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BILL ANALYSIS

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Senate Bill 647 (as passed by the Senate)
Sponsor: Senator Bruce Patterson
Committee: Commerce and Labor

Date Completed: 4-14-04

RATIONALE

An Executive Order issued by Governor Granholm in January 2003 has raised concerns among some firms wishing to do business with the State. Executive Order (E.O.) 2003-1 authorizes the Department of Management and Budget (DMB) to debar a vendor from consideration for the award of a contract for the provision of goods or services to the State of Michigan or suspend the procurement of goods and services from a vendor for up to eight years if, within the prior three years, the vendor, an officer of the vendor, or an owner of 25% or greater interest in the vendor has been convicted of any offense or violated any State or Federal law, which in the opinion of the DMB indicates that the vendor is unable to perform responsibly or reflects a lack of integrity that could negatively affect or reflect upon the State. The Order's definition of an offense or violation includes a "wilful" or persistent violation of the Michigan Occupational Safety and Health Act, but the E.O. does not define "wilful".

Evidently, the Order's failure to define "wilful" has been problematic for some businesses seeking State contracts. These firms are worried that previous or future violations of the Act could be found to be "wilful" by the Michigan Occupational Safety and Health Administration (MIOSHA) and cost them State contracts without due process. Some people believe that, if the Act defined "wilful" for this purpose, by amending MIOSHA, Michigan businesses could be sure that the Order would be enforced fairly and the agency would apply the term "wilful" in a predictable manner.

CONTENT

The bill would amend the Michigan Occupational Safety and Health Act to do all of the following:

-- Require a Department of Labor and Economic Growth (DLEG) representative to develop or record certain evidence in an investigation of an employer's wilful violation of the Act.
-- Define "wilful" for purposes of an administrative action, and require the factual demonstration of particular criteria to establish a willful violation.
-- Specify the rights of a person interviewed as part of an inspection, investigation, or violation proceeding.
-- Allow a DLEG representative to conduct a partial interview to establish a violation of the Act.

Wilful Violation

The bill specifies that, in determining the existence of a wilful violation of the Act that would subject an employer to civil and/or criminal penalties, during the inspection concerning a citation the DLEG representative carefully would have to develop and obtain or record all evidence indicating that the employer knew of the hazardous condition and acted knowingly and purposefully with intentional disregard of the Act, or a rule or standard adopted under it, despite that knowledge.

In determining whether a wilful violation citation should be issued, the DLEG representative would have to document and retain all facts establishing the criteria for a wilful violation that would result in an administrative action. Those facts would have to be documented and retained for consideration by the trier-of-fact in any appeal proceeding relative to a contested citation of a wilful violation.

Under the Act, for the purpose of criminal prosecutions, "wilful" means the intent to do an act knowingly and purposely by an individual who, having a free will and choice, either intentionally disregards a requirement of the Act or a rule or standard under it or is knowingly and purposely indifferent to a requirement of the Act or a rule or standard under it. An omission or failure to act is considered wilful if done knowingly and purposely.

The bill would add that, for purposes of an administrative action under the Act, "wilful" would mean an action performed with knowledge of the hazardous condition and action with a knowing and purposeful intentional disregard of the Act, a rule, or standard, despite that knowledge. "Wilful", for purposes of an administrative action, would have to be established by factual demonstration of the following:

-- Whether the employer had knowledge that the condition was hazardous and did not abate the hazard.
-- Whether the employer was aware of the standard established by the Act or by rule.
-- Whether the employer knew that the condition at issue violated a standard established by the Act or by rule.
-- Whether the employer took steps to comply with the standard established by the Act or rule.
-- How the nature and extent of the violation constituted the employer's plain indifference to the health and safety of the employees.
-- How the employer intentionally and deliberately disregarded his or her responsibilities under a specific provision of the Act or a rule or standard adopted under it.
-- The employer's motive for noncompliance with a provision of the Act or a rule or standard adopted under it.

Interviews

To implement the Act, a DLEG representative, upon presenting appropriate credentials, may enter a place of employment to inspect or investigate conditions of employment and all pertinent conditions, equipment, and materials and to question privately the employer, owner, operator, agent, or an employee with respect to safety or health.

The bill specifies that, during an interview or partial interview conducted as part of an inspection, investigation, or violation proceeding, the interviewee would have the following rights, and would have to be made aware of them:

-- The right to decline an interview.
-- The right to have the interview conducted in private.
-- The right to have his or her representative present.

If an interviewee had a representative present, the interview would have to be conducted on a date and in a location mutually agreed upon by all of the parties to the interview.

The Department could conduct a partial interview if it were necessary to ask certain questions in order to establish a violation of the Act or a rule or standard adopted under the Act. An employer could not direct an employee to select a particular interview option.

The bill provides that all statements relative to a violation proceeding under the Act, a rule, or a standard, that were generated by an interview or partial interview, would have to be in writing and signed by the interviewee.

MCL 408.1006 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would give businesses greater certainty as to what scenarios MIOSHA would define as "wilful", and would help companies predict what violations could be found to be "wilful". The bill clearly lays out the conditions that would have to exist for a company to be found in "wilful" violation of the Act, and would alleviate concerns of Michigan businesses that they could be barred from receiving a contract because the agency had acted arbitrarily in determining a violation to be "wilful". Amending the Act to include a definition of "wilful" would not affect a great number of businesses because only a small number of MIOSHA violations each year are found to have been "wilful".

Opposing Argument

By defining the term "willful" narrowly and laying out strict criteria for determining that a violation was willful, the bill would make it more difficult for MIOSHA to conclude that a violation was "wilful". As a result, businesses that continue to expose their employees to possible harm could be awarded State contracts they may not otherwise receive.

The agency already has developed procedures and policies for conducting interviews and determining the appropriate classification of a violation. These procedures and policies are periodically updated. It would be inappropriate to add detailed administrative requirements that would conflict with current Michigan case law. The definition currently used by Michigan courts to determine whether MIOSHA violations are "wilful" is laid out in the 1995 Michigan Court of Appeals case of *Barker Brothers Construction* v *Bureau of Safety & Regulation* (212 Mich App 132). "'[W]illful'", according to the *Barker Brothers* ruling, "means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, 'regardless of venial motive.'"

The definition used by the *Barker Brothers* Court is the one applied by the United States Court of Appeals, Sixth Circuit, when it is determining whether a violation of the Federal Occupational Safety and Health Act of 1970 is 'wilful'. The Sixth Circuit Court of Appeals includes Michigan.

Response: The bill would serve to clarify how current laws should be applied by MIOSHA and would comply with current OSHA requirements.

Opposing Argument

The Michigan Occupational Safety and Health Administration does not have a record of recklessly citing employers for "wilful" violations. According to the DLEG, in 2002, only 0.2% of all citations issued by the agency were classified as "wilful" and, in 2003, that number was only 0.4%. Most employers fined for "wilful" violations are not receiving them for minor violations, but rather, for major violations in which a company has been repeatedly cited and employees have been injured.

Opposing Argument

The bill would make it more difficult for MIOSHA to collect information through employee interviews. By giving employees the right to decline interviews, the bill would make it easier for employers to intimidate employees. It is not difficult to imagine a scenario in which an employer could pressure an employee with damaging information to decline to meet with MIOSHA investigators. Although investigators still would have the opportunity to compel the employee through an investigatory subpoena, seeking one for each interview would add unnecessarily to the time and expense of an investigation and guarantee that fewer violations would be investigated. According to the bill, a "wilful" violation would require the agency to determine that an employer knew of the hazardous condition and deliberately disregarded the law, factors that would be very difficult to prove when the parties involved declined to be interviewed.

Legislative Analysts: J.P. Finet

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on the Michigan Occupational Safety and Health Agency. The proposed requirement for interviews to be conducted at a mutually agreed upon location would increase the Agency's administrative responsibilities and, according to the Agency, could divert time from existing responsibilities, such as inspections, possibly resulting in a reduction in penalty revenue collections.

Fiscal Analyst: Maria Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.