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*AWARDS OF ATTORNEY'S FEES TO SMALL
BUSINESSES AND LABOR ORGANIZATIONS THAT
PREVAIL AGAINST THE NLRB OR OSHA: H.R. 1987,
106TH CONGRESS*

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Abstract. H.R. 1987, 106th Congress, the Fair Access to Indemnity and Reimbursement (FAIR) Act, which was reported by the Committee on Education and the Workforce on October 14, 1999, would make it easier for small businesses and labor organizations that prevail against the NLRB or OSHA, in administrative or court proceedings, to recover their attorneys' fees from the government. It would do so by requiring fees to be awarded automatically in cases to which it applied, instead of only when the government's position was not substantially justified.

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Awards of Attorneys' Fees to Small Businesses and Labor Organizations that Prevail Against the NLRB or OSHA: H.R. 1987, 106th Congress

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Summary

H.R. 1987, 106th Congress, the Fair Access to Indemnity and Reimbursement (FAIR) Act, which was reported by the Committee on Education and the Workforce on October 14, 1999, would make it easier for small businesses and labor organizations that prevail against the NLRB or OSHA, in administrative or court proceedings, to recover their attorneys' fees from the government. It would do so by requiring fees to be awarded automatically in cases to which it applied, instead of only when the government's position was not substantially justified.

H.R. 1987, 106th Congress, the Fair Access to Indemnity and Reimbursement (FAIR) Act, was reported by the Committee on Education and the Workforce on October 14, 1999. The Committee report (H.Rept 106-385) states that its purpose

is to assist small businesses and labor organizations in defending themselves against government bureaucracy. By providing for the reimbursement of attorney's fees and expenses to certain prevailing small employers, the legislation is intended to help prevent spurious lawsuits and ensure that employers of modest means have an incentive to adequately represent themselves against the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA).

The bill would amend the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (OSHA) so that each would provide that, if an employer, or, in the case of the NLRA, a labor organization, prevails in an "adversary adjudication" conducted by the NLRB or OSHA, or prevails in a civil action, including proceedings for judicial review of agency action, brought by or against the NLRB or (in the case of OSHA) the Secretary of Labor, then the employer or labor organization shall be awarded fees and other expenses as a prevailing party under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 28 U.S.C. § 2412(d), but without regard to whether the position of the Board or (in the case of OSHA) the Secretary of Labor, "was substantially

justified or special circumstances make an award unjust.” This entitlement to an award of fees and other expenses, would apply, however, only to employers or labor organizations that “had not more than 100 employees and a net worth of not more than \$7,000,000 at the time the adversary adjudication was initiated.”

To understand H.R. 1987, one must have some background in the law of attorneys’ fees awards and EAJA. The general rule in the United States, known as the “American rule,” is that each party to a lawsuit pays its own legal fees, and that a federal court ordinarily may not order the losing party to pay the winning party’s attorneys’ fees unless a statute authorizes it to do so. Congress, however, has enacted numerous “fee-shifting” provisions that authorize federal courts to order the losing party to a lawsuit to pay the prevailing party’s attorneys’ fees (see *Awards of Attorneys’ Fees by Federal Courts and Federal Agencies*, CRS Rept. 94-970 A). EAJA is one of these provisions.

Most fee-shifting provisions are parts of particular statutes and apply only to suits brought under those statutes. For example, Title VII of the Civil Rights Act of 1964 includes a fee-shifting provision that authorizes courts to award attorneys’ fees to parties who prevail in lawsuits filed under Title VII. 42 U.S.C. § 2000e-5(k). EAJA, however, is not a part of any other statute. It provides that, in “adversary adjudications” before federal agencies, and in civil actions, including proceedings for judicial review of agency action, brought by or against the United States under a statute that does not have its own fee-shifting provision, the agency or court shall award fees to a party who prevails against the United States.

The agency or court may *not* award fees, however, if the United States proves that, even though it lost the proceeding, its position “was substantially justified or that special circumstances make an award unjust.” The agency or court may also not award fees if the prevailing party is an individual whose net worth exceeded \$2,000,000 at the time the adversary adjudication or civil action was filed, or is a business or association with more than 500 employees or a net worth of not more than \$7,000,000 at the time the adversary adjudication or civil action was filed. Furthermore, although most fee-shifting provisions authorize a court to award “reasonable” fees, EAJA imposes a cap of \$125 per hour unless the agency or court determines that “an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”

Comparing H.R. 1987 with EAJA reveals that, under the bill, fees could be awarded in the same types of proceedings as under EAJA: “adversary adjudications” and civil actions, including proceedings for judicial review of agency action. And, as fees under H.R. 1987 would be awarded “under” and “in accordance with” EAJA, the \$125 per hour cap, as well as other features of EAJA not mentioned above, would apply.

The differences between the bill and EAJA are two. First, an employer or labor organization with not more than 100 employees and a net worth of not more than \$7,000,000 could recover fees under H.R. 1987 without regard to whether the position of the government was substantially justified or special circumstances make an award unjust. This is significant because, under EAJA, the “substantially justified” exception means that, even in most cases it loses, the United States does *not* have to pay attorneys’ fees. Under H.R. 1987, by contrast, a fee award to a party with not more than 100 employees and a net worth of not more than \$7,000,000 that prevailed against the United

States would apparently be automatic, as the bill provides that fees “shall” be awarded, and provides no exceptions (and the committee report states that fees would “automatically” be allowed).

Second, employers and labor organizations with between 101 and 500 employees could not recover under the bill, whereas they may recover under EAJA if they have a net worth of not more than \$7,000,000. The committee report indicates the intention that “[t]he employee-eligibility limit [be] a mere 20 percent of the current 500 employee limit for employers under the EAJA.” If the bill is enacted, employers and labor organizations with between 101 and 500 employees presumably could continue to recover fees under EAJA, with its “substantially justified” exception. H.R. 1987 does not state this explicitly, but it does not seem intended to eliminate existing rights of employers and labor organizations that it does not benefit.

“The rationale for the FAIR Act,” the committee report states,

is that government agencies the size of the NLRB and OSHA -- well-staffed, with numerous lawyers -- should more carefully evaluate the merits of a case before bringing it against a small business, which is ill-equipped to defend itself against an opponent with such superior expertise and resources. Furthermore, small businesses have been victimized by relatively frivolous lawsuits by these agencies, but have been unable to fight cases to their conclusions based on the merits due to lack of resources, and have had to settle the case. . . .

Under current law, small businesses and unions who have prevailed against the NLRB or the OSHA may use the Equal Access to Justice Act Unfortunately, the EAJA is not often utilized against the NLRB or the OSHA and has proven ineffective. . . . Agencies have easily met the “substantially justified” burden of proof because courts have interpreted the burden to actually be one of “reasonable basis in law and fact.” . . .

Given the low burden before the NLRB and the OSHA, and sine an EAJA claim itself can be as costly as the underlying action, not many EAJA claims are being filed with either agency.

The minority views that accompany the committee report argue:

The Majority failed to provide any evidence whatsoever that the Board or OSHA have abused their statutory authority in issuing and prosecuting complaints. The Majority has also failed to show that the Equal Access to Justice Act provides insufficient redress to respondents who prevail in proceedings before the NLRB and OSHA Review Commission.

H.R. 1987 is a blatant attempt to chill the Board’s and OSHA’s exercise of statutory responsibility to enforce the NLRA and the OSH Act, by penalizing these agencies for every instance in which they attempt to do so unsuccessfully. Instead of encouraging cooperation between employers and the two agencies, H.R. 1987 would actually encourage defendants to litigate matters with the NLRB and OSHA, resulting in fewer settlements, lengthier litigation, and ultimately delaying compliance with the NLRA and OSH Act. Enactment of H.R. 1987 would put the safety and health of thousands of workers at risk and deny workers the right to organize in order to secure higher pay, greater benefits, and job protections.

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