

# Push to Give Workers Right to Sue Employers for Occupational Safety and Health Act Violations

By Catherine A. Cano &

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## Meet the Authors



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Workplace Safety and Health

As the Occupational Safety and Health Act (OSH Act) turned 50 in December 2020, the Center for Progressive Reform (CPR) issued “[OSHA’s Next 50 Years: Legislating a Private Right of Action to Empower Workers](#),” in which it suggested that Congress provide a private right of action for employees under the OSH Act.

[CPR has expressed optimism](#) recently that the new political climate in Washington, D.C. will make reality this and other goals.

Currently, the Occupational Safety and Health Administration (OSHA) has the sole right to pursue claims under the OSH Act through citations and civil penalties. OSHA relies, in part, on workers to inform the agency of unsafe working conditions and offers whistleblower protection to those who do. According to CPR, funding shortages and a disproportionate number of inspectors compared to workers and worksites have left workers vulnerable to workplace hazards. CPR argues that providing employees a private cause of action under the OSH Act can fill those gaps, help OSHA identify problematic worksites, and motivate employers to better protect workers from harm or face litigation, among other things.

CPR proposes an expedited administrative agency review that commences with an employee complaint and then a “notice of intent to sue.” The agency would have a brief period to conduct an inspection (up to five days, depending on the alleged severity) and issue a citation (30 or three days, depending on the severity). The complaining party would have 90 days after OSHA’s failure to issue a citation to file suit in state or federal court, and the employer would be barred from removing the case to federal court. CPR also proposes extending the statute of limitations to bring suit from six months to five years.

In addition to creating a private cause of action, CPR has called on Congress to implement legislation that would:

- Incentivize employee whistleblowers by instituting a “bounty provision,” by splitting civil penalties recovered between workers and OSHA (30% and 70%, respectively);
- Provide automatic recovery of attorney’s fees in successful cases;
- Ban mandatory arbitration as a condition of employment;
- Require states with OSHA-approved State Plans to also incorporate a private right of action into those plans;
- “Modernize” whistleblower protections; and
- Expand the OSH Act’s coverage to public sector workers, farmworkers, and “gig workers.”

CPR is not alone in these efforts. In its [2021 National Agenda for Worker Safety and Health](#), the National Council for Occupational Safety and Health (COSH) called on the

Biden administration to back a version of the Protecting America's Workers Act (PAWA) that also would incorporate a private right of action into the OSH Act. PAWA is a measure that has been reintroduced in each Congress, but typically does not receive bipartisan support or advance beyond referral to the House Committee on Education and Labor and the Senate Committee on Health, Education, Labor and Pensions. On February 7, 2021, Congressman Joe Courtney (D-Conn.) introduced House Resolution 1074, a version of PAWA that does not include a private right of action for employees.

A private right of action under the OSH Act could have a significant impact on the balance of power between employers and employees and, potentially, independent contractors. First, it would substitute OSHA, an agency with more than 50 years of experience investigating and evaluating workplace hazards, with an employee with little or no background in the application of OSHA standards. Second, it may force employers to defend meritless claims. Private litigation potentially could be available without the benefit of OSHA having conducted an inspection or even after OSHA investigated and determined there was no violation.

The proposed incentives for workers and their attorneys only increase the risk of unfounded claims. The threat of paying attorney's fees (both to defend themselves and if a plaintiff succeeds) puts pressure on businesses to settle, regardless of the merits of a claim.

If you have questions or need assistance with an OSHA inspection or citation, contact the Jackson Lewis attorney with whom you work or the [Workplace Safety and Health Practice Group](#).

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