



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

October 5, 1999

H.R. 1987

Fair Access to Indemnity and Reimbursement Act

*As ordered reported by the House Committee on Education and the Workforce
on July 29, 1999*

SUMMARY

H.R. 1987 would increase spending by the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA) by allowing small businesses to be awarded attorney's fees and expenses when they prevail against the NLRB or OSHA in administrative or judicial proceedings. By enabling those businesses to be reimbursed regardless of whether the position of the NLRB or OSHA was substantially justified, H.R. 1987 would increase spending by about \$4 million in 2000, and \$20 million over the 2000-2004 period, subject to annual appropriations.

In addition, enactment of H.R. 1987 could affect fines collected by the federal government from companies that violate employment health and safety laws. Although the reduction in the amount of fines is likely to be insignificant, the bill would be subject to pay-as-you-go procedures.

H.R. 1987 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on the budgets of state, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 1987 is shown in the following table. The costs of this legislation fall within budget functions 500 (education, training, employment, and social services) and 550 (health).

| | By Fiscal Year, in Millions of Dollars | | | | | |
|--|--|------|------|------|------|------|
| | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
| SPENDING SUBJECT TO APPROPRIATION | | | | | | |
| Spending by the NLRB and OSHA Under Current Law ^a | | | | | | |
| Estimated Authorization Level | 528 | 549 | 567 | 586 | 605 | 624 |
| Estimated Outlays | 527 | 547 | 565 | 583 | 602 | 622 |
| Proposed Changes | | | | | | |
| Estimated Authorization Level | 0 | 4 | 4 | 4 | 4 | 4 |
| Estimated Outlays | 0 | 4 | 4 | 4 | 4 | 4 |
| Spending by the NLRB and OSHA Under H.R. 1987 | | | | | | |
| Estimated Authorization Level | 528 | 553 | 571 | 590 | 609 | 628 |
| Estimated Outlays | 527 | 551 | 569 | 587 | 606 | 626 |

a. Amounts shown are CBO's baseline projections, assuming adjustments for anticipated inflation. Without such inflation adjustments, the estimates under current law would be \$528 million each year, and the estimates of spending under H.R. 1987 would be \$532 million for each year over the 2000-2004 period.

BASIS OF ESTIMATE

Spending Subject to Appropriation

H.R. 1987 would amend the statutes governing the NLRB and OSHA to change the situations in which these agencies make payments under the Equal Access to Justice Act (EAJA). Currently under the EAJA, a prevailing party with fewer than 500 employees and less than \$7 million in net worth may recover fees and expenses, but only if the party can prove that the position of the United States was substantially unjustified. In practice, that is difficult to prove. Between 1982 and 1997, 345 parties involved in NLRB cases filed applications under EAJA. Those claims represent about 4 percent of the NLRB cases which went to adjudication. Of those applications, only 59 of NLRB petitions (about 17 percent of those that had applied) were granted. Over the same period, 82 parties involved in OSHA cases filed applications under EAJA, which represented less than 1 percent of OSHA cases that went to adjudication. Of those applications, 37 percent were granted EAJA reimbursement. A total of \$1.6 million in fees and expenses was awarded under EAJA from cases involving the two agencies.

Enacting H.R. 1987 would make it easier for very small businesses to recover fees and expenses by eliminating the requirement that they prove that the U.S. government was not substantially justified in bringing its case. The increase in spending by the NLRB and OSHA due to that change would be about \$4 million annually. In accordance with provisions of EAJA, the payments of fees and expenses would be made from each agency's discretionary appropriations.

Of the roughly 30,000 unfair labor practice cases brought annually by the NLRB, about half involve firms with fewer than 100 employees, and less than 2 percent of those cases go to adjudication. The NLRB generally prevails in over 80 percent of cases brought before an administrative law judge. Although the NLRB does not keep data on the net worth of the businesses against which it brings cases, the business information services firm of Dun & Bradstreet estimates that the distribution of net worth is roughly similar to the distribution of the number of employees per company. This estimate assumes that about half of the cases lost by the NLRB—or about 40 per year—involve establishments that meet the size and net worth tests under H.R. 1987. Using the average amount paid by the NLRB under EAJA, CBO estimates that the NLRB would pay an additional \$1 million per year.

In regard to OSHA cases under EAJA, the prevailing party is determined on a per citation basis. If a fine or penalty out of the several fines that may be contested in a case is removed or significantly reduced, OSHA reimburses the employer for the attorney's fees attributable to that portion of the case. In almost all of the OSHA cases that have been contested by the employer in adjudication, the judges have reduced the fines to be collected from the employer. Based on data from the Occupational Safety and Health Review Commission through 1998, the amount awarded for attorney's fees under EAJA has varied, but averages around \$8,000 per case. In 1998, 350 of the OSHA cases that went to adjudication involved employers with 100 or fewer employees. Based on this information, CBO estimates that, under H.R. 1987, OSHA would pay an additional \$3 million per year in attorney's fees.

PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. Requiring OSHA to pay the attorney's fees for very small businesses that prevail against OSHA in adjudication would increase the incentive for OSHA to reduce its fine or penalty in a settlement and avoid adjudication. This could reduce the amount of the penalties OSHA would have otherwise collected from these employers. Amounts collected from fines and penalties are considered revenues and are thus subject to pay-as-you-go procedures. Based on the amount that OSHA has collected after

adjudication in the past, CBO estimates the reduction in revenue from enacting H.R. 1987 would be less than \$500,000 a year.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 1987 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

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