



SEPTEMBER 2008

APPROPRIATIONS AND AUTHORIZATION BILLS

Appropriations and authorization bills are needed to keep the government operating. As such, they provide Congress with an excellent opportunity to try and bury labor, employment, and contractor accountability/responsibility provisions. Concerning labor and employment, such bills would provide a vehicle to try and force construction contractors to use the E-Verify worker eligibility system (slated to expire September 30, 2008)—a provision that has become a major concern for trade associations and their members. (NOTE: The House approved **H.R.6633: the Employment Verification Act of 2008** which would extend E-Verify by five years to allow time to craft a verification system that works fairly and effectively for both employers and employees. A Senate version, **S.3414: Visa Efficiency and E-Verify Extension Act of 2008**, would also extend the E-Verify program by five years.)

The Campaign for Quality Construction Alliance, of which the FCA is a member, has recently written the General Services Administration a five page letter spelling out our twelve major comments concerning the proposed Federal Acquisition Regulation as union contractors (FAR Case 2007-013, Employment Eligibility Verification). Overall, employer organizations that responded agreed that mandating the use of the DHS's E-Verify system contradicts the voluntary nature of the program and presents the potential for dangerous human resource violations due to the system's unacceptably high error rate and lack of liability protection. Basically, the FCA recommends that implementation of any new mandatory electronic verification system for new hires are accurate, easy-to-use, cost-effective, phased in gradually, and contain safe harbor protection for employers who comply.

What is E-Verify? E-Verify is an Internet-based voluntary system that electronically compares information on the employment I-9 authorization forms with records at the SSA and the DHS. Critics say that the system has a 10-percent error rate. **H.R.6633** would authorize two Government Accountability Office studies into the E-Verify system. The first would examine erroneous tentative non-confirmations, while the second would analyze the system's effect on small businesses, particularly costs and system administration.

Concerning contractor accountability/responsibility provisions, **H.R.3033, The Contractors and Federal Spending Accountability Act** would create a centralized government-wide database of information on not only companies debarred by the Federal government, but also information on concluded civil, criminal, and administrative proceedings. This legislation, supported by the FCA, is included in the DOD Authorization Bill.

DHS ISSUES PROPOSED H-2B VISA RULE

The DHS has issued proposed rule changes to enforce and streamline the procedures for hiring workers under the H-2B visa program. These changes would crack down on employers and recruiters who impose fees on prospective H-2B workers as a condition of employment, require employers to notify CIS when these workers fail to show up for work or are terminated, establish a land-border exit system pilot program, and reduce the amount of time from six to three months that these workers must wait outside the U.S. The rule would also create a system of post-adjudication audits and procedures for penalizing employers that fail to meet H-2B program requirements. One of the changes to streamline the process is to switch the H-2B visa program to attestation-based applications through which employers would attest that the program's requirements have been met, rather than the current process where state workforce agencies must certify that recruitment, wage rates, and other requirements have been met. Labor has adversely reacted to the rule recommending that the DOL withdraw the changes because they reduce oversight and weaken worker protections. (NOTE: The H-2B visa program currently allows up to 66,000 non-agricultural foreign workers to enter the U.S. to work seasonally each year.)

BCTD URGES INCREASED FUNDING

BCTD President Mark Ayers has urged senators to consider at least \$500 billion in funding for the highway authorization bill which is expected to come up for debate in 2009. Senate Appropriations Committee Chairman Robert Byrd (D-WY) outlined the details of a domestic supplemental spending bill that will move in September to pump \$25 billion into infrastructure, energy, disaster relief, and other programs as part of a second economic stimulus package.

Transportation and Infrastructure Committee Chairman James Oberstar (D-MN) introduced **H.R.3999: National Highway Bridge Reconstruction and Inspection Act**—a bill that would authorize \$1 billion in FY2009 to repair, reconstruct, and replace structurally deficient bridges on the National Highway System.

TOP REGULATORY ISSUES

CONSTRUCTION DEATHS OUTPACE OTHER INDUSTRIES

Although the number of fatalities in construction declined from 1,239 in 2006 to 1,178 in 2007, for the fifth consecutive year it has remained the industry with the most worker deaths according to the Bureau of Labor Statistics. The largest construction group, the specialty trade contractors, had six percent fewer fatalities in 2007 than in 2006, but the number of fatal falls in 2007 represents a 39 percent increase since 1992.

According to a separate University of Tennessee study, entitled “An Analysis of Fatal Events in the Construction Industry (2006),” the leading causes of fatal construction incidents in CY2006 were similar to those in 2005. Of the 30 causes classified in the report, 351 fatalities (45 percent) were from five leading causes: falls from or through roofs (98 deaths [12.6 percent]), falls from or along with a falling structure other than a roof (72 deaths [9.2 percent]), running over or crushing of non-operators by operating construction equipment (63 deaths [8.1 percent]), electrocution from equipment installation or tool use (61 deaths [7.8 percent]), and trapping, running over, or crushing of the operator of construction equipment (57 deaths [7.3 percent]).

OSHA SEEKS COMMENTS ON PROPOSED NEW PPE RULE

Contractors through their comments disagreed with the proposed PPE rule that “each employee not protected may be considered a separate violation for penalty purposes.” As exists under the current OSHA policy, there should be only one fine for one safety violation and not for each individual who has committed the PPE violation. The FCA feels that the current rule sufficiently covers how penalties are to be assessed. In addition, we feel that the revised rule provides a classic example of a “negative regulation” which could by the sheer magnitude of individual citations force a responsible contractor out of business. Finally, it appears that the new rule may simply be an attempt to increase revenues rather than actually contribute to a safer workplace.

EMPLOYERS SEE NO NEED FOR, BUT LABOR URGES ADOPTING SEPARATE STANDARD

The employers commented that OSHA’s proposed rule for confined spaces in construction is unnecessary, too complex, and will only create more confusion. They felt that the provisions governing confined spaces on OSHA’s general industry standard are adequate, while labor unions said that the industry standard is inadequate, so a separate standard for construction in confined spaces is needed.

HOUSE EDUCATION AND LABOR COMMITTEE RECOMMENDS ENFORCEMENT POLICY CHANGES

According to the Committee, changes to OSHA’s enforcement program should be considered because OSHA’s major enforcement tool (penalties) is not working for the construction industry. Experts comment that such penalties are assessed long after an inspection occurs, are too low, and are often reduced during settlement negotiations. In an effort to change the enforcement policy, the following suggestions/actions have been mentioned. Rep. George Miller (D-CA) favors adopting some elements from New York’s aggressive construction safety program (e.g., issuing stop-work orders to immediately halt unsafe construction). In addition, Mark Ayers, President of the BCTD, has recommended that we establish a separate Construction Safety and Health Administration to provide a stronger Construction Directorate Office within OSHA. OSHA feels that more employers need to take advantage of their Alliance Program.

Finally, proponents of safety enforcement continue to stress passage of **S.1244/H.R.2049: Protecting America's Workers Act** which would set criminal penalties for employers whose workers die on the job because of willful/repeated safety standard violations.

ANSI UPHOLDS VOLUNTARY MUSCULOSKELETAL RULE

According to the American Society of Safety Engineers, an appeals panel for the American National Standards Institute (ANSI) rejected the final appeal by the Construction Industry Employer Coalition to withdraw a voluntary consensus standard, Reduction of Musculoskeletal Problems in Construction (ANSI/ASSE A10.40-200x), aimed at reducing musculoskeletal disorders on construction worksites. The Coalition, which consists of the following five trade associations: AGC, ABC, ASA, MCAA, and NAHB, appealed mainly on the grounds that the standard is "unworkable" (e.g., one section suggests cutting drywall into three-foot pieces, which would not fit on the framing used by nearly all architects, designers, and builders).

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