

Although this provision appears designed to anticipate and prevent a conflict with OSHA that would result in termination of federal funding or of the MOSH program itself, we cannot guarantee that the provision would so operate. The provision leaves it unclear what event would trigger abrogation. MOSH is already on notice that enactment of these provisions will threaten withdrawal of federal approval. Because OSHA has available to it a variety of procedures, it cannot be predicted what steps might trigger abrogation, and OSHA and MOSH might not be in agreement on this matter. For example, OSHA could begin by assertion of concurrent jurisdiction. This would presumably not be a loss of State authority triggering abrogation. Nonetheless, this would be an encroachment upon operation of the State program, and could also be accompanied by withdrawal of federal funding. An action to withdraw approval to operate a state plan is a lengthy adversarial proceeding.⁴ It is not clear whether the prospect of "loss of authority of the State" sufficient to trigger abrogation of these bills would occur at any step prior to exhaustion of appeal of an adverse decision.

In summary, although we find no constitutional impediment to enactment of House Bill 259 or Senate Bill 270, the implementation of their provisions would conflict with federal OSHA requirements, resulting in any of a number of possible encroachments upon the operations of the MOSH program. These may include the loss of federal funding, subjection to concurrent federal jurisdiction, and initiation of adversarial proceedings to withdraw federal approval. Any of these, however, may be insufficient to trigger the abrogation provision of these bills to avoid such result.

Very truly yours,
J. Joseph Curran, Jr.
Attorney General

¹ This is the short title of the House bill; the short title of the Senate bill is simply Occupational Safety and Health – Penalties. The only other variation in the final versions of the two bills is in the rendering of a phrase in the purpose paragraph: in the House bill it is "a nonserious violation;" in the Senate version it is "not a serious violation."

² This difference from federal requirements may well be viewed as substantial, even though the grace period would be available only for non-serious violations. A provision that undermines preventive action to maintain a safe workplace could be viewed as substantial.

³ An additional respect in which these bills appear to make MOSH less effective than OSHA is that it is arguable that the penalty for failing to correct the type of violation addressed in the bill within the 10-day grace period would be the penalty assessed for an other than serious violation, rather than the more substantial penalty for failure to correct a previously cited violation (a maximum of \$7,000, rather than \$7,000 per day). See, Labor and Employment Article, § 5-810(a).

⁴ The process includes notice to the state, hearing before an administrative law judge, and decision by the Secretary of Labor, which decision may also be appealed. See 29 U.S.C. 667(f); 29 CFR Part 1955.