Re: House Bill 259 and Senate Bill 270

Dear Governor Glendening:

We have reviewed for constitutionality and legal sufficiency House Bill 259 and Senate Bill 270, companion bills on the subject of Occupational Safety and Health – Assessment of Civil Penalties[1]. The bills amend § 5–809 of the Labor and Employment Article to prohibit the Commissioner of Labor and Industry from assessing an employer a penalty for a first violation of a Maryland Occupational Safety and Health ("MOSH") program regulation, if the violation is not a serious one and the employer corrects it within 10 days after issuance of the citation alleging the violation. While the bills may constitutionally be enacted, we note that implementation of either bill could conflict with federal law, resulting in a variety of possible federal actions, including withdrawal of federal funding, or displacement of MOSH. Moreover, an abrogation provision in Section 2 of the bills does not guarantee that such results would not occur.

To retain the MOSH program, Maryland must operate it in a manner that is at least as effective as that of the federal Occupational Safety and Health Administration ("OSHA") of the Department of Labor. A substantial failure to comply with this requirement permits OSHA to assert concurrent jurisdiction with the State or to terminate the State's program altogether. OSHA has advised the Commissioner that if these bills are enacted, it will view MOSH as less effective than OSHA and initiate proceedings to withdraw approval of the MOSH program, thereby terminating it. It is likely that upon initiation of such a proceeding, OSHA would prohibit MOSH from drawing against its federal grant.

We understand that the principal basis for the OSHA view that these bills would make MOSH substantially less effective than the federal program is the ten–day grace period permitted under the bills to every employer for correction of an initial, non–serious violation. This prohibition of certain first–instance sanctions is contrary to OSHA regulations which expressly require states to provide for sanctions for first violations. 29 C.F.R. 1902.37(b)(12).[2]

First–instance sanctions are considered by OSHA to be an important deterrent to unsafe conditions, by motivating employers to achieve compliance before regulatory inspection. OSHA could reasonably and permissibly conclude that the grace period under these bills, combined with the reality of an inadequate number of inspectors, could be taken by employers as an encouragement to refrain from preventive compliance, thereby increasing the likelihood of accidents. This is contrary to the fundamental purpose of the Occupational Safety and Health Act, 29 U.S.C. 651 et. seq. (the "Act"), which is to prevent the first accident, not to console the first victim or the victim's survivors. Brown & Root, Inc. v. OSHRC, 639 F.2d 1289 (5th Cir., 1981).[3]

Each bill contains in Section 2 the provision:

> "... That, if any provision of this Act would result in the loss of the authority of the State, under the provisions of § 18(b) of the Williams–Steiger Occupational Safety and Health Act of 1970, as amended, to administer a State occupational safety and health program, this Act shall be abrogated and of no further force and effect."