109TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 109–61
Part 2

OCCUPATIONAL SAFETY AND HEALTH SMALL EMPLOYER ACCESS TO JUSTICE ACT OF 2005

MAY 20, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 742]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 742) to amend the Occupational Safety and Health Act of 1970 to provide for the award of attorneys' fees and costs to small employers when such employers prevail in litigation prompted by the issuance of a citation by the Occupational Safety and Health Administration, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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39–006

PURPOSE AND SUMMARY

The purpose of H.R. 742, the "Occupational Safety and Health Small Employer Access to Justice Act of 2005," is to increase the ability of small businesses to obtain reimbursement for their legal costs when they prevail in cases brought against them by the Occupational Safety and Health Administration ("OSHA"). The bill provides that a small business (defined as a business with less than 100 employees and a net worth of no more than $7 million) shall recover attorneys' fees when it prevails in an adjudicatory action brought by OSHA. The legislation is intended to prevent non-meritorious lawsuits from proceeding, to encourage OSHA to ensure that the cases it brings against small businesses are meritorious, and to provide small businesses the means to adequately represent themselves when confronted by adjudicatory actions brought by a Federal agency with overwhelmingly superior legal resources.

BACKGROUND AND NEED FOR THE LEGISLATION

Small businesses have repeatedly complained that when faced with government investigations of their workplaces, that it is often far easier and cheaper to settle than to dispute a claim. The result is that small businesses are often pressured to settle even when they possess a reasonable basis for disputing the action. Congress enacted the Equal Access to Justice Act ("EAJA") in 1980 to provide for Federal reimbursement of small businesses faced with non-meritorious complaints or actions by Federal agencies under a "not substantially justified" standard. H.R. 742 modifies the existing statute by creating a separate standard for EAJA cases at OSHA. Under H.R. 742, EAJA cases would result in an award of attorneys' fees and costs if an employer is the prevailing party and had less than 100 employees with a net worth of less than $7 million when the adversarial adjudication was initiated by OSHA.

H.R. 742 demonstrates that Congress is aware that small business owners are sometimes forced to settle OSHA claims even when these claims lack merit. This pressure to settle stems from the fact that small businesses typically possess limited financial resources and are unable to sustain protracted litigation against a well-financed, well-represented government agency. This burden is most acutely felt by small businesses that would be better served by reinvesting financial resources into their employees and organizations, rather than expending precious resources litigating non-meritorious citations. Small businesses should be focused on what they do best, creating jobs for working Americans, rather than diverting their resources to defend against incessant, sometimes non-meritorious claims by Federal officials with vastly superior legal resources.

It is critical to note that H.R. 742 does not insulate small businesses from legal expenses when OSHA prevails in its adjudicatory actions against these firms. Rather, the legislation is narrowly tailored to provide OSHA an incentive to more carefully examine the cases it brings against small businesses to ensure that they are meritorious. The National Federation of Independent Businesses (which includes 600,000 members) strongly supports this legislation.

The Committee notes that a similar bill, H.R. 2731, was passed by the House during the 108th Congress by a vote of 233 to 194 on May 18, 2004.

HEARINGS

The Committee held no hearings on H.R. 742.

COMMITTEE CONSIDERATION

On May 11, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 742 by a vote of 18 to 11, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that there was a recorded vote for reporting the bill during the committee consideration of H.R.742.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus			
Mr. Inglis			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Mr. Issa			
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Smith (Washington)			
Mr. Van Hollen		X	
Mr. Sensenbrenner, Chairman	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Total	18	11	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 742, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 19, 2005.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 742, the Occupational Safety and Health Small Employer Access to Justice Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Tom Bradley, who can be reached at 226–9010.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 742—Occupational Safety and Health Small Employer Access to Justice Act of 2005.

SUMMARY

H.R. 742 would amend the Occupational Safety and Health Act to permit small employers with 100 or fewer employers and net worth of not more than $7 million to be awarded attorney fees and expenses if they prevail against the Occupational Safety and Health Agency (OSHA) in administrative or court proceedings.

CBO estimates that implementing H.R. 742 would cost $4 million in 2006 and $39 million over the 2006–2010 period, subject to the availability of appropriated funds. H.R. 742 would not affect direct spending or revenues.

H.R. 742 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 742 is shown in the following table. The costs of this legislation fall within budget function 550 (health).

By Fiscal Year, in Millions of Dollars

	2005	2006	2007	2008	2009	2010
SPENDING SUBJECT TO APPROPRIATION						
OSHA Spending Under Current Law						
Estimated Authorization Level [1]	464	478	491	505	519	533
Estimated Outlays	467	471	484	498	512	526
Proposed Changes						
Estimated Authorization Level	0	9	9	9	9	10
Estimated Outlays	0	4	7	9	9	10
OSHA Spending Under H.R. 742						
Estimated Authorization Level	464	487	500	514	528	543
Estimated Outlays	467	475	491	507	521	536

1. The 2005 level is the amount appropriated for that year for the Occupational Safety and Health Agency. The amounts for 2006 through 2010 are baseline projections that assume annual increases for anticipated inflation.

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill will be enacted in the fall of 2005, that the estimated amounts will be appropriated for each year, and that outlays will follow historical spending patterns for similar activities authorized under the Equal Access to Justice Act (EAJA).

H.R. 742 would amend the Occupational Safety and Health Act to allow employers with 100 or fewer employees and less than $7 million in net worth to be awarded reasonable attorney fees and expenses if they prevail in an adversarial adjudication or a court proceeding in which they contest a citation made by OSHA. Under the EAJA, the payment of fees and expenses would be made from the agency's discretionary appropriations. CBO estimates that implementing H.R. 742 would cost $4 million in 2006 and $39 million over the 2006–2010 period, subject to the availability of appropriated funds.

Currently under the EAJA, a prevailing party with fewer than 500 employees and less than $7 million in net worth may recover their legal expenses, but only when it is found that the action brought by the United States is not substantially justified or when special circumstances would make an award unjust. In practice, OSHA actions (that is, citations pursuant to the Occupational Safety and Health Act) have nearly always met those standards. (Only a handful of employers with 100 or fewer employees were awarded fees and expenses after prevailing against OSHA in 2003.) Regardless of whether OSHA's actions were substantially justified or the

award unjust, OSHA would be required, under H.R. 742, to pay fees and expenses of small employers who prevail in administrative or court proceedings.

According to data from the agency, each year OSHA issues citations in about 28,000 cases across all employer groups. Employers with fewer than 101 employees accounted for about 70 percent of that caseload. (Most small employers cited by OSHA are construction-related firms.) Only about 7 percent of the citations made to small firms are contested, or about 1,400 cases per year. Of these contested cases, CBO estimates that about 400 would involve either adjudication in an administrative proceeding or judicial review, based on the percentage of all contested cases that reached these levels over the past 2 years.

In addition, CBO assumes that small employers would prevail against OSHA on at least one count in over half of the cases that reach the required administrative or judicial level. This assumption is based on the historical rate at which all employers prevail when they contest OSHA citations. In 2006, CBO assumes OSHA would reimburse small employers about $40,000 in legal costs, on average, when they prevail in overturning OSHA actions. That assumption is based on a survey of OSHA awards to small employers in 2003 and the expectation that the awards will grow with inflation. CBO assumed the average award under H.R. 742 would be 50 percent higher than under current law because reductions for substantial justification would be removed.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 742 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

PREVIOUS CBO ESTIMATE

On April 15, 2005, CBO transmitted a cost estimate for H.R. 742 as ordered reported by the House Committee on Energy and Commerce on April 13, 2005. The version of H.R. 742 approved by House Committee on the Judiciary is identical to the version approved by the Committee on Energy and Commerce, as is CBO's estimate of the budgetary effect of implementing the bill.

ESTIMATE PREPARED BY:

Federal Costs: Tom Bradley (226–9010)
Impact on State, Local, and Tribal Governments: Leo Lex (225–3220)
Impact on the Private Sector: Peter Richmond (226–2666)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, H.R. 742 is designed to improve the effectiveness of the Equal Access to Justice Act regarding OSHA cases.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article one, section eight, clause three of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SEC. 1. SHORT TITLE.

This section designates the legislation the "Occupational Safety and Health Small Employer Access to Justice Act of 2005."

SEC. 2. AWARD OF ATTORNEYS' FEES AND COSTS.

This section amends the Occupational Safety and Health Act of 1970 by adding a new section 32 and renumbering sections 32 through 34 as 33 through 35. The new section 32 provides that an employer who is the prevailing party in an adversary adjudication commenced on or after the date of enactment under the OSH Act, which at the time the action was initiated had not more than 100 employees and a net worth of not more than $7 million, shall be awarded attorneys' fees pursuant to the section 504 of title 5 of U.S. Code irrespective of whether the position taken by OSHA was "substantially justified."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

* * * * * * *

AWARD OF ATTORNEYS' FEES AND COSTS

SEC. 32.

(a) ADMINISTRATIVE PROCEEDINGS.—An employer who—

(1) is the prevailing party in any adversary adjudication instituted under this Act, and

(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the adversary adjudication was initiated,

shall be awarded fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Secretary was substantially justified or special circumstances make an award unjust. For purposes of this section the term "adversary adjudication" has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

(b) PROCEEDINGS.—An employer who—

(1) is the prevailing party in any proceeding for judicial review of any action instituted under this Act, and

(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the action addressed under subsection (1) was filed,

shall be awarded fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) of this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.

(c) APPLICABILITY.—

(1) COMMISSION PROCEEDINGS.—Subsection (a) shall apply to proceedings commenced on or after the date of enactment of this section.

(2) COURT PROCEEDINGS.—Subsection (b) shall apply to proceedings for judicial review commenced on or after the date of enactment of this section.

SEPARABILITY

SEC. [32] *33*. If any provision of this Act, or the application of such provision to any person of circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

APPROPRIATIONS

SEC. [33] *34*. There are authorized to be appropriated to carry out this Act for each fiscal year such sums as the Congress shall deem necessary.

EFFECTIVE DATE

SEC. [34] *35*. This Act shall take effect one hundred and twenty days after the date of its enactment.

MARKUP TRANSCRIPT

BUSINESS MEETING

MAY 18, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 742, the "Occupational Safety and Health Small Employer Access to Justice Act of 2005," for purposes of markup and move its favorable recommendation to the House. Without objection, the

bill will be considered as read and open for amendment at any point.

[The bill, H.R. 742, follows:]

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109TH CONGRESS
1ST SESSION

H. R. 742

To amend the Occupational Safety and Health Act of 1970 to provide for the award of attorneys' fees and costs to small employers when such employers prevail in litigation prompted by the issuance of a citation by the Occupational Safety and Health Administration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 10, 2005

Mr. NORWOOD (for himself, Mr. BOEHNER, Mr. SAM JOHNSON of Texas, Mr. MCKEON, Mr. EHLERS, Mrs. BIGGERT, Mr. KELLER, Mr. WILSON of South Carolina, Mr. KLINE, Mr. PAUL, and Mr. NEUGEBAUER) introduced the following bill; which was referred to the Committee on Education and the Workforce

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A BILL

To amend the Occupational Safety and Health Act of 1970 to provide for the award of attorneys' fees and costs to small employers when such employers prevail in litigation prompted by the issuance of a citation by the Occupational Safety and Health Administration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Occupational Safety and Health Small Employer Access to Justice Act of 2005".

SEC. 2. AWARD OF ATTORNEYS' FEES AND COSTS.

The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) is amended by redesignating sections 32, 33, and 34 as sections 33, 34, and 35, respectively, and by inserting after section 31 the following new section:

"AWARD OF ATTORNEYS' FEES AND COSTS

"SEC. 32.

"(a) ADMINISTRATIVE PROCEEDINGS.—An employer who—

"(1) is the prevailing party in any adversary adjudication instituted under this Act, and

"(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the adversary adjudication was initiated,

shall be awarded fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Secretary was substantially justified or special circumstances make an award unjust. For purposes of this section the term 'adversary adjudication' has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

"(b) PROCEEDINGS.—An employer who—

"(1) is the prevailing party in any proceeding for judicial review of any action instituted under this Act, and

"(2) had not more than 100 employees and a net worth of not more than $7,000,000 at the time the action addressed under subsection (1) was filed, shall be awarded fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) of this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.

"(c) APPLICABILITY.—

"(1) COMMISSION PROCEEDINGS.—Subsection (a) shall apply to proceedings commenced on or after the date of enactment of this section.

"(2) COURT PROCEEDINGS.—Subsection (b) shall apply to proceedings for judicial review commenced on or after the date of enactment of this section.".

○

Chairman SENSENBRENNER. And the Chair recognizes himself for 5 minutes to explain the bill.

Enacted in 1980, the Equal Access to Justice Act requires Federal agencies to reimburse the legal costs of small businesses that successfully challenge actions brought against them by a Federal agency. The reason for passage of that legislation was clear. Small businesses have fewer resources to defend themselves against the virtually unlimited financial and legal resources of Government agencies, even when they have a strong basis for proclaiming their innocence.

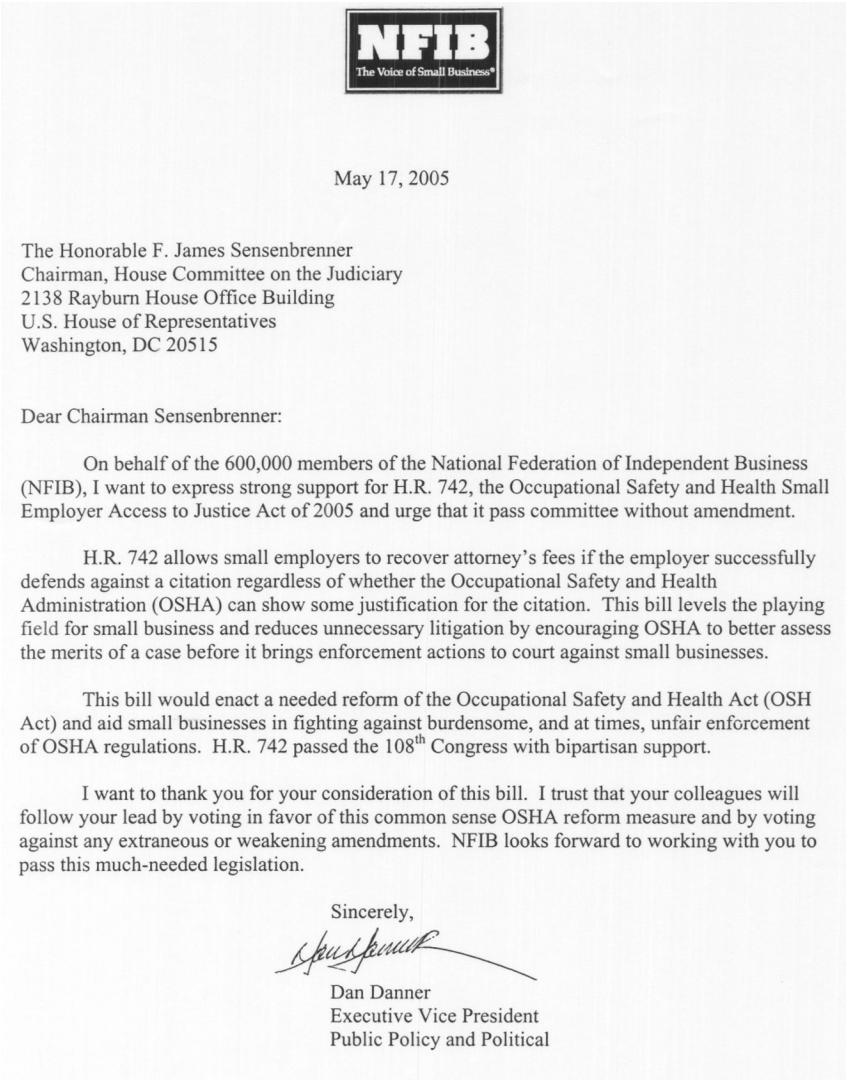
Even with the cost recovery provisions of the Equal Access to Justice Act, when faced with Government investigations at their workplaces by OSHA, it is often far cheaper and easier for small businesses to settle than to dispute a claim. The result is that small businesses are often pressured to settle, even when they possess a reasonable basis for disputing the action.

Additionally, the current practice has the perverse incentive of encouraging less than qualified OSHA actions against small businesses since Government regulators know that small businesses with limited resources will routinely settle with the Government regardless of the merits of their dispute.

This bill will help restore the balance between OSHA and small businesses by making it easier for the small businesses to obtain Government reimbursement. The bill was reported by the Committee on Education and the Workforce on April 27. The Committee on the Judiciary received a sequential referral of this legislation which expires on Friday, which means we have to act today in order to preserve jurisdiction.

I ask unanimous consent that a letter to me from the 600,000 members of the NFIB expressing strong support with this legislation and requesting that it be passed by the Committee without amendment be included in the record, and without objection, that is so ordered.

[The letter referred to follows:]



NFIB
The Voice of Small Business®

May 17, 2005

The Honorable F. James Sensenbrenner
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sensenbrenner:

On behalf of the 600,000 members of the National Federation of Independent Business (NFIB), I want to express strong support for H.R. 742, the Occupational Safety and Health Small Employer Access to Justice Act of 2005 and urge that it pass committee without amendment.

H.R. 742 allows small employers to recover attorney's fees if the employer successfully defends against a citation regardless of whether the Occupational Safety and Health Administration (OSHA) can show some justification for the citation. This bill levels the playing field for small business and reduces unnecessary litigation by encouraging OSHA to better assess the merits of a case before it brings enforcement actions to court against small businesses.

This bill would enact a needed reform of the Occupational Safety and Health Act (OSH Act) and aid small businesses in fighting against burdensome, and at times, unfair enforcement of OSHA regulations. H.R. 742 passed the 108th Congress with bipartisan support.

I want to thank you for your consideration of this bill. I trust that your colleagues will follow your lead by voting in favor of this common sense OSHA reform measure and by voting against any extraneous or weakening amendments. NFIB looks forward to working with you to pass this much-needed legislation.

Sincerely,

Dan Danner
Executive Vice President
Public Policy and Political

Chairman SENSENBRENNER. I urge my colleagues to favorably report the legislation and recognize the gentleman from Michigan.

Mr. CONYERS. Mr. Chairman, this is our first legislation which constitutes the wolf in sheep's clothing because I consider this a very dangerous measure because it actually creates an incentive for employers to litigate with OSHA rather than to correct any safety flaws in the workplace.

Unfortunately, this measure will undermine the goal of OSHA, which is to assure, so far as possible, every worker in the Nation safe and healthful working conditions, because what we will do is, in effect, penalize OSHA for any instance in which it attempts to

safeguard worker safety and losses that even for technical reasons may exist.

Now, let's look at the picture. First of all, this is going to harm small employees of which most workers are employed in this country. It applies to any company with less than 100 employees, without regard for their safety record, and currently over 6.5 million small businesses fall into this category. That is 97 percent of all employers. The companies employ more than 55 million workers.

Many of these businesses have maybe billions of dollars in annual revenues, certainly millions, and have no business being covered by a small business bill.

Now, curiously enough—and here's where the wolf in sheep's clothing description comes in—the Committee has received no evidence that OSHA has been acting in any incorrect way or that they pursued unwarranted litigation or that they have abused its prosecutorial discretion. To the contrary, 60 percent of all OSHA citations are settled, and those that go to trial, OSHA wins 4 out of 5 cases. And so employers are already entitled to recovery of legal fees under the law and—which further specifies that the Government must pay the prevailing party's fees and costs in any situation in which the Government's position was not substantially justified.

So we have before us an unwarranted bill that lashes out against an effective agency and places our workers in this country in further jeopardy. And it's for these reasons it is my position that the bill is dangerous, that it is—and assuming that it's well intended, is going to very much frustrate OSHA in the very good job in this area that they're doing in terms of seeking more safe and more healthful working conditions.

I urge the Members to consider these points as we move this measure in the Committee on the Judiciary, and I return my time.

Chairman SENSENBRENNER. Without objection, all Members' opening statements can appear in the record at this point in time.

Are there amendments?

[No response.]

Chairman SENSENBRENNER. If there are no amendments——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I would just move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I won't take 5 minutes. I just think this is bad public policy, and I intend to vote against it. And I know what the outcome is going to be. I just wanted to be on record.

I yield back.

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. WATERS. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. WATERS. I know that there perhaps are great changes in policy taking place in the Congress of the United States on any number of subjects and issue areas. But one of the things that I think we can be proud of in this country is the fact that we moved a long time ago to protect workers in the workplace, and because of

OSHA, I believe that we have avoided the loss of limb, we have protected workers from being placed in situations where they could have their eyes basically lost, all kinds of protections that I think we can be very proud of as a country as it relates to protections we give our workers.

And so to move in this direction and to try and frame it as protecting small businesses is an absolute misinterpretation of what is really happening here. First of all, this legislation goes way beyond what is small business. It does not in anyway define small business in the same way that we define small businesses in Title 7 of the Civil Rights Act or the Americans with Disabilities Act where we're talking about small businesses, 15 employees or 20 employees. This is far-reaching and what it simply does is it puts a chill on OSHA's being able to protect the workers.

There's no real evidence that's been presented that OSHA's prosecutorial discretion warrants its paying—its paying of attorneys' fees in cases it loses, and so I just think that we need to take a real close look a this and not proceed in this fashion to just run roughshod over much of the good public policy that we have developed over the years. I would ask for a no vote on——

Mr. WEINER. Would the gentlelady yield before she yields back?

Ms. WATERS. Yes, I will yield.

Mr. WEINER. You know, this does perhaps, though, give us some food for thought about the way we deal with State proceedings before the NLRB. If a company is trying to stop a union from organizing and it turns out they were unsuccessful or they get violations, maybe it should be treble damages or maybe they should have to pay the legal fees of the workers who are trying to organize. So perhaps—you know, consistency has never been a strength of this Committee, I would say to the gentlelady, but perhaps it gives us some opportunities later on.

Ms. WATERS. That is a good thought. Thank you very much. I yield back the balance of my time.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. Are there amendments?

[No response.]

Chairman SENSENBRENNER. If there are no amendments, a reporting quorum——

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. SCOTT. Did someone seek recognition?

Mr. LUNGREN. Mr. Chairman?

Mr. SCOTT. I move to strike the last word unless somebody on that——

Chairman SENSENBRENNER. The gentleman from California.

Mr. LUNGREN. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. Mr. Chairman, just in response to the comments that we just heard, there's nothing in this bill that undoes anything that OSHA can do. There's nothing that restricts its jurisdiction here. There's nothing that tries to refine what it does. This bill simply says that for small businesses—and they are defined as has been stated—they may recover attorneys' fees when they prevail in an adjudicatory action brought by OSHA.

Why is this important? During part of the time that I was absent from this body, I practiced law in the private sector and had the opportunity to represent some private parties dealing with the Federal Government. And it is a fact of life that the Federal Government's size, staying power, strength overwhelms many individuals in the private sector, that oftentimes what has been stated is absolutely true, and I've seen it. You settle rather than going through all of that which is necessary to deal with the Federal Government on issues before them.

It's not a condemnation of the Federal Government. It's not a condemnation of the agencies involved. But to allow someone to recover attorneys' fees is a relatively simple fix on——

Mr. WATT. Would the gentleman yield?

Mr. LUNGREN.—a problem that may otherwise exist.

Mr. WATT. Would the gentleman yield?

Mr. LUNGREN. I'll be happy to yield.

Mr. WATT. Is the gentleman aware that currently if there is a showing of—that fees are substantially justified or where, quote, special circumstances would make——

Mr. LUNGREN. Yes.

Mr. WATT.—shifting unjust, that the court already has discretion to crack the whip on OSHA——

Mr. LUNGREN. Yes, I understand that. Reclaiming my time, I would say this——

Mr. WATT. You got 90 percent of the loaf; you want the other 10 percent now.

Mr. LUNGREN. No. What I want is something which fairly shifts a balance, that allows people to be heard, requires the Federal Government in these instances to take a second look as to the seriousness of their case, and, frankly, just allows people to be treated fairly. As I said, if I hadn't been in the private sector, if I hadn't represented people in adversarial positions with the Federal Government, if I hadn't seen one of the tactics of the Federal Government, which is to squeeze individuals basically with the threat of just the staying power of the Federal Government, I would not be supporting this. But I've seen this, and unfortunately I think we need to do this sort of thing and——

Mr. BERMAN. Would the gentleman yield?

Mr. LUNGREN. I'd be happy to yield.

Mr. BERMAN. I'm curious. If—I have two questions. If OSHA prevails and, in fact, an employer, large or small, is found to have violated safety standards, can OSHA collect attorneys' fees on behalf of the taxpayers against that small employer under existing law?

Mr. LUNGREN. I'm not certain of that, but they can certainly get fines, and fines that I have seen in the past are certainly significant. They can take civil action against them for——

Mr. BERMAN. No, there are penalties for——

Mr. LUNGREN. That's what I mean.

Mr. BERMAN. But for the costs of having to litigate that which the employer could have acknowledged in the beginning and paid the fines for, can the Federal Government get reimbursed for the attorneys' fees expended?

Mr. LUNGREN. Under normal circumstances I don't believe so.

Mr. BERMAN. I think that's right.

If a group of workers go to their union and their union hires an attorney to present to OSHA the evidence of safety code violations and OSHA brings an action and prevails, should the union members or the union be able to—or the employees be able to recover the attorneys' fees they expended in pursuing a claim which vindicated Federal rights and turned out to have demonstrated OSHA violations by an employer?

Mr. LUNGREN. I hadn't thought about that. I'd be happy to talk with the gentleman another time on that.

Mr. BERMAN. Is there a time when the majority might want to propose a bill that's evenhanded on this subject?

Mr. LUNGREN. I understand that's a rhetorical question by the gentleman. I would say that from the perspective of individuals who have been on the other side of cases such as this by the Federal Government, in this respect OSHA, this is an attempt to try and balance the case.

I yield back the balance of my time.

[Intervening business.]

Chairman SENSENBRENNER. We will now return to H.R. 742. Are there amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, very briefly—and some of these points have been covered—the Equal Access to Justice Act already provides for attorneys' fees when the OSHA is not substantially justified. In fact, there is no problem because the findings are that virtually every cases—virtually every case, the OSHA is justified, and so we're looking for a problem that does not exist. The fact is that this will—this has the effect of discouraging OSHA from bringing cases.

Now, there is no independent right of action under OSHA, so the employees depend on OSHA to protect them from—for safety and health. And relying on OSHA, if we're discouraging OSHA, we're putting these workers at risk.

I would hope that we would rely on the present law, the Equal Access to Justice Act, which provides just about everything this bill does without discouraging OSHA from enforcing the law. I yield to the gentleman from Michigan.

Mr. CONYERS. I thank Mr. Scott for yielding.

Ladies and gentlemen of the Committee, we have no evidence before us that OSHA has been bringing unwarranted litigation or that they have abused prosecutorial discretion. This is a great idea with no foundation. And let me tell you what a lot of people are beginning to think.

This is an anti-worker bill in which people injured in the workplace are going to be made more vulnerable as a result of our concern about allowing many private businesses, many of whom are very large in size, to use this as a further way of intimidating OSHA. And so I hope that the Occupational Safety and Health organization will not change its policy of moving aggressively if this measure happens to get out of the House or out of—become law. It's just unfair for us to say that we're now going to protect bamboozled employers, but there's nothing that proves that that's the case at all. This is—this is a phantom issue, and I think it's a move to encircle and intimidate the Occupational Safety and Health Administration.

I thank the gentleman for yielding.

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Speaker. I'll be brief.

Mr. Speaker, I think the gentleman from Michigan is, as is customary, very mild. The fact of the matter is OSHA has too few prosecutions of businesses. Thousands and thousands, tens of thousands of American workers are injured in preventable accidents every year because the law isn't adequately enforced. This bill is simply a measure to try to intimidate OSHA from enforcing the law, even to the extent it does now. It is a bill designed to get more American workers injured or killed on the job. It is a disgraceful bill. I hope we don't report it.

I yield back.

Chairman SENSENBRENNER. The question—a reporting quorum is present. The question occurs on the motion to report the bill H.R. 742 favorably. All in favor will say aye? Opposed, no?

The noes appear to have it. A rollcall is ordered. Those in favor of reporting the bill favorably will, as your names are called, answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Lungren?

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

Mr. PENCE. Aye.

The CLERK. Mr. Pence, aye. Mr. Forbes?

[No response.]
The CLERK. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mr. Franks?
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye. Mr. Gohmert?
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sanchez?
Ms. SANCHEZ. No.
The CLERK. Ms. Sanchez, no. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their votes? The gentleman from Virginia, Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.
Mr. SMITH OF TEXAS. Aye.
The CLERK. Mr. Smith, aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their votes? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 18 ayes and 11 noes.

Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by the House rules in which to submit additional, dissenting, supplemental, or minority views.

[Intervening business.]

Chairman SENSENBRENNER. The Committee stands adjourned.

[Whereupon, at 11:41 a.m., the Committee adjourned.]

DISSENTING VIEWS

We strongly dissent from H.R. 742, the "Occupational Safety and Health Small Employers Access to Justice Act of 2005." H.R. 742, as the title suggests, does nothing to enhance workers' safety and health protections or safeguard small business. H.R. 742 will weaken the Occupational Safety and Health Administration's (OSHA) ability to protect workers by discouraging the agency from exercising its enforcement and labor standard setting responsibilities. H.R. 742 will result in greater workplace fatalities, injuries, and illnesses.

The Bureau of Labor Statistics reports that in 2003, 5,559 workers were killed by traumatic injuries. This means that on average, 15 workers were fatally injured each day in 2003.[1] In 2003, 4.4 million workers were injured on the job and 2.3 million of these workers had to spend days away from work or experience job transfers or restrictions as a result of injuries.[2] The AFL-CIO reports that Federal OSHA currently has 861 safety and health inspectors and can inspect workplaces on an average of once every 108 years.[3] OSHA's current budget for fiscal year 2005 of almost $462 million amounts to $4.33 per worker in the private sector.[4] H.R. 742 will do nothing to rectify these numbers, but rather force taxpayers to pay the legal costs of employers and jeopardize workplace health and safety.

We oppose this legislation for several reasons. First, H.R. 742 will severely limit OSHA's ability to protect workers. Second, H.R. 742, which has been characterized as a small business bill, is not limited to small business. Third, the need for H.R. 742 is unsupported by evidence that OSHA has pursued unwarranted litigation or abused its prosecutorial discretion. And fourth, H.R. 742 is unnecessary because employers are already entitled to recovery of legal fees under the Equal Access to Justice Act.

DESCRIPTION OF LEGISLATION

Section I of H.R. 742 designates the bill as the "Occupational Safety and Health Small Employer Access to Justice Act of 2005."

Section II of H.R. 742 requires that OSHA pay the attorneys' fees and costs of employers with 100 or fewer employees and a net worth of up to $7 million when such employers prevail in any administrative or enforcement case brought by OSHA or any challenge to an OSHA standard. Employers will be entitled to attorneys' fees and costs in cases in which it prevails against OSHA regardless of whether OSHA's action was substantially justified.

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[1] Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries in 2003,* September 22, 2004.
[2] Bureau of Labor Statistics, *Workplace Injuries and Illnesses in 2003,* December 14, 2004.
[3] AFL-CIO, Death on the Job, 14th Edition, April 2005.
[4] Budget of the U.S. Government, Fiscal Year 2005, Appendix, Pages 725–727.

H.R. 742 was introduced on February 10, 2005 by Representative Charles Norwood (R-GA). The bill was referred to the Committee on Education and the Workforce and on April 13, 2005, the bill was ordered favorably reported to the House by a party-line vote of 27–18. On April 27, 2005, the bill was reported by the Committee on Education and the Workforce and referred sequentially to the Committee on the Judiciary. On May 18, 2005, the Committee on the Judiciary, which did not hold any hearings on H.R. 742, reported the bill favorably by a party-line vote of 18–11.

Organizations that oppose H.R. 742 include the 57 national and international unions that comprise the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), such as the American Federation of State, County, and Municipal Employees (AFSCME), Service Employees International Union (SEIU), United Automobile Workers (UAW), and International Brotherhood of Teamsters (IBT).[5]

I. H.R. 742 SEVERELY LIMITS OSHA'S ABILITY TO PROTECT WORKERS

Since OSHA was created in 1970, its mission has been clear: "to assure the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace health and safety"[6] OSHA's mission to save lives, prevent injuries and illnesses, and to protect the health of America's workers remains essential today. H.R. 742 will stifle OSHA's exercise of statutory responsibility to enforce the Occupational and Safety Health Act of 1970 (OSH Act)[7] by penalizing the agency for every instance in which it attempts to do so unsuccessfully. H.R. 742 will enure that an agency that is already pursuing too few prosecutions, will pursue even fewer.

H.R. 472 will have a chilling effect on both OSHA enforcement and OSHA standard setting because attorneys' fees would be available to prevailing employers in both types of actions. OSHA would be hesitant to cite employers for violations of the OSH Act unless there is absolute certainty that the enforcement action will be upheld in its entirety. Similarly, unless OSHA is certain that a standard will not be challenged, it would be reluctant to develop and issue rules on any hazard no matter how dangerous a threat to workers. Rather than foster cooperation between employers and OSHA, H.R. 742 will encourage defendants to litigate matters with OSHA. To the detriment of our American workers, this legislation will result in fewer settlements and lengthier litigation, as well as delayed compliance with the OSH Act.

H.R. 472 represents yet another bill that places worker safety and lives at risk. During the last 5 years, the labor community has witnessed workplace protections and job safety programs weakened. Each year, the labor community has had to fight proposed cuts to OSHA, the Mine Safety and Health Administration (MSHA), and the National Institute for Occupational Safety and

[5] Letter from William Samuel, Director, Department of Legislation, AFL-CIO to Representative John Conyers, Jr., May 17, 2005.

[6] Occupational Safety and Health Administration, *Mission Statement,* www.osha.gov/oshainfo/mission.html, May 19, 2005.

[7] 29 USC § 651.

Heath (NIOSH) budgets.[8] H.R. 472 will drain resources away from an agency that has perpetually struggled to do its job with the limited resources available to do it. The Congressional Budget Office estimates that H.R. 472 will cost $4 million for fiscal year 2006 and $39 million for fiscal years 2006–2010, which must come out of OSHA's budget.[9] This would require Congress to appropriate additional money to OSHA's budget to cover the cost of the bill or to cut OSHA's enforcement budget or reduce compliance assistance to businesses.

II. H.R. 742 IS NOT LIMITED TO SMALL BUSINESS

H.R. 742 has been characterized as a small business bill, but this bill actually will apply to the majority of private sector employers. The bill defines a small business as an employer with fewer than 100 employees and a net worth of up to $7 million dollars. Businesses with fewer than 100 employees make up almost 98% of all private sector establishments.[10] These businesses have a higher rate of fatal occupational injury than do establishments with 100 or more workers.[11] As a result, H.R. 472 will result in even higher rates of worker fatalities, injury, and illness.

Furthermore, Congress traditionally defines "small business" for the purpose of establishing coverage under a wide range of employment related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act applies to employers who have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[12] Also, the Americans with Disabilities Act[13] and Title VII of the Civil Rights Act of 1964[14] cover employers with fifteen or more employees.

III. H.R. 742 IS UNSUPPORTED BY EVIDENCE THAT OSHA ABUSES PROSECUTORIAL DISCRETION

There is no evidence that OSHA's prosecutorial discretion warrants its paying of attorneys' fees and costs in cases it loses. Indeed, the statistics demonstrate otherwise. Out of nearly 77,000 total violations cited in fiscal year 1998, only 2,061 inspections resulted in citations that were contested. In fiscal year 1998, Federal OSHA conducted more than 34,000 inspections, 16,396 of which resulted in citations at workplaces with fewer than 100 employees. Sixty percent of these citations were settled between OSHA and the employer in informal conferences. Employers contested just 1,275 or 8% of the citations before the Occupational Safety and Health Review Commission. Furthermore, in fiscal year 1998, 19

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[8] AFL-CIO Safety and Health Fact Sheet, *Norwood Reintroduces Four OSHA Deform Bills, Worker Safety Threatened,* March 2005.

[9] *Congressional Budget Office Cost Estimate for H.R. 742, the Occupational Safety and Health Small Employer Access to Justice Act of 2005,* as ordered by the House Committee on the Judiciary on May 18, 2005.

[10] U.S. Census Bureau, Statistics of U.S. Businesses: 2001, *U.S.—All Industries by Employment Size of Enterprise.*

[11] AFL-CIO Safety and Health Fact Sheet, *Norwood Reintroduces Four OSHA Deform Bills, Worker Safety Threatened,* March 2005.

[12] 29 USC § 621.

[13] 42 USC § 12101.

[14] 42 USC § 2000.

OSHA enforcement cases were decided by Federal appellate courts. OSHA won a total of 77%, or four out of five, of these cases.[15]

These numbers suggest that OSHA neither issues citations nor enters into litigation against employers in a capricious manner. Since OSHA either settles or wins the vast majority of enforcement cases, there is no justification for assuming that employers need to be protected against an overzealous prosecutorial agency. Instead of encouraging cooperation between employers and OSHA, H.R. 742 encourages defendants to litigate. Fewer settlements and lengthier litigation would delay compliance with the OSH Act. Altering OSHA's prosecutorial discretion could prove to be extremely counterproductive and disastrous to millions of workers.

IV. H.R. 742 IS UNNECESSARY BECAUSE GOVERNMENT AGENCIES SUBJECT TO EAJA

OSHA, like most other government agencies is already subject to the Equal Access to Justice Act (EAJA). Under EAJA businesses must pay the prevailing party's fees and costs only in those situations in which the government's position was not "substantially justified," or where "special circumstances" would make fee-shifting unjust.[16] Congress has never seen fit simply to shift the financial burdens of litigation to the government when it does not prevail without regard to the merits of the government's position. There is no evidence warranting that proceedings involving OSHA be singled out for imposition of the new rule that H.R. 742 will impose. Furthermore, OSHA is not entitled to attorneys' fees and costs when it prevails in a claim against an employer.

There is no evidence that EAJA is failing to achieve Congressional intent, nor is there any evidence that EAJA works differently at OSHA than it does in any other agency. There is also a lack of data indicating that businesses have underutilized EAJA with respect to administrative and judicial actions under the OSH Act. According to a 1998 GAO study, the Department of Labor ranked fifth out of 15 Federal agencies in the number of judicial decisions issued with respect to EAJA applications in fiscal year 1994. Specifically, OSHA awarded approximately $192, 494 in EAJA fees during fiscal years 1987–1997 in 28 cases.[17] This amounts to an average of $6,874, a statistic which hardly demonstrates that employers, small or large, have spent large amounts of money in defense of frivolous lawsuits under the OSH Act.

CONCLUSION

H.R. 742 does nothing to address the serious job safety hazards that millions of American workers face everyday. H.R. 742 will only stifle any attempt of OSHA's to carry out its mission of assuring the health and safety of America's workers. It should not be in the interest of this country to deprive OSHA of the resources and authority that it needs to do its job. Rather, we should work to improve safety and health protections for the millions of workers in this country.

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[15] U.S. Department of Labor, Data from The Office of the Solicitor For Records, 1998.
[16] 5 USC § 504.
[17] General Accounting Office, *Equal Access to Justice Act: Its Use in Selected Agencies,* GAO/HEHS–98–58R, January 14, 1998.

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