The Occupational Safety and Health Act (OSHA) became law in 1970 with the laudable goal of assuring “safe and healthy working conditions” for every working man and woman. But during its 20-plus years of existence, OSHA (both the statute and the agency) has received low marks from the business community complaining of over-regulation and too much paperwork, criticism from labor groups citing its shortcomings, and complaints from Capitol Hill that the agency is understaffed and inefficient.

Legislation to reform the Occupational Safety and Health Act (designated as the Comprehensive Occupational Health and Safety Reform Act, or COSHRA) is expected to be a top priority in the 103rd Congress after economy stimulus legislation and health care reform. With new, activist members of Congress and an Administration that has indicated it will focus on workplace problems, OSHA reform legislation is clearly on the Democratic leadership agenda.

It is expected that the House of Representatives will introduce its COSHRA version early this year. This article was authored with a companion Senate bill to be emerging a couple of months later. [NOTE: This article was authored in late January 1993.] Considering the daunting tasks that Congress faces with the budget deficit and health care reform, the real action on OSHA reform will probably occur towards the end of the year and could spill over into 1994. A quick glance at the congressional authors of last year’s version of the bill illustrates the potential fast track that this legislation could take once the other top priorities appear to be on their way.

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The Chairman of the House, Education and Labor Committee, Representative William D. Ford (D-Mich.) and Senator Edward M. Kennedy (D-Mass.), Chairman of the Committee on Labor and Human Resources, first introduced the OSHA reform legislation August 1, 1991. Ford, whose father was killed in an industrial accident, held a September 1991 series of hearings on the tragic Hamlet, NC poultry processing plant fire as a vehicle to push his newly introduced bill.

The bill received the unqualified support of the labor movement. AFL-CIO President Lane Kirkland commented, “The reform is among the most important items on labor’s agenda, and we will spare no effort to get it enacted into law.” The business community, led by the U.S. Chamber of Commerce and the National Association of Manufacturers opposed the legislation and received the backing of the Bush administration. The business community will have no such ally in the Clinton administration when they wage their war against the bill this year.

Senator Kennedy remarked that OSHA reform’s “legislative purpose is based on two concepts: employee empowerment and a workplace approach to occupational safety and health. The bill attempts to improve OSHA on two levels — by strengthening the existing scheme and developing a new approach based on the concept of worker involvement.”

When the bill is re-introduced this session, it will be essentially the same as last year with some exceptions, including the fact that construction safety legislation will be merged with the OSHA reform bill.

Remaining as one of the key provisions will be the establishment of safety and health committees at any work site where there are 11 or more employees. For those whose work is transitory, this provision...
would result in delays and slow down of work as each job site elects, establishes and operates its committee.

A review of the proposed 1991 legislation illustrates how the amendments will impinge on construction activities. As an example, the bill extended employer's duties under OSHA to include all employees working at a specific workplace. This applies even if individuals are not the employer's employees. The impact on contractors performing construction is obvious. Construction work sites of ten contain a multitude of trades, and an individual conducting work as a subcontractor now could become liable for the acts of other subcontractors, even if there is no direct supervisory responsibility for those individuals.

The provision for establishment of safety and health committees also contained a number of provisions that bear watching. This section required:

- A committee to be composed of an equal number of employer and employee representatives be formed;
- The committee would have the ability to review and amend an employer's safety and health program;
- The committee would have the right to review complaints regarding workplace safety and health;
- The committee would have the right to participate in inspections and interviews on a quarterly basis;
- The committee would have the right to accompany any OSHA inspector during a workplace inspection;
- All activities undertaken by the committee would be conducted on company time, with the company paying wages and benefits accruing during that period.

The proposed legislation also significantly enhances criminal penalties. Senator Howard Metzenbaum (D-Ohio) authored the portion of the bill which increases fines and prison terms for violations of the laws for enforcement in the event that there is a serious bodily injury. At present, OSHA can only seek criminal enforcement in the event of a death. The fines are upgraded from a maximum of $20,000 to $50,000 per day. The prison term applicable is changed from six months to 10 years.

In the standard setting context, several provisions were introduced which would greatly affect the construction industry. First, the act would allow standard setting to be initiated by a petition from an interested person that establishes the need for an occupational safety and health standard. After such a petition is filed, and when the secretary receives the recommendation from an advisory committee, a decision would have to be published within

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90 days stating whether a new standard would be enacted.

In the event that the secretary did not intend to publish such a rule, it would still require a listing of the reasons for the decision. If the secretary decides to pursue a rule-making process, a rule must be published within 12 months.

Finally, the private party petitioner can appeal the secretary’s decision to the appropriate United States Court of Appeals. These provisions would actively insert organizations, such as labor, into the day-to-day decision making process within the Department of Labor.

COSHRA also provides for dramatically expanded employee rights in the event a citation is contested. At present, an employee can only contest the abatement date, and has no rights to participate in an OSHA proceeding. However, the amended bill permits active employee participation in all aspects of the contest. This will lead to an employee being allowed input on the type of abatement, the classification of the violation, the penalty and other aspects of the enforcement proceeding. The act also allows attorneys’ fees to be awarded to employee representatives in situations where the Secretary of Labor does not cooperate in providing certain information. These provisions serve as a powerful incentive to labor to become actively involved in contest proceedings.

The COSHRA legislation is not the only factor to consider on the horizon. With a Democratic appointed OSHA Assistant Secretary, one can expect more active regulation review, the promulgation of regulations, hiring of additional inspectors and enforcement of existing regulations. The appointment of an OSHA Assistant Secretary and the new OSHA legislation will have significant repercussions for business and, in particular, the construction industry.

Construction work sites have long been a favored area for OSHA to concentrate inspection resources. The reasons for this are many, but include the ability for OSHA to conduct inspections with a number of employers situated in one location and to maximize the inspectors’ activities. By inspecting contract sites, OSHA can issue multiple citations to separate employers for the same violations.

As an example, an improperly grounded outlet which is utilized by various construction trades, can serve as a basis for individual citations to each employer—despite the fact that the general contractor usually should be responsible for the electrical wiring at a work site.

Title 12 of the bill contains specific rules for construction safety. The section, entitled, “Construction Safety, Health and Education Im-
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provement Act of 1991,” requires:
-that each construction project and individual is responsible for the creation of a written safety and health plan, that regulations be developed which will apply to each construction work site requiring identification of critical conditions on the site which may cause hazards and to identify methods to

insure the structural stability of all buildings, structures and excavations, as well as a listing of inspections and tests required to protect employee safety and health;

-the certification of the safety coordinator by an organization approved by the secretary;

-written approval by the safety coordinator before an employer may begin work in a specified activity;

-every employer participate in every safety and health program;

-every on-site employer to conduct a safety meeting prior to commencement of the project, and on a monthly basis thereafter, require each employer on the construction work site to have a “competent” person with qualifications and responsibilities to identify safety and health hazards and the authority to initiate corrective action.

In summary, the new Administration will probably be the impetus for an upswing of regulatory activity. Contractors should pursue two courses of action. First, a comprehensive review of the existing safety and health programs should be undertaken with a resultant re-dedication commitment to employee safety. Second, contractors, individually and as a group, should attempt to express their concern to Congress to ensure that a fair bill is presented. The prior legislation was drafted primarily by Democrats. With the present Administration, input must come at an early stage in order to protect the rights of all involved.

The fact the proposed legislation is an omnibus bill allows for amendments at any stage. Concern channelled through trade associations and elected representatives, can lead to more balanced legislation.

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