



HR & BENEFITS UPDATE

“Chemical Facility” Employers Would Face New Background Check, HR & Other Safety & Security Mandates Under Proposed Chemical Facility Anti-Terrorism Bill

November 16, 2009

“The Chemical Facility Anti-Terrorism Act of 2009” (“Act”) passed by the House of Representatives on Friday, November includes a provision that if enacted, will require employers operating “chemical facilities” to conduct security background checks on certain individuals, provide paid administrative leave for any employee being investigated, and implement other management controls intended to strengthen the security of their facilities. By tightening the regulation of security practices at chemical facilities, Title XXI of the Act seeks to strengthen the security of chemical facilities against terroristic acts or other threats.

The Act requires any facility (“chemical facility”) at which the owner or operator of the facility possesses or plans to possess at any relevant point in time a substance of concern or that that meets other risk-related criteria identified by the Secretary of Homeland Security (the “Secretary”) to implement processes and procedures that would comply with a broad range of risk-based standards established by the Secretary to ensure or enhance the security of a chemical facility against a chemical facility terrorist incident referred to in the Act as “chemical facility security performance standards” (the “Standards”).

By their express terms and inherently as part of other requirements, the Standards would require that chemical facilities implement a host of new processes and procedures impacting on the selection, credentialing and management of employees and other service providers. Among other things, for example, the Act would require chemical facilities to:

- Administer a regularly updated identification system that checks the identification of chemical facility personnel and other persons seeking access to the chemical facility and that discourages abuse through established disciplinary measures;
- Restrict access to facilities and secure site assets, systems, and technology;
- Screen and control access to the facility and to restricted areas within the facility by screening or inspecting individuals and vehicles as they enter, measures to deter the unauthorized introduction of dangerous substances and devices that may facilitate a chemical facility terrorist incident or actions having serious negative consequences for the population surrounding the chemical facility;
- Perform personnel surety for individuals with access to restricted areas or critical assets by conducting appropriate background checks and ensuring appropriate credentials for unescorted visitors and chemical facility personnel, including permanent and part-time

personnel, temporary personnel, and contract personnel, including measures designed to verify and validate identity, to check criminal history, to verify and validate legal authorization to work and to identify people with terrorist ties;

- Require that employees and other member of the workforce comply with new processes, plans and procedures for preventing and responding to chemical facility terrorist incidents and other required procedures for deterring and responding to chemical facility terrorist incidents and threats of those incidents; and
- Appointing new security officials responsible for overseeing and administering compliance under the Act.

As part of some of these required procedures, chemical facilities could expect to be required to adopt and train employees on their specific roles or responsibilities for deterring or responding to a chemical facility terrorist incident

Furthermore, the oversight and enforcement powers granted to the Secretary under the also would create a host of new employer retaliation and whistleblower exposures. The Act would prohibit employer retaliation, implement new whistleblower safeguards and remedies and grant the Secretary the right to offer non-supervisory employees the opportunity to confidentially communicate information relevant to the employer's compliance or non-compliance of the chemical facility with the Act or its implementing regulations; It also would grant "an employee representative of each certified or recognized bargaining agent at the covered chemical facility, if any, or, if none, a non-supervisory employee ... the opportunity to accompany the Secretary during a physical inspection of such covered chemical facility for the purpose of aiding in such inspection, if representatives of the owner or operator of the covered chemical facility will also be accompanying the Secretary on such inspection."

Beyond these and other specific staffing requirements, the Act also would require chemical facilities implement, retrain and require that members of its workforce comply with a broad range of new procedures required under the Standards, including procedures to:

- Deter chemical facility terrorist incidents through visible, professional, well-maintained security measures and systems, including security personnel, detection systems, barriers and barricades, and hardened or reduced value targets;
- Deter theft or diversion of a substances of concern, insider sabotage, cyber sabotage, unauthorized onsite or remote access to critical process controls; and other critical product elements, data or systems;

If you have questions about or need assistance with evaluation and responding to the provisions of the Act or any other employment, compensation, employee benefit, workplace health and safety, corporate ethics and compliance practices, concerns or claims, please contact the author of this article, Curran Tomko Tarski LLP Labor & Employment Practice Group Chair Cynthia Marcotte Stamer. Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and Chair of the American Bar Association RPTe Employee Benefits & Other Compensation Group, Ms. Stamer is experienced with assisting employers and others about compliance with federal and state equal employment opportunity, compensation and employee benefit, workplace safety, and other labor and employment, as well as advising and defending employers and others against tax, employment discrimination and other labor and employment, and other related audits, investigations and litigation, charges, audits, claims and investigations by the IRS, Department of Labor and other federal and state regulators. Ms. Stamer has advised and represented employers on these and other labor and employment, compensation, employee

benefit and other personnel and staffing matters for more than 20 years. Ms. Stamer also speaks and writes extensively on these and other related matters. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly. For additional information about the experience and services of Ms. Stamer and other members of the Curran Tomko Tarksi LLP team, see [here](#).

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