



Bad Facts Make Bad Laws

Insights

5.01.13

Former Clinton official Webb Hubbell summed it up well...

There is an old adage in politics and the law that “Bad Facts, Lead to Bad Law.” In law, a horrible fact situation full of sympathy for one side can lead to a Judge or a jury making a poor decision or bad precedent.

In politics a bad or terrible tragedy may lead to sympathetic legislators making a law that seems to redress one inequity, but it has terrible consequences for society.

When an accident occurs, such as the recent Texas fertilizer plant explosion, there is a rush to pass new laws or to use an accident to justify resuscitating unsuccessful past legislation. Unfortunately, such laws may not contribute to better workplace safety. Instead, they may include interest groups’ “wish lists,” which may have little to do with the incident which triggered their proposal. Ideology should not trump objective analysis. The question must always be “*will this law improve workplace safety?*”

The day after the Texas explosion Congressman George Miller introduced legislation (law text) to increase Federal-OSHA power over the 21 State OSHA Plans, along with provisions drawn from the Protecting of American Workers Act (PAWA) which has not progressed in four years (and whose weaknesses have been discussed). The explosion occurred in Texas, which is a Federal-OSHA state. So why does an explosion in Texas demonstrate a need for more Federal oversight of OSHA State Plans? Well, . . . it doesn’t. But “*bad facts*” present opportunities to “*make bad laws.*”

The current Administration prefers a centralized management approach, and has reduced the authority of OSHA Regional and Area Office Leadership; many of whom are highly seasoned professionals. One could excuse those civil servants if they feel as if D.C. seemingly distrusts its own people.

D.C. leadership appears to distrust State OSHA Plans even more than its own system, and acts on the assumption that D.C. always knows best. In the last few years, Federal-OSHA has increasingly tried to induce State OSHA Plans to adopt new Federal “*approaches.*” The problem is that many of the State-OSHA Plans believe that their approach may be more effective in their State than the one-size-fits-all punitive approach sometimes promoted by D.C.

Congressman Miller stated that he introduced the legislation in response to the recent GAO Report, "OSHA Can Better Respond To State-Run Programs Facing Challenges." This is the latest report criticizing OSHA's State Plans, and focuses on underfunding and staffing, especially for OSHA Plans in Nevada, Arizona, California, Michigan, New Mexico, Kentucky, Tennessee, Utah and Alaska.

The Report accurately notes that the identified State Plans are increasingly struggling with adequate staffing and funding. However, the Administration has been critical of the State Plans since coming into office, both before and after funding set-backs.

Given how strapped Federal-OSHA is, one does not see how Federal-OSHA would provide the help most desperately needed by these State OSHA Plans . . . more money.

A greater motive may be a dislike of the State Plans doing things their own way. A reasonable question is whether greater Federal-OSHA intervention would improve the State OSHA Plans.

Let's look at Federal-OSHA. Everyone should agree that Federal-OSHA needs a substantial budget increase so as to hire and train more inspectors without having to eliminate vital consultation programs. However, the political reality is that OSHA will not receive the funds it reasonably requires. Thus, OSHA has all but eliminated the consultation programs, which many experts within and outside of OSHA believe accomplished a great deal. Also, D.C. shifted more resources to enforcement. Despite a stagnant budget, OSHA continues to shift money to its whistle blowing focus. While we do not disagree with the need to protect whistleblowers, most management labor attorneys will tell you that they rarely encounter legitimate retaliation claims. Nevertheless, many of the current Administration's supporters strongly believe that encouraging whistle blowing must be one of OSHA's primary focuses. But it seems difficult to defend the transfer money when OSHA cannot adequately fund its core safety responsibilities. We have handled too many death cases to accept anything less than a constant focus on core safety goals.

What Will Fed-OSHA Add?

There are certainly problems with some of the State OSHA Plans, but few of these problems could not be corrected by an infusion of cash. (There are valid concerns in OSHA's State Plan Analysis). Can Fed-OSHA even assist in more training when it is cutting training and development for CSHO's? Can Fed-OSHA provide technical assistance when its own Salt Lake lab is facing challenges?

A big concern is that instead of cash and support, D.C. will add more responsibilities to State Plans, which will further hinder their effectiveness. As an example, State Plans are unsure how to respond to Fed-OSHA's February 21, 2013 Interpretation Letter encouraging more third-party involvement in OSHA inspections. Changes like this Interpretation will disrupt the inspection process and place more burdens on already overworked OSHA Compliance Officers. The proposed law isn't awful, but it does add to the State's burdens and gives Fed-OSHA faster more wide ranging powers than under Section 18 of the OSHAct of 1970.

Some advocates of the legislation point to Nevada-OSHA and the problems it encountered with the mammoth, Las Vegas City Center project. Nevada-OSHA is a professional operation, and many observers believe that City Center's problems reflected the perfect storm of a gigantic project with 9,000 employees, almost 100 architects, and local unions who could not supply an adequate amount of qualified crafts people . . . not incompetent OSHA professionals.

OSHA has taken a large role in Nevada-OSHA's operations, without changes in the law, although I am not aware of studies noting great improvements in its operations. This begs the question, does Fed-OSHA reasonably need more powers to deal with State-OSHA Plans? The GAO Report cites Hawaii cutting the Hawaii-OSHA budget by 50%. However, Federal-OSHA was able to take over Hawaiian inspections without new laws.

Absent more funds, legislation needs to be scrutinized to determine if it will make OSHA more effective and workers safer. Valid concerns have been raised about State OSHA Plans, but the proposed legislation does not seem to address those concerns, and may add more burdens. Some State Plans may just close shop and let Fed-OSHA take over. One might suspect such an outcome appeals to some inside the beltway, but surely not in this era of inadequate OSHA budgets.

It would be great if there could be a bipartisan effort to simply provide more money to Federal-OSHA and the State Plans, and to make it unnecessary for Federal-OSHA to impose more demands on already overextended personnel. Our President established April 28, 2013 as Workers' Memorial Day. Wouldn't a bipartisan effort to better fund OSHA be a great way to honor next April 29, 2014?

Howard

Related People



Howard A. Mavity
Partner
404.240.4204
Email

