and health needs and a statement of when the employer expects to comply. The temporary variance application must also contain a description of how affected employees were informed of the application and their right to petition the Assistant Secretary for a hearing.[59]

An application for a permanent variance must contain an appropriate substantive showing that the conditions, practices, means, methods, operations or processes to be used are as safe and healthful to employees as those required by the standard. The applicant must certify that he has given a copy of his application to his employees' authorized representative, that he has posted a summary of the application where employee notices are usually posted and that he has taken other appropriate means to notify employees of the application and of their right to petition the Assistant Secretary for a hearing.[60]

An application for a national defense exemption or variance must contain six specific items, including a demonstration of how the variance or exemption is necessary and proper to avoid serious impairment of the national defense.[61] As indicated above, employees have a right to petition the Assistant Secretary for a hearing and must be notified of this right.[62]

Applicants may also request an interim order for a variance until a final decision is rendered. The interim order application should include a supporting statement of fact establishing a basis upon which the Assistant Secretary of Labor for Occupational Safety and Health may exercise his discretion to issue the interim variance. Interim orders will be published inthe *Federal Register* and the applicant is required to so notify his employees.[63]

Either applicants or affected employees may request a hearing in any variance proceeding. Hearing applications must demonstrate how the petitioner would be affected by the relief sought. It should also include any statement or representations in dispute and a summary of evidence and

58. 36 Fed. Reg. 12290 (1971).
59. OSHA Reg. § 1905.10, 36 Fed. Reg. 12291 (1971).
60. OSHA Reg. § 1905.11, 36 Fed. Reg. 12291 (1971).
61. OSHA Reg. § 1905.12 (b), 36 Fed. Reg. 12292 (1971).
62. OSHA Reg. § 1905.12(b)(6), 36 Fed. Reg. 12292 (1971).
63. OSHA Regs. §§ 1905.10(c), 1905.11(c), 1905.12(c), 36 Fed. Reg. 12291-92 (1971). The interim order may be issued in an *ex parte* fashion.

argument on any issue of fact or law presented.[64] Other specific regulations have been promulgated regarding government hearings, including rules for service, prehearing conferences, discovery procedures, and summary decisions. Careful study of these procedures is advised for those who expect to file variance applications.

General Duty Provision

OSHA also contains a "general duty" provision which requires an employer "to furnish to each of his employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . ."[65] This catch-all provision is intended to supplement the standards promulgated by the Secretary. An OSHA investigator may issue a citation charging a violation of the general duty provision as well as any violation of a standard, rule, or order promulgated pursuant to the Act.[66]

The legislative history of the Act supports an interpretation that a proposed penalty may not be assessed initially for a violation of the general duty provision. (Penalties are assessable upon discovery of a violation of a standard.[67] However, a penalty could result from the failure to abate a general duty violation.[68] In a lengthy statement discussing the general duty provisions, Senator Harrison A. Williams (D.-N.J.) stated:

> "There is no penalty for violation of the clause; it is only if the employer refuses to correct the unsafe condition after it has been called to his attention and an abatement order issued that a penalty may attach. Before that is done, the employer would be entitled to a full administrative hearing, followed by judicial review, if he disagrees that the situation in question is unsafe."[69]

Similar general duty provisions appear in other federal safety standards laws, as well as in the safety provisions of thirty-five or more states. In a statement on the floor of the House, Congressman William A. Steiger (R.-Mich.) offered his personal observation that the Labor Department has not yet enforced general duty provisions in the absence of specific standards.[70] However, language in the Act's penalty provision supports an

64. OSHA Reg. § 1905.15, 36 Fed. Reg. 12293 (1971).
65. Pub. L. No. 91-596, § 5(a)(1).
66. *Id.*, § 9(a).
67. *Id.*, §§ 17(b), (c).
68. *Id.*, § 17(d).
69. 116 Cong. Rec. S18250 (daily ed. Nov. 16, 1970).
70. 116 Cong. Rec. H10620 (daily ed. Nov. 23, 1970).

interpretation that would authorize the Secretary to impose a civil fine for violation of the general duty provision.[71] There is as yet no indication of the Secretary's position on this question.

Investigations and Inspections

The first step in the enforcement procedures of the Act is an investigation of the employer's premises by an OSHA investigator. The investigations may be categorized into two groups based on the method of initiation: a spontaneous investigation, and a complaint investigation.

Spontaneous Investigations

OSHA authorizes the Department of Labor to hire inspectors with the following authority:

> "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer . . .
> "(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."[72]

This section authorizes the investigators to enter and inspect a workplace without a prior complaint by an employee or other interested party. It is the policy of the Occupational Safety and Health Administration to make spontaneous inspections on a "worst, first" basis.

Inspection Upon Complaint

There are two provisions in the statute which provide for inspection upon employee complaints. Any employee or representative of an employee who believes that a violation of a safety or health standard exists and that the violation threatens physical harm or causes imminent danger, may request an inspection by giving notice to the Secretary.[73] This limited

71. Pub. L. No. 91-596, §§ 17(a), (b), (c).
72. *Id.*, § 8(a).
73. Pub. L. No. 91-596, § 8(f)(1).

procedure does not encompass complaints that allege a mere violation of either a standard or a general duty; it includes only those violations which threaten physical harm or create an imminent danger.

Another provision contains a broader complaint procedure. It states that "*prior to* or during any inspection of a workplace, any employees or a representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they shall have reason to believe exists in such workplace."[74] The words "prior to" clearly indicate that an employee may initiate an investigation by filing a complaint. Furthermore, the internal review procedure in section 8(f)(2)—triggered by the failure of an inspector to issue a citation on an employee complaint—necessarily implies that an inspection should be carried out following a complaint unless it is frivolous on its face. Proposed enforcement regulations *require* an investigation if the Occupational Safety and Health Area Director finds "reasonable grounds to believe that such violation or danger exists."[75]N

Advance Notice

Section 17(f) of the Act presupposes an inspection without advance notice. It provides for the imposition of a fine on any person who gives advance notice of inspection without authority of the Secretary or his designees. However, proposed regulations and a policy statement by the Assistant Secretary of Labor for Occupational Safety and Health George C. Guenther indicate that in order to facilitate efficient inspections, upon authorization by the OSHA Area Director or the Compliance Officer, up to twenty-four hours advance notice may be given.[76] This policy, however, is not intended to preclude an inspection without notice in appropriate cases.

Inspection Procedure

The inspection procedure is set out in detail in the statute and proposed regulations. The inspector must be allowed to investigate any workplace

74. *Id.*, § 8(f)(2) (emphasis added).

75. Proposed OSHA Reg. § 1903.8, 36 Fed. Reg. 8377 (1971). Arguably, this regulation would apply only to § 8(f)(1) (imminent danger) complaints. However, this interpretation does not appear consistent with the intent of the Act and with the proposed regulations as a whole.

76. Proposed OSHA Reg. § 1903.4, 36 Fed. Reg. 8377 (1971); Address by Assistant Secretary of Labor for Occupational Safety and Health George C. Guenther before the United Steelworkers of America on March 27, 1971, in Chicago, Illinois, U.S. Department of Labor Press Release USDL 71-178, p. 12.

during regular working hours and at other reasonable times. In general, the rule of reason will govern the inspection.[77] The inspector has the right and duty during the inspection to question either the employees or their representatives, and the agents of the employer. He may require the attendance and testimony of witnesses and the production of evidence under oath.[78]

Where the employees in any separate workplace in a business establishment are represented by a union, a representative of the union must be given an opportunity to accompany the inspector during the physical inspection of that particular workplace. There appears to be no impediment, statutory or regulatory, to having employees authorize, by appropriate procedure, a representative for such inspections who need not be an employee. Where there is no union representative or other authorized representatives, the investigator must consult with a reasonable number of employees concerning matters of health and safety in their particular workplace.[79] The consultations will probably be in the nature of informal interviews with a cross section of employees.

As noted earlier, an employee may notify the inspector of a violation during the inspection. This notice should be *in writing*.[80] Apparently, the inspector will carry complaint forms and supply one to any employee who wishes to note a complaint. While the inspector will undoubtedly consider oral complaints, the informal intra-agency review proceedings are dependent on the filing of a written complaint by the employee.

Records

During the inspection the employer must make available to the inspector such records as are required to be maintained pursuant to the appropriate regulations.[81] Employers are required to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first-aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfers to another job.[82]

77. Pub. L. No. 91-596, § 8(a); Proposed OSHA Reg. § 1903.5, 36 Fed. Reg. 8377 (1971).

78. Pub. L. No. 91-596, § 8(b).

79. *Id.*, § 8(3).

80. *Id.*, § 8(f)(2).

81. *Id.*, § 8(c).

82. OSHA Regs. §§ 1904, 1904(a) and 1908, governing suplementary records, temporary rules and fatality or multiple hospitalization accident reporting, are effective July 2, 1971. Unless otherwise indicated, other record-keeping procedures are effective August 1, 1971. 36 Fed. Reg. 12612 (1971).

Additionally, the law requires the promulgation of procedures to measure and maintain records of employee exposure to potentially toxic materials. Regulations will be promulgated that will provide employees and their representatives with an opportunity to observe the monitoring and measuring of the exposure to toxic substances as well as with access to the records that are maintained pursuant to this program. The employer is obliged to notify promptly any employee who has been exposed to toxic materials or harmful physical agents in concentrations or levels that exceed those prescribed by standards to be promulgated in cooperation with the Department of Health, Education and Welfare. The employer is also obligated to inform any employee who has been exposed about the corrective action that the employer is taking.[83]

Confidentiality of Trade Secrets

Section 15 provides that all information received by the Secretary or his representatives which might reveal a trade secret shall be considered confidential. However, this information may be disclosed to other employees concerned with administering the Occupational Safety and Health Act when the information is relevant to any proceeding under Act. In any such proceeding, the Commission, the Secretary, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.[84]

We have paraphrased section 15 almost verbatim because there has been some dispute as to its implications. Some commentators have taken the position that the "law, as passed, provides that no witness or any other person will be required to divulge trade secrets or secret processes."[85] We can find no provision in the Act expressly providing for such immunity from producing trade secrets. The Act merely states that when required to be produced, trade secrets shall be treated as confidential and the appropriate body governing the proceeding is required to issue protective orders to preserve their confidentiality.

ENFORCEMENT

Citations

The enforcement provisions of the Act commence with the issuance of a

3. Pub. L. No. 91-596, § 8(c)(3. The retroactivity of these notice requirements remains an open question.

84. Pub. L. No. 91-596, § 15.

85. BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY AND HEALTH ACT OF 1970, at 91 (1971).

citation indicating that the employer has violated either a safety standard or the Act's general duty provision. Each citation must be in writing, describing with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated.

If the violation is of a *de minimis* nature, a notice in lieu of a citation may be issued.[86] The compliance officer need not issue a citation at the time of the inspection but must furnish one with reasonable promptness thereafter. The citation will fix the time for the abatement of the violation. It need not, however, include a proposed assessment of penalty, for the statute provides that the proposed assessment of the penalty may be supplied at some future time.[87]

No citation may be issued more than six months after the occurrence of a violation.[88] However, in many cases it would seem that the violation might be of a continuing nature, thereby tolling the limitation period. The employer is obliged to post at the location of the violation a copy or copies of the citation,[89] and is subject to a fine at $1,000 for each day that he fails to meet this duty.[90] Additionally, the time limit for employee appeals challenging the time allowed for abatement will undoubtedly be tolled if the employer fails to post a copy of the citation.

Penalties

Shortly after receiving a copy of the citation, or, ideally, at the same time, the employer will be notified by certified mail of the penalty, if any, proposed for the violation.[91]

Section 17 of the Act contains a broad spectrum of penalties designed to encourage adherence to the standards, rules or orders promulgated under the Act. If an employer commits a serious violation of the Act, he will be assessed a civil penalty of up to $1,000 to each violation.[92] An employer who willfully or repeatedly violates the Act may be assessed a civil penalty of up to $10,000 for each violation.[93] If the citation is for a violation which *is specifically determined not to be serious in nature*, the

86. Pub. L. No. 91-596, § 9(a).
87. *Id.*, § 10(a).
88. *Id.*, § 9(c).
89. *Id.*, § 9(b).
90. *Id.*, § 17(d).
91. *Id.*, § 10(a).
92. *Id.*, § 17(b).
93. *Id.*, § 17(a).

employer *may* be assessed a civil penalty of up to $1,000 for each violation.[94]

The seriousness of a violation determines whether or not the penalty will be discretionary on the part of the Secretary. A serious violation is one which causes a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such place or employment unless the employer did not, or could not with the exercise of reasonable diligence, know of the presence of the violation.[95] If the Commission finds a violation to be of a serious nature, section 17(b) requires the assessment of some monetary civil fine. It appears, however, that the Secretary has discretion regarding less than serious violations.

If an employer fails to abate a violation within the period permitted for its correction (which period begins with the final order of the Commission affirming the action of the Secretary) he may be assessed a civil penalty of not more than $1,000 a day for each day he fails to abate the violation.[96] If an employer's willful violation of any standard rule or order results in the death of an employee, the employer is subject to criminal prosecution, and may be fined not more than $10,000 and imprisoned for not more than six months or both.[97] Criminal penalties apparently do not apply to violations of the general duty to provide safe working conditions, even though a violation results in an employee's death.

Appeals

The employer has fifteen *working* days from receipt of this latter notice to notify the Secretary that he wishes to contest the citation or proposed assessment of the penalty. Since the limitation period for contesting a citation is triggered by the receipt of the notice of proposed penalty, it appears that the Labor Department must formally notify the employer even in the case where no penalty is proposed.[98] The employer's notification of his intention to seek review of the citation or proposed penalty will probably be sent to the Occupational Safety and Health Commission, via the OSHA Area Director.[99]

94. *Id.*, § 17(c).
95. *Id.*, § 17(k).
96. *Id.*, § 17(d).
97. *Id.*, § 17(e).
98. Proposed OSHA Reg. § 1903.14, 36 Fed. Reg. 8378 (1971).
99. Proposed OSHA Reg. § 1903.17, 36 Fed. Reg. 8378 (1971).

If the employer fails to notify the Secretary of his intention to challenge either the citation or the proposed assessment of penalty, the citation and the assessment shall be deemed the final order of the Commission not subject to review by any court or agency.[100] For this reason, citations should contain a finding that the employer is within the jurisdiction of the Act.

The employer cannot avoid paying the penalty by abating a violation of a standard, rule or order. The initial penalty is triggered by the violation itself rather than the failure to abate it.[101] However, the Act's provision that "whenever the Secretary compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the *Federal Register*" clearly indicates that the Secretary has the authority to compromise, mitigate or mitigate or settle an assessed penalty.[102] Consequently, if the violation is abated, the employer might petition the Secretary to mitigate, reduce or otherwise modify the penalty.[103]

If the employees are dissatisfied with the time allotted for the abatement of a violation, they must file a notice of appeal with the Secretary within 15 days of receipt of the *citation*.[104] This is to be contrasted with the appeal period afforded an employer, who must appeal within 15 days after receipt of the notice of proposed penalty. Since the penalty notice will probably be received some time after the citation, the employer has a longer period within which to appeal.

The employees have no right to a Commission appeal of either the amount of the penalty proposed to be assessed or the contents of the citation issued. If the inspection was based on a written employee complaint, the Secretary must provide at the request of the complaining party, an intradepartmental, informal review of the inspection. An employee may seek formal Commission review, however, of the time allotted for abating the violation. The employer, on the other hand, may challenge the citation, the proposed penalty assessment, as well as the time for abatement. If the employer should take an appeal, the Commission's rules will allow the employees to intervene at the time of the hearing.[105]

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100. Pub. L. No. 91-596, § 10(a).

101. *Id.*, § 17(b).

102. *Id.*, § 6(e).

103. In its Guidelines for Compliance Officers, the Occupational Safety and Health Administration is reported to have provided for fifty percent discounts for penalties assessed for *de minimis* violations abated within the allowed time. Bureau of National Affairs, 6 *Occupational Safety and Health Reporter* 103 (1971).

104. Pub. L. No. 91-596, § 10(c).

105. *Ibid.*

If the employer has not abated the violation within the time provided in the penalty notice, he will be notified of this failure by certified mail, together with any additional penalty to be assessed. The employer has 15 days within which to challenge this proposed penalty. His failure to make such a challenge converts the notification and assessment into a final order of the Commission not subject to review by any court or agency.[106]

If the employer finds that he cannot abate the violation within the time limit set out in the citation, and the abatement cannot be completed because of factors beyond his reasonable control, he may petition for an order modifying the abatement requirements. The statute provides that the "Secretary" shall hold a hearing on such a request and shall provide the affected employees or representatives of affected employees with an opportunity to participate as parties to the hearing.[107]

Once the Secretary is notified that the employer plans to challenge a citation or proposed penalty or that either an employer or an employee plans to challenge the time period for abatement, jurisdiction over the enforcement procedure is transferred to the Occupational Health and Safety Review Commission. The Commission is composed of three members appointed by the President with the advice and consent of the Senate.[108] They are independent of the Secretary of Labor and serve terms of six years.[109]

Proceedings before the Commission are *de novo*, that is, the Commission will appoint a hearing examiner to take testimony on the reasonableness and evidentiary support for the citation, proposed penalty assessment and the abatement period. The hearing examiner will hear evidence and make a report to the Commission. The report will contain his determination whether the Act has been violated and whether the abatement period and the penalty are authorized and reasonable. The statute provides no automatic right of review for the employer or employee to the Commisson from the report of the hearing examiner. The hearing examiner's report shall become the final order of the Commission after thirty days unless a Commission member has directed that such a report shall be reviewed by the Commission.[110]

106. *Id.*, § 10(b).

107. This hearing will undoubtedly be conducted by the Commission. The use of the word "Secretary" rather than "Commission" in Section 10(c) was the result of legislative oversight that came about when the bill was amended to make the Commission independent from the Secretary. *See* S. Rep. No. 91-1282, 91st Cong., 2d Sess. 32-33 (1970).

108. Pub. L. No. 91-596, § 12(a).

109. *Id.*, § 12(b).

110. *Id.*, § 12(j).

Injunctions against Imminent Dangers

If an OSHA inspector discovers that a condition exists that could reasonably be expected to cause death or serious physical harm immediately, or before imminence of such danger can be eliminated through the enforcement procedures in the Act, he must notify employers and employees that he is recommending that the Secretary seek an injunction.[111] The Secretary is then authorized to petition in the United States district court for a complete cessation of operations at the plant, or an order requiring the immediate correction of the imminent danger.[112] The statute expressly states that the employees may bring an action in *mandamus* to require the Secretary to so petition the court.[113] The cour may issue an injunction or a five-day temporary restraining order.[114]

Judicial Review

The Act provides that any person affected or aggrieved by a final order of the Commission may obtain review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred, or where the employer has its principal office, or in the Court of Appeals in the District of Columbia, within 60 days of its issuance. The commencement of court proceedings will not stay the order unless the court of appeals rules otherwise. In the absence of extraordinary circumstances, no objection that has not been urged before the Commission will be considered by the court. On questions of fact, the Commission will be sustained if supported by substantial evidence on the record considered as a whole.[115]

The Act also contains an expeditious enforcement provision. The Secretary may obtain enforcement or review of any final order of the Commission if an employer or employee has not petitioned for review within 60 days after service of the Commission's order. In such a case, the Commission's findings of fact shall be conclusive. In this circumstance, as well as in the case of the uncontested citation or notification, the statute authorizes the clerk of the court to enter a decree enforcing the order.[116]

111. *Id.*, § 13(c).
112. *Id.*, § 13(d).
113. *Id.*, § 13(d).
114. *Id.*, § 13(b).
115. *Id.*, § 11(a).
116. *Id.*, § 11(b).

EXISTING STATE PLANS

The Act envisions active participation by the states in the regulation of workplaces and employment facilities. The federal law provides that a state agency or court has jurisdiction over occupational safety and health issues with respect to which no standard has been promulgated.[117] There is thus no possibility of conflict until the Secretary has acted. Once the Secretary has promulgated standards, however, and overlapping and possibly inconsistent federal and state standard do exist, the Act contains a procedure for resolving such differences without emasculating the state's enforcement effort.

For the first two years of the Act's existence, the Secretary is authorized to enter into an agreement with the states under which the states will be permitted to enforce their own health and safety standards until such time as the Secretary has had an opportunity to evaluate the adequacy of the state safety and health plan.[118] Once this initial, temporary approval for a state plan is given, a period of overlapping jurisdiction begins during which either the Secretary or the state agency may enforce its respective standards.

During this two-year period the state must submit a plan designed to result in the state's receiving a permanent exemption from the Secretary. This plan may cover one or more occupational health or safety areas with respect to which federal standards have been promulgated.[119] If the Secretary finds that the state plan meets the statutory criteria set out in section 18(c), he may refrain from enforcing the parallel federal standards. If, following three years of state-plan enforcement, the Secretary determines that the standards are being effectively enforced by the state, he may withdraw federal jurisdiction over the occupational health and safety issues covered in the state plan. The Secretary, of course, retains the authority to rescind such withdrawal of jurisdiction after notice and hearing, if he finds that the state's administration has not been in substantial compliance with its plan.[120]

The state has the right to appeal to the United States Court of Appeals any action by the Secretary either rejecting or rescinding approval of a state plan. The Secretary's decision will stand, however, unless it is found to be unsupported by substantial evidence on the record.[121]

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117. *Id.*, § 18(a).
118. *Id.* § 18(h).
119. *Id.*, § 18(b).
120. *Id.*, § 18(f); OSHA Regs., §§ 1901.1-1901.7, 36 Fed. Reg. 7006-07 (1971), discuss in detail procedures and criteria for state plans and agreements.
121. Pub. L. No. 91-596, § 18(g).

MISCELLANEOUS PROVISIONS

OSHA contains other provisions of marginal importance to the transportation industry. Among these are the establishment of a National Institute for Safety and Health,[122] the authorization of grants for training and employee education[123] and other grants to the states[124] and a provision for audits for these grants.[125] Section 20 imposes primary responsibility for research and related activities on the Secretary of Health, Education and Welfare, and section 27 establishes a National Commission on State Workmen's Compensation Laws.

Finally, OSHA provides that whenever the standards set by the federal government are so severe that they will cause real and substantial economic injury, the Small Business Administration may assist a small business in effecting additions to or alterations in equipment, facilities, or methods of operations necessary to comply with applicable standards.[126] This provision may be of importance to qualifying business in the transportation industry.

CONCLUSION

The transportation industry has traditionally been the subject of extensive safety regulation. That regulation, however, has developed in a piecemeal fashion and thus many working conditions have not been adequately regulated by federal safety standards. The Occupational Safety and Health Act will fill the interstices of existing regulatory schemes. Consequently, it is incumbent on all employer in the transportation industry to carefully define in their own companies the jurisdictional lines of applicable safety regulation and to initiate the necessary changes to insure that previously unregulated working conditions are inconformity with the standards and general duty provisions of the Occupational Safety and Health Act.

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122. *Id.*, § 22.
123. *Id.*, § 21.
124. *Id.*, § 23.
125. *Id.*, § 25.
126. *Id.*, § 28(a).