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cc:

Subject: Comments on OMB's Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations

Attached please find the comments of the U.S. Chamber of Commerce on OMB's Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations.

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- COMMENTS - Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations.pdf

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
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May 20, 2004

Ms. Lorraine Hunt
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10202
725 17th Street, N.W.
Washington, D.C. 20503

Re: Comments on OMB's *Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations*

Dear Ms. Hunt:

The U.S. Chamber of Commerce (U.S. Chamber), the world's largest business federation representing more than three million businesses of all sizes, sectors, and regions, is pleased to provide the following comments in response to the Office of Management and Budget's (OMB) *Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations* (Draft Report)[1].

These comments respond to OMB's request for general comments on the Draft Report concerning the costs and benefits of regulations and OMB's regulatory accounting method. In further response to OMB's request, attached to these comments is a list of regulations and guidance documents affecting the manufacturing sector that the U.S. Chamber believes should be reformed, revised, or rescinded.

BACKGROUND ON COST-BENEFIT ANALYSIS

The U.S. Chamber is very concerned about the regulatory process, including cost-benefit analyses and the accounting methods used to assess the impact of regulations because the costs of regulations on the nation's economy are staggering. In 2003, the United States Department of the Treasury reported that federal discretionary spending was $825

[1] *Federal Register* 69 (February 20, 2004): 7987.

billion[2], and in 2003 the total of all individual income taxes paid was $794 billion[3]. In addition, according to a Crain and Hopkins study commissioned by the U.S. Small Business Administration the annual cost of **all** federal regulations is presently estimated at about $843 billion[4]. Of this amount, the annual cost of environmental regulations is estimated at $197 billion[5] while the total of all corporate income taxes paid in 2003 was $132 billion[6]. The role of OMB's Office of Information and Regulatory Affairs (OIRA) in seeking to improve regulatory actions therefore has great significance to the business community and to small businesses in particular, since federal regulations cost small businesses $6,975 per employee, almost 60 percent more per employee than a large company[7].

We applaud OMB and OIRA for the effort it has made to advance the discussion of how to ensure that regulations are based on reliable information, as well as OMB's candid acknowledgement that the current regulatory accounting method it utilizes in preparing the Draft Report is not satisfactory. However, OMB's annual report undertaking is critical to helping to establish the soundness, usefulness, and effectiveness of regulations. The U.S. Chamber encourages OMB to continue to improve its annual reports and seek further improvements in its regulatory assessment process.

THE IMPORTANCE OF COST-BENEFIT ANALYSIS

In simple terms, cost-benefit analysis is used to help determine whether a particular regulatory action is worth the expenditure of public and private resources in relation to the benefits to be received. A reliable assessment that uncovers the advantages (or disadvantages) of regulatory options is essential when funding and other resources are limited, as is often the case in the real world. While the U.S. Chamber recognizes that federal regulations play an important role in assuring public health, safety, and protection of the environment, it also believes that rules and standards must be based on scientifically sound, transparent, and peer-reviewed science. Moreover, federal agencies must utilize appropriate risk assessments and management protocols in developing their regulatory programs. This approach, along with reliable cost-benefit analyses should be used to prioritize regulatory objectives, identify appropriate regulatory options, and target resource allocations to address the most important problems. Without such informed prioritization it will be difficult to ensure that the greatest public benefit will be achieved in the most

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[2] *Budget of the United States Government, Fiscal Year 2005*. 2000 U.S. Government Printing Office. http://www.whitehouse.gov/omb/budget/fy2005/pdf/hist.pdf, page 150.
[3] "Treasury Department Gross Tax Collections: Amount Collected by Quarter and Fiscal Year, 1987–2003," SOI Bulletin, Historical Table. Excel ver. 4. Issued Quarterly, Internal Revenue Service, Statistics of Income Division.
[4] W. Crain, T. Hopkins, *The Impact of Regulatory Costs on Small Firms*, Report RFP No. SBAHQ-00-R-0027, The Office of Advocacy, U.S. Small Business Administration (July 2001).
[5] *Ibid*, Page 25.
[6] *Ibid*, Footnote 1.
[7] *Ibid*, Footnote 2.

efficient manner. Cost-benefit analysis, therefore, is not an end in itself. Rather, it is one of several decisional tools that policymakers must rely upon to assess regulatory options. In this respect, we are encouraged by OMB's effort to improve the cost-benefit methodology used by federal agencies.

Each of OMB's annual reports to Congress has been an improvement over the preceding year's report. Further, the latest revision to OMB Circular A-4, Regulatory Analysis (September 17, 2003)[8], represents a significant step forward by providing uniform guidance to all federal agencies for the development of cost-benefit analysis. In addition, OMB's Information Quality Guidelines[9], as well as its recently proposed Peer Review Bulletin[10], will provide the foundation needed for federal agencies to develop methodologies for performing more reliable cost-benefit analyses and are necessary for ensuring that government decisions are sound, transparent, and open to the public.

The U.S. Chamber is not opposed to regulations per se and recognizes that many regulations are sound, sensible, and well-founded. In fact, in many instances, regulations function as good business practices. That observation notwithstanding, because aggregate regulatory costs are so enormous, it is absolutely essential that federal agencies fully understand the real world costs and benefits of their regulatory actions, and that resource expenditures be prioritized so that we as a nation achieve the maximum protection of human health and the environment with the public and private funds expended. As one of the primary tools needed to accomplish this task cost-benefit analysis methodology must be made as reliable as possible.

THE CURRENT PROCESS IS COMPLEX AND CONFUSING TO THE PUBLIC

Unfortunately, measuring the costs and benefits of regulations is an extremely difficult and complex undertaking. Consequently, and not surprisingly, many stakeholders have expressed various concerns about OMB's annual report to Congress, its regulatory accounting methodology, and its revised Circular A-4.

One criticism is that the economic modeling methodology used for assessing the costs and benefits of regulations, especially in the aggregate, is inadequate and does not present the public with a reasonable and true account of the costs and impacts of regulations. The Crain and Hopkins study is widely cited in support of this observation. While Crain and Hopkins conclude that the true cost of **all** federal government regulations was an estimated $843 billion in 2000, OMB, which examines only a few major regulations, concludes that regulatory cost burdens are much smaller; for example only about $1.9 billion in fiscal year 2003 for the six major regulations it examined. These numbers are difficult to compare, as they are derived from different bases (all regulations versus a few major

[8] www.whitehouse.gov/omb/circulars/a004/a-4.html (September 17, 2003).
[9] *Federal Register* 67 (February 22, 2002): 8452.
[10] *Federal Register* 68 (September 15, 2003): 54023; *Federal Register* 69 (April 28, 2004): 23230.

regulations) and in different timeframes. However, differences in accounting methods notwithstanding, the **message** that is conveyed to the public about the significance of regulatory impacts is very misleading. Certainly there is little doubt that there is a large discrepancy in the information that has been developed, and much public confusion as a result. OMB must resolve this issue in a manner that clarifies any uncertainties. If it does not, then neither Congress nor the public will be able to fully appreciate the true cost impacts of federal regulations on business and industry.

Organizations such as the AEI-Brookings Joint Center for Regulatory Studies and the Mercatus Center at George Mason University have made similar observations. These groups have concluded that assessment approaches and modeling methodologies must be further improved to reliably and transparently calculate the cost-benefit impacts of government regulations. Absent such an initiative, stakeholder confidence in cost-benefit estimates will be weak, and rightly so. The lack of reliable modeling methodologies has resulted in extremely wide cost-benefit disparities between studies, and the disparities can be so great that they can literally render the results so subjective as to be useless.

Another concern is that OMB's Draft Report only provides a **snapshot** of certain regulatory costs and benefits, mainly those associated with major rules and regulations, and, at that, only a few of these are in fact considered in any great detail. For example, OMB's 2004 Draft Report is based on individual agency cost-benefit estimates for only six major regulations out of a total of 37 **major** rules reviewed by OMB. These six comprise less than one percent of all the final rules that were established by the U.S. government during the preceding 12-month period. This situation is particularly troublesome because as OMB notes, the *...total costs and benefits of all Federal rules now in effect (major and non-major, including those adopted more than 10 years ago) could easily be a factor of ten or more larger than the sum of the costs and benefits reported...*[11]

LACK OF CONSISTENCY, BENCHMARKING, AND COMPREHENSIVENESS

Furthermore, neither OMB nor federal agencies have made any significant attempt to retrospectively reassess initial cost-benefit projections. As a result, OMB's reported information, which is based on agency projections of costs and benefits, is not benchmarked against what actually occurred after the regulations were implemented. This is an unacceptable situation. At a minimum, federal agencies should be required to periodically revise and recalculate their earlier estimates based on what actually occurred after the regulations were implemented. Such an undertaking could be limited in the future should such recalculations convincingly demonstrate that original cost-benefit estimates in fact presented reasonable approximations of what actually transpired once the regulations were implemented.

[11] *Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations*, Office of Management and Budget, page 6.

As a further consideration, some methodological approach should be established that can enable OMB to more reliably gauge the impact of all federal rules that are in effect and not just those major rules promulgated over the previous ten years or some other arbitrarily established timeframe that fails to capture the full cost and benefit impacts of regulations on the public. The assertion that rules promulgated more than ten years ago are not presently of significant consequence should be convincingly demonstrated and not just stated as a matter of fact.

An additional concern is that many so-called **minor** rules might in fact be **major** in their impact. Despite this possibility, OMB excludes cost-benefit estimates for all **non-major** rules. Is this a problem? It may be, but this is not clear at present. For one thing, it is the individual federal agencies themselves that determine, absent oversight, which rules are **major** and therefore require preparation of a regulatory impact analysis. How, under these circumstances, can the public have any confidence in the assessed impacts? Are some agencies manipulating the system, for example, by purposefully understating costs or benefits of proposed regulations to avoid having to perform a regulatory impact analysis? An example of an agency manipulating the system is the U.S. Environmental Protection Agency's (EPA) determination that its extremely controversial Total Maximum Daily Load (TMDL) standard only had an annual impact of $25 million[12]; yet state studies estimated the cost of implementing the TMDL standard at between $670 million and $1.2 billion annually[13]. It will take more than 15 years to complete the estimated 40,000 TMDLs that would have to be performed, so there are likely comparable recurring costs in this time period.

Another way agencies avoid the preparation of regulatory impact analyses altogether is by implementing de facto regulations through the issuance of guidance documents, or by using consent decrees to avoid rulemaking procedures that must undergo scrutiny by OMB and the public. A good example of the use of guidance documents that act like regulations is EPA's Environmental Justice Program, which establishes an entire administrative program that is spelled out through guidance documents[14]. This problem is rampant throughout the federal government, with agencies such as EPA and the Occupational Safety & Health Administration (OSHA), in particular, issuing countless numbers of guidance documents in lieu of regulations. Between March 1996 and October 2000, EPA issued 2,653 guidance

[12] *Federal Register* 64 (August 23, 1999): 46043.
[13] Testimony of David Holm, President, Association of State and Interstate Water Pollution Control Administrators before the House Subcommittee on Water Resources and the Environment (February 10, 2000).
[14] W. Kovacs, Comments to the Office of Management and Budget regarding "Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations" U.S. Chamber of Commerce (May 5, 2003).

documents, and OSHA issued 3,374 guidance documents[15]. Not all guidance documents act as regulations, but the sheer volume issued by agencies raise serious concerns that they are being issued in order to avoid the preparation of cost-benefit analyses. Unless questions such as these can be answered now, closer scrutiny of regulatory practices at individual federal agencies is warranted.

Equally problematic are the manifold different cost-benefit assessment methods used by various federal agencies. As a result, it is fair to say that OMB finds itself in the difficult position of comparing apples to oranges again raising concerns that reported cost-benefit estimates are suspect. OMB's revised Circular A-4 may improve this situation, especially by promoting transparency, ensuring more consistent practices across federal agencies, and allowing better cross-agency comparisons. Improving the consistency of cost-benefit assessments among federal agencies should be encouraged.

NEED FOR SOUND SCIENCE AND RELIABLE ASSESSMENT METHODOLOGY

Underlying all these expressed concerns are the needs for science that is more sound and improved modeling methodologies. Although OMB has made great strides in this area, much work remains to be done. Too many regulatory actions are still based on unsound data, poor analyses, and the use of inadequate scientific and economic modeling methods. This is an intolerable situation given the great magnitude of aggregate regulatory cost estimates.

As but one example, EPA's regulatory activities aimed at addressing fine particulate matter encompass the major portion of the costs and benefits included in OMB's aggregated estimate of the impact of regulations promulgated over the past decade. That this is true is particularly alarming, as there is persuasive evidence that the underlying science of particulate matter does not support EPA's regulatory stance. This observation has most recently been brought to the fore in a peer-reviewed science journal article written by academic researchers Gary Koop and Lise Tole of the University of Leicester, Leicester, UK[16]. In their article entitled, *Measuring the health effects of air pollution: to what extent can we really say that people are dying from bad air?* the authors conclude that uncertainties about air pollution-mortality impacts are so large as to question the plausibility of previously measured links between air pollution and mortality.

A key assumption made by EPA in its cost-benefit analysis of the regulatory impact of its environmental regulations is that inhalation of fine particulate matter is **causally** associated with a risk of premature death at concentrations near those experienced by most Americans on a daily basis. If in fact, there is no plausible link, one has to wonder in all

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[15] *Non-Binding Legal Effect of Agency Guidance Documents*, Seventh Report by the Committee on Government Reform, House Report 106-1009, U.S. House of Representatives (October 26, 2000).

[16] G. Koop, L. Tole, "Measuring the health effects of air pollution: to what extent can we really say that people are dying from bad air?", J*ournal of Environmental Economics and Management* 47 (2004): 30-54.

seriousness about the veracity of EPA's fine particulate matter cost-benefit estimates, which are far from inconsequential. For example, in the past decade, 60 percent of all the costs and benefits of all the major federal rules analyzed by OMB in its annual reports to Congress are accounted for by major rules issued by EPA. It should not go unnoticed that the majority of the benefits calculated by EPA derive from reductions in exposure to particulate matter.

Simply put, the public and regulators must establish and incorporate an improved understanding of the influence of uncertainties in both risk and cost-benefit impact analyses. The U.S. Chamber made more extensive comments concerning this specific issue to EPA in January, noting especially EPA's marked bias in its treatment and assessment of scientific information concerning particulate matter. In sum, the U.S. Chamber firmly believes that sound science, quality data, reliable environmental and economic modeling methodologies, and transparent weight-of-evidence techniques must be used in assessing health impacts. Without such underlying attention to scientific details, cost-benefit estimates are doomed to fail.

COST-BENEFIT ANALYSES MUST CONSIDER THE COSTS OF LOST OPPORTUNITIES

Another concern is that current cost-benefit analyses do not address what societal needs are ignored when a decision is made to implement a regulation. Consider, for example, a hypothetical decision to implement a regulation aimed at reducing carbon dioxide emissions by limiting the use of carbon-based energy resources. One may rightly ask if making this decision will result in the diversion of resources from other initiatives such as prenatal health screenings, medical treatment for the uninsured, medical or biotechnology research, or the development of advanced materials or communications systems? Clearly the use of funds to accomplish specific regulatory objectives can have unintended consequences, such as benefits not realized. This problem must be addressed and points to the need to **prioritize** regulatory objectives based on a balanced assessment of the benefits and costs of **all** regulatory options.

Simply put, the public will be best served when it gets the most bang for the bucks that are expended. This will be accomplished when those regulations that are implemented are in fact those regulations that are really needed, and when those regulations that are implemented are those regulations that are the most efficient and have the fewest number of unintended consequences.

A REGULATORY ACCOUNTING PILOT STUDY IS ADVISABLE

The U.S. Chamber recommends that OMB begin to address some of the issues and concerns raised above, and that OMB recommend that Congress fund a pilot study aimed at assessing how to improve cost-benefit impact assessment methodologies, and how to integrate these improved assessment approaches into the consideration and establishment of

regulatory and budgetary priorities. This undertaking should be fully transparent and subject to open peer review. Given the likely complexities of such an undertaking, perhaps only one or two specific areas impacted by regulatory activity should be addressed, such as workplace safety, air quality, or technology development.

Relevant to, and in support of, this proposed initiative various institutions and think tanks, as well as some federal agencies have already conducted, or are conducting, detailed studies of the costs and benefits of regulatory programs. These undertakings should be made fully transparent and publicly available to stimulate further public awareness and debate in this area. In particular, it is essential that the public and federal agencies gain an improved understanding of the risks of regulatory options, how they are influenced by uncertainties, and how this information can be better used to craft and subsequently use improved cost-benefit assessments to prioritize regulatory and budgetary initiatives.

At the end of the day, the public has a right to an honest assessment of regulatory options. Every private or corporate dollar spent on an unnecessary regulation is one that could instead have gone toward providing workers with better wages, better pensions, or improved healthcare. Likewise, public dollars spent on developing and enforcing ill-founded regulations are dollars that could have been used on improving medial research, education, or transportation infrastructure.

While substantial debate remains about the nature of cost-benefit analyses and the accuracy of OMB's accounting methods, OMB has clearly advanced the discussion of this important topic through its annual reports and its revised Circular A-4. These activities continue to provide a significant opportunity to identify measures that can strengthen and improve regulatory assessment procedures and their application in a manner that can provide greater and more efficient protection of human health and the environment in a cost-effective, scientifically sound, prioritized manner.

The U.S. Chamber is grateful for this opportunity to present its comments on the *Draft 2004 OMB Annual Report to Congress on the Costs and Benefits of Federal Regulations*. Per your request, attached is a list of regulations and guidance documents affecting the manufacturing sector that the U.S. Chamber believes should be reformed, revised, or rescinded. We would be pleased to discuss these nominations with you in greater detail or to provide additional information should you require it.

Sincerely,

William L. Kovacs

Attachment

EXISTING REGULATIONS
(Some nominations contain both regulation and guidance)

Regulatory Reform Nomination: Definition of "Serious Health Condition" Under the Family and Medical Leave Act (FMLA)

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Part 825.114 and DOL Opinion Letter FMLA-86 (December 12, 1996)

Authority: 29 U.S.C. Section 2654

Description of the Problem:
Under the FMLA, covered employers must provide qualifying employees with twelve weeks of leave in any twelve-month period. While employees may take leave for various reasons, they most commonly do so because they cannot work due to a serious health condition or need leave in order to care for a family member with a serious health condition.

The plain language of the act, its legislative history, and an early DOL opinion letter all make it quite clear that the term "serious health condition" does not include minor ailments. Yet, contrary to this clear mandate, DOL regulation 29 C.F.R. Part 825.114 and DOL Opinion Letter FMLA-86 (December 12, 1996) include minor ailments within definition of the term and, by doing so, vastly increase the number of FMLA leaves an employer may experience and, consequently, substantially increase the already significant administrative burdens and costs imposed by the FMLA and potential for fraud and misuse of the FMLA.

Proposed Solution:
Rescind DOL Opinion Letter FMLA-86 (December 12, 1996) and any similar letters or guidance and revise 29 C.F.R. Part 825.114 so that it explicitly excludes minor ailments from the definition of serious health condition.

Economic/Manufacturing Impact:
Making the aforementioned changes will return the scope of the FMLA to its original intent, greatly reducing uncertainty as well as the costs and burdens imposed on employers, including manufacturers.

Regulatory Reform Nomination: Definition of "Intermittent Leave" Under the Family and Medical Leave Act (FMLA)

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.203, 825.302(f) & 825.303 and DOL Opinion Letter FMLA-101 (January 15, 1999)

Authority: 29 U.S.C. Section 2654

Description of the Problem:
The statute permits employees to take leave on an intermittent basis or to work on a reduced schedule when medically necessary. According to recent DOL study, more than one quarter of all FMLA leave is taken on an intermittent basis.

Tracking – The FMLA is silent on whether an employer may limit the increment of time an employee takes as intermittent leave to a minimum number of days, hours or minutes. During the notice and comment period for the regulation, many urged DOL to limit intermittent leave increments to a half-day minimum, expressing concern that smaller increments would prove over-burdensome for employers. Despite these warnings, DOL regulation 29 C.F.R. Parts 825.203 requires that employers permit employees to take FMLA leave increments as small as the "shortest period of time the employer's payroll system uses to account for absences of leave, provided it is one hour or less." Employers, many of which have payroll systems capable of tracking time in periods as small as six minutes, find tracking leave in such small increments extremely burdensome. This is particularly problematic with respect to employees who are exempt from the Fair Labor Standard Act's (FLSA) overtime requirements. Exempt employees are paid on a salary basis and employers are not required to – and normally do not – track their time.

Notice – Scheduling around intermittent leave can be difficult if not impossible for employers because the regulations do not require the employee to provide advanced notice of specific instances of intermittent leave. DOL Opinion Letter FMLA-101 (January 15, 1999) exacerbates the problem by permitting employees to notify the employer of the need for leave up to two days <u>following</u> the absence.

Proposed Solution:
Amend 29 C.F.R. Part 825.203 so that it permits employers to require that employees take intermittent leave in a minimum of half-day increments. Also, rescind DOL Opinion Letter FMLA-101 (January 15, 1999) as well as any similar letters and amend 29 C.F.R. Parts 825.302 and 825.303 so they require that employees provide at least one week advanced notice of the need for intermittent leave except in cases of emergency, in which case they must provide notice on the day of the absence, unless they can show it was impossible to do so.

Economic/Manufacturing Impact:
Permitting employers to limit leave to a minimum of half-day increments will greatly reduce the recordkeeping burdens associated with intermittent leave. Requiring employees to provide reasonable notice of absences will reduce employer costs and burdens incurred because of unpredictable employee absences. This savings should be especially significant in manufacturing industries dependant on reliable attendance.

Regulatory Reform Nomination: Requirements for "Medical Certification" Under the Family and Medical Leave Act (FMLA)

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.307 & 825.308

Authority: 29 U.S.C. Section 2654

Description of the Problem:
Under the FMLA, an employer may require that an employee who requests leave due to a serious health condition or in order to care for a family member with a serious health condition, provide certification by a health care provider of the serious health condition.

Clarification and Authentication – Regulation 29 C.F.R. Part 825.307 prohibits an employer from contacting the health care provider of the employee or the employee's family member without the employee's permission, even in order to clarify or authenticate the certification. Even with the employee's permission, the employer may not directly contact the employee's health care provider, but must have a health care provider it has hired contact the employee's health care provider to get the information. As a result, it is very difficult, costly and time-consuming for employers to obtain clarification or authentication of certifications.

Intermittent Leave – The statute permits employees to take leave on an intermittent basis or work on a reduced schedule when medically necessary. Under regulation 29 C.F.R. Part 825.308, an employer can require an employee to provide initial certification of need for intermittent leave, but may not require the employee to provide certification for each absence. In fact, the regulation only permits the employer to request re-certification every thirty days in most cases. Thus, an employee with certification for intermittent leave can claim that any absence is FMLA qualifying without having to provide medical certification substantiating the claim. This invites abuse.

Proposed Solution:
Amend 29 C.F.R. Part 825.307 so that employers may directly contact employee's health care providers in order to authenticate or clarify medical certification. Also, amend 29 C.F.R. Part 825.308 so that employers may require employees to provide certification for each absence.

Economic/Manufacturing Impact:
Making the aforementioned changes will help ensure that only those leave requests that actually meet the statute's criteria are designated as FMLA leave, thus reducing FMLA-related costs to businesses of all types, including manufacturers.

Regulatory Reform Nomination: Requirements Concerning Requests for and Designation of "Leave" Under the Family and Medical Leave Act (FMLA)

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.208 & 825.302(c)

Authority: 29 U.S.C. Section 2654

Description of the Problem:
Under the existing regulations, an employee requesting leave does not have to expressly refer to the FMLA for the leave to qualify under the Act. Rather, the employee need only request the time off and provide the employer with a reason for the requested leave. If the employee does not provide enough information for the employer to determine whether the leave is FMLA qualifying, the employer must follow up with the employee in order to get the necessary information.

Once the request has been made, the employer only has two days to determine whether the leave is FMLA qualifying and notify the employee whether or not the leave qualifies and will be counted against the employee's FMLA leave entitlement.

Placing the entire burden on employers to determine if leave requests are FMLA qualifying is inefficient and unreasonable. First of all, it requires employers to pry unnecessarily into an employee's private matters. Furthermore, under the current regulations and an applicable DOL opinion letter, absences related to almost any employee or family member illness – no matter how minor – may qualify for FMLA leave. Consequently, employers must investigate almost any request for leave. These investigations can be particularly difficult and time consuming because the regulations make it extremely difficult for employers to contact the employee's or family member's health care provider to obtain clarification or authentication of certifications.

Proposed Solution:
Amend 29 C.F.R. Parts 825.208 & 825.302(c) so that the employee must request the leave be designated as FMLA leave in order to invoke the protections of the Act.

Economic/Manufacturing Impact:
Requiring the employee to request that leave be designated as FMLA leave in order to invoke the protections of the Act will reduce employer costs as a result of investigations into whether each and every employee leave request is FMLA qualifying. This reform would be particularly beneficial to the manufacturing sector.

Regulatory Reform Nomination: Definition of "Inability to Work" Under the Family and Medical Leave Act (FMLA)

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Part 825.114

Authority: 29 U.S.C. Section 2654

Description of the Problem:
Under the FMLA, a qualifying employee may take FMLA leave because he or she is "unable to perform the functions" of his or her job. The intent of the provision was to permit employees who could not work because of a severe illness to take leave without fear of losing their job.

The DOL regulation interpreting the provision, however, is overly broad and contrary to the plan language and the intent of the statute. Specifically, it permits leave when the employee cannot perform any one of the essential functions of the job, effectively limiting an employer's ability to reduce costly employee absences by putting employees with medical restrictions on light duty.

Proposed Solution:
Amend 29 C.F.R. Part 825.114 so that it limits FMLA leave to situations where the serious health condition prevents the employee from performing the majority of essential functions of his or her position, rather than just one function.

Economic/Manufacturing Impact:
Permitting employers to put employees with medical restrictions on "light duty" rather than on leave, when appropriate, will reduce costs associated with employee absences. It would also increase efficiency if light duty employees could be used rather than untrained replacements. This reform would be particularly beneficial to the manufacturing sector.

Regulatory Reform Nomination: Use of "Attendance Awards" Under the Family and Medical Leave Act (FMLA)

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.215(c) & 825.220(c)

Authority: 29 U.S.C. Section 2654

Description of the Problem:
The statute states that leave taken under the FMLA "shall not result in the loss of any employment benefits accrued prior to the date on which the leave commenced."

The regulations include among the protected benefits bonuses for perfect attendance. Thus, under the regulations, even though an employee is absent for up to twelve weeks out of the year on FMLA leave, he or she still is entitled to a perfect attendance award. This essentially renders such awards meaningless, and as a result many employers have abandoned attendance reward programs.

Proposed Solution:
Amend 29 C.F.R. Parts 825.215(c) & 825.220(c) so that perfect attendance programs are not considered a protected FMLA benefit.

Economic/Manufacturing Impact:
Permitting the use of attendance award programs will increase employee moral and efficiency, and will reduce costs employers, including manufacturers.

Regulatory Reform Nomination: Regulations Governing Issuance of H-1B Visas

Regulating Agency: Department of Labor (DOL)

Citation: 20 C.F.R. Parts 655 & 656

Authority: 8 U.S.C. Sections 1101 *et. seq.*

Description of the Problem:
The regulation goes significantly beyond the scope of the principal authorizing statutes, the Immigration Act of 1990, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the 21st Century Act (AC21), and ignores legislative history and court precedent. The legislation imposes significant logistical and practical burdens on employers and, in doing so, circumvents the stated intent of the authorizing statutes to streamline the process. Further, the regulations exhibit an overall disdain to the program the agency is charged with regulating.

In addition, the regulation is particularly problematic with respect to the treatment of traveling employees, increased paperwork requirements, wage and benefit issues, ignorance and interference with normal business practices and legal commercial transactions.

Lastly, the promulgation of the rules did not comport to the requirements of the Administrative Procedure Act and the Paperwork Reduction Act.

Proposed Solution:
Rescind the regulation and issue a new Notice of Proposed Rulemaking in order to create new regulations that better address the aforementioned problems and the volumes of comments received in response to the Interim Final Rule.

Economic/Manufacturing Impact:
Approximately 200,000 H-1B petitions have been filed annually in recent years by employers seeking to initially hire H-1B non-immigrants or extend or change the status of existing H-1B employees. Many of these visa holders are employed in the manufacturing sector. According to Department of Homeland Security data, in Fiscal Year 2002, almost 35% of petitions filed for new and continuing employment were filed by companies in manufacturing.[17] Significantly, according to specific employers in manufacturing, H-1B visa holders fill key positions in research and development, manufacturing process engineering and technology and other positions directly impacting on the competitiveness and profitability of these companies.[18] Improvements to these regulations will reduce unnecessary costs related to compliance with overly-complex regulations, increase the effectiveness of the labor condition application as a protection of U.S. workers, reduce the uncertainty that employers have regarding their compliance with the regulation, and increase the flexibility of employers to utilize H-1B professionals in locations and positions that are most effective for the employer.

[17] *Office of Immigration Statistics, Department of Homeland Security, Characteristics of Specialty Occupation Workers (H-1B), Fiscal Year 200, at http://uscis.gov/graphics/shared/services/employerinfo/FY2002Charact.pdf).*

[18] *See, e.g., Testimony of Elizabeth C. Dickson of Ingersoll-Rand before the Senate Judiciary Committee, September 16, 2003 at http://www.competeamerica.org/hill/testimony/testimony_dickson_h1b.html.*

Regulatory Reform Nomination: Revise Occupational Safety and Health Administration (OSHA) Sling Standard

Regulating Agency: OSHA, Department of Labor (DOL)

Citation: 29 C.F.R. Part 1910.184

Authority: 29 U.S.C. Section 655(b)(1) - (5)

Description of the Problem:
Companies in the lifting, rigging and load security industry typically use slings made of wire rope to lift objects by crane. These activities are used at facilities throughout the manufacturing industry. The current OSHA standard, nearly 30 years old, is considered by many in the industry to be dangerously outmoded, especially when compared to an applicable consensus standard ("B30.9") promulgated by the American Society of Mechanical Engineers (ASME). OSHA inspectors continue to issue citations to companies for failure to meet the outmoded OSHA sling standard even though they meet the requirements of the B30.9 standard. Companies in the industry have made numerous requests of OSHA to issue an updated sling standard. OSHA has not honored this request.

The companies, through their trade associations (Associated Wire Rope Fabricators (AWRF) and the National Association of Chain Manufacturers (NACM)) have in the past asked the United States House of Representatives Science Committee, Subcommittee on Environment, Technology & Standards to conduct an oversight investigation of this matter.

Proposed Solution:
Promptly commence the rulemaking process to develop a new sling standard, and issue a public enforcement notice citing the ASME B30.9 standard as an acceptable standard for sling safety until the revised OSHA sling standard is developed.

Economic/Manufacturing Impact:
The affected companies and their employees, including manufacturers, will no longer be required to adhere to a dangerously outmoded standard, thus saving noticeable sums in OSHA-inflicted penalties, potential liability, and, most importantly, enhancing the inestimable value of the affected employees' safety.

Regulatory Reform Nomination: Affirmative Action Plans and Equal Opportunity Survey Requirements

Regulating Agency: Office of Federal Contract Compliance Programs (OFCCP), Department of Labor (DOL)

Citation: 41 C.F.R. Part 60-2

Authority: Executive Order 11246

Description of the Problem:
In the past, contractors have been permitted to develop affirmative action programs (AAPs) consistent with the contractor's management system, often including multiple physical establishments under one AAP. The 2000 revisions of the requirements for federal contractors, however, require AAPs for each physical establishment, unless the contractor reaches agreement providing otherwise with OFCCP. As a result of the revisions, contractors are forced to create, maintain and report on many more AAPs than they had prior to the revisions, unless the contractor comes to an alternative agreement with OFCCP. Unfortunately, negotiating an agreement with the overburdened agency can be a slow and arduous process.

OFCCP's Equal Opportunity Survey is sent out to approximately 10,000 federal supply and service contractors. Each contractor receiving the survey has a limited time to complete the form and return it to OFCCP. The survey requires contractors provide general information on each establishment's equal employment opportunity and AAP activities. It also requires combined personnel activity information (applications, new hires, terminations, promotions, etc.) for each Employer Information Report EEO-1 (EEO-1) category by gender, race, and ethnicity as well as combined compensation data for each EEO-1 category for minorities and non-minorities by gender. There are far less burdensome methods of increasing compliance with equal employment requirements, and the utility of this survey is highly questionable.

The survey's requirement that employers compile data on applicants has proven particularly burdensome. Applicant, under the survey, is any "person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity." The definition makes no exceptions for persons who apply, but are clearly not qualified for the position sought or persons who apply for positions that are already filled. In addition, the survey fails to take into account that in the age of the Internet, employers may receive hundreds of unsolicited resumes via e-mail every week. While the OFCCP has recently proposed a new definition applicable to Internet applicants (which the U.S. Chamber is currently reviewing), application to traditional applicants remains problematic.

Proposed Solution:
- Allow companies to report as they always have, by functional groupings. Also develop guidelines for functional AAPs.
- Eliminate, or greatly simplify and shorten the survey.
- Define applicant as a person who applies for a specific position and meets the basic qualifications of that position.

Economic/Manufacturing Impact:
At a minimum, eliminating the EEO Survey would reduce recordkeeping and paperwork burdens on federal contractors, including manufacturers.

Regulatory Reform Nomination: Leak Detection and Repair Regulations

Regulating Agency: Environmental Protection Agency

Citation: 40 C.F.R. Parts 60, 61, and 63

Authority: 42 U.S.C. Section 7411

Description of the Problem:
Leak Detection and Repair (LDAR) regulations assist in reducing or eliminating Volatile Organic Compound (VOC) or Volatile Hazardous Air Pollutant (VHAP) emissions from certain process equipment leaks in seals, pumps, and valves. Nearly all domestic refineries and chemical processing plants are subject to LDAR regulations. Those regulations require monitoring and maintenance practices intended to reduce and/or eliminate these leaks and their resulting fugitive emissions. These include requirements that the instruments survey the entire surface of every potential leak source on a given valve, pump, compressor, or connector. This routine activity is incredibly costly and labor intensive, with annual costs often exceeding $1,000,000 per facility to monitor over 200,000 traditional components. A study published by the American Petroleum Institute (API) in 1997 found that over 90% of controllable fugitive emissions come from only about 0.13% of the piping components. In other words, more than 99.8% of the effort is spent monitoring, identifying, and controlling less than 10% of the emissions.

Proposed Solution:
Emerging technologies such as optical imaging, offer a superior method to monitor leaks while reducing labor and operation costs significantly. Using these new technologies, operators are able to identify leaking components as a black cloud in real time on a video screen. The capabilities of optical imaging technologies allow an operator to more quickly scan areas containing tens to hundreds of piping components, allowing leaks to be detected and repaired sooner. Programs to develop the optical imaging technique for routine process plant monitoring are nearing successful conclusion and revision of LDAR regulations to authorize their use should be given high priority by EPA and OMB.

Economic/Manufacturing Impact:
Implementation of these regulations provide an alternative to LDAR programs that achieves a higher level of emissions control at lower cost, while providing a safer operating environment for workers.

Regulatory Reform Nomination: Reform the National Environmental Policy Act Approval Process

Regulating Agency: Council on Environmental Quality (CEQ)

Citation: 40 C.F.R. Parts 1500 - 1508

Authority: 42 U.S.C. Sections 4321 – 4370e

Description of the Problem:
The National Environmental Policy Act (NEPA) and its implementing regulations issued by the Council on Environmental Quality (CEQ) require that federal agencies consider the impact of major federal actions (such as funding projects, developing regulations, or issuing operating permits) on the quality of the human environment. If a proposed regulatory activity is expected to have a significant adverse impact on the environment, NEPA requires the preparation of an environment impact statement (EIS) that considers those environmental impacts, assesses adverse effects, and considers feasible alternatives. The NEPA process is not intended to halt or indefinitely delay proposed actions. Rather, it is intended to be an effective decisional tool to aid policy makers in minimizing adverse environmental impacts when approving regulatory actions. Despite this goal, the NEPA process has become unduly complex, time-consuming, and costly, and has caused uncertainty, excessive litigation, and project delays.

Proposed Solution:
CEQ recently formed a task force to review the NEPA process and issue recommendations to modernize NEPA implementation. The task force's report, which was issued in September 2003, contains many sound recommendations that should be implemented by CEQ. In addition, CEQ should consider the following recommendations. First, NEPA is a procedural law and not an end unto itself. NEPA should lead to sound decision making and project approvals, and not be an instrument of obstruction and delay. Second, the consideration of alternatives should not require an endless search for alternatives, regardless of how unreasonable or infeasible they may be. This is especially problematic when project sponsors are expected to pay the entire costs of the NEPA process. Third, the NEPA process should be based on sound science and best-available information, but project sponsors should not be expected to prepare duplicative studies or endlessly assess costly zero-risk alternatives. Fourth, outside stakeholders should be required to raise relevant issues during established comment periods, and should not be allowed to commence litigation on new issues that were not raised during appropriate comment periods.

Economic/Manufacturing Impact:
The NEPA process has become unduly complex, time-consuming, and costly for businesses, including the manufacturing sector. The current NEPA process leads to uncertainty, excessive litigation, and project delay. CEQ should streamline the NEPA process to reduce costs, increase predictability, and remove barriers to project approvals.

Proposed Regulatory Reform: Revise the Definition of "Solid Waste" for Recycled Materials

Regulating Agency: Environmental Protection Agency (EPA)

Citation: 40 C.F.R. Part 261.2(c); 68 Fed. Reg. 61558

Authority: 42 U.S.C. Section 6902

Description of the Problem:
In order to be classified as a "hazardous waste" under the Resource Conservation and Recovery Act (RCRA), a material must first meet the definition of a "solid waste." According to RCRA, "solid waste" is specifically limited to discarded material, a classification that depends on the intent of its generator. Several courts have addressed the issue of waste classification. For example, the D.C. Circuit Court of Appeals held that "solid waste" is limited to those materials that are "disposed of, abandoned, or thrown away." *American Mining Congress v. EPA*, 824 F.2d 1177 at 1193 (D.C. Cir. 1987). Nevertheless, EPA persists in treating recycled materials as solid waste, even where the materials are not discarded, abandoned, or thrown away. This interpretation impedes the use of recycled materials by increasing the costs and regulatory burdens associated with their reuse.

Proposed Solution:
On October 28, 2003 EPA proposed to revise its definition of solid waste. Unfortunately, the agency's revised definition continues to treat recycled materials as solid waste, even when the materials are reclaimed or reused, used to produce fuel, burned for energy recovery, or used to produce products that are applied land. EPA should revise its definition of solid waste to comport to the statutory intent of RCRA. Specifically, EPA's definition of solid waste should be limited to those materials that are "discarded," meaning they are disposed of, thrown away, or abandoned with no intent to recycle or reuse them.

Economic/Manufacturing Impact:
Reform of this regulation will result in significant economic and manufacturing benefits by increasing recycling, reducing the use of raw materials, and extending the useful life cycle of natural resources. EPA's current classification of recycled and reused materials as solid waste, and more specifically as hazardous waste, subjects those materials to costly and unnecessary regulatory requirements that significantly raises the costs of goods and discourages recycling.

GUIDANCE DOCUMENTS

Regulatory Reform Nomination: Occupational Safety and Health Administration (OSHA) Draft Ergonomics Guidelines for Retail Grocery Stores, Poultry Processing, and Final Ergonomics Guidelines for Nursing Homes

Regulating Agency: OSHA, Department of Labor (DOL)

Citation: 68 Fed. Reg. 33536-33538 (June 4, 2003); 68 Fed. Reg. 25068-25069 (May 5, 2003); 67 Fed. Reg. 55884-55885 (August 30, 2002)

Authority: 29 U.S.C. Section 655(b)(1) - (5)

Description of the Problem:
The U.S. Chamber agrees with the sound justifications for OSHA's decision to address ergonomics through voluntary guidelines rather than binding regulation. However, the final and draft guidelines issued by OSHA do not appropriately acknowledge the uncertainty surrounding the science of ergonomics and the causes of "ergonomic" injuries. This is true despite the fact that such uncertainty was instrumental in Congress's decision to overturn OSHA's former Ergonomics regulation (under the Congressional Review Act) and was a key justification for OSHA's decision to forgo the promulgation of another rule. While OSHA can perform a valuable service by providing guidance that may be beneficial to employee comfort, efficiency, productivity, and morale, it should not make any conclusion that are not supported by existing research.

Proposed Solution:
OSHA should revise its final and draft guidelines to include language acknowledging the lack of consensus within the scientific and medical communities on the nature and causes of musculoskeletal disorders (MSDs), the difficulty in developing a workable definition of "MSD" or "ergonomic injury," the inability to definitively determine work-relatedness, the lack of evidence concerning exposure-response relationships, and feasibility and cost considerations. Furthermore, the guidelines should explicitly state that they should be not interpreted as a resolution of open scientific or medical questions, or a finding that any particular recommendation will lead to a particular result with any degree of certainty.

Economic/Manufacturing Impact:
Without clarification regarding the uncertainty regarding the science surrounding ergonomics and MSDs, the guidelines may serve as the basis for future enforcement actions, abatement orders and voluntary changes to the workplace, that are extremely costly to business, including manufacturers, but would do little to reduce MSDs in that workforce.

Regulatory Reform Nomination: Administration of Federal Prison Industries

Regulating Agency: Department of Justice (DOJ)

Citation: DOJ memorandum from Criminal Division Chief, Mary Spearling (January 1994); DOJ memorandums from Federal Bureau of Prisons General Counsel Ira Kirschbaum (November 1997; February 1998)

Authority: 18 U.S.C. 1761 (a) and 4122 (a)

Description of the Problem:
Federal Prison Industries (FPI) originating statute clearly states that the market for prison commodities is other prisons and federal agencies, but 'not for sale to the public in competition with the private sector.' Today, FPI ignores this seemingly clear prohibition by selling services into the commercial market. The decision was made by FPIs Board based on a series of internal Justice Department legal 'opinions' that found that expansion into the commercial market is not in conflict with FPIs enabling legislation. Internal memoranda serves as the basis to allow the United States government to sell commercial services in competition with law abiding, taxpaying businesses, using prison labor being paid $1.35 per hour or less.

The FPI Board reasoned that Congressional debate on this provision focused mainly on products; therefore it was not Congressional intent to prohibit FPI from entering the commercial services market. This decision is arbitrary, capricious and beyond the discretion of the Board. It is a reversal of more than sixty years of public policy and it is an expansion that cannot and should not take place by administrative fiat but rather by the passage of a legislative mandate that is a matter of public record.

Proposed Solution:
Rescind DOJ memoranda.

Economic/Manufacturing Impact:
Federal inmates are performing services, such as the remanufacturing of auto components, for sale in the commercial market in direct competition with American businesses and the workers they employ. The recognition that the DOJ memo is not binding would open more manufacturing jobs to the private sector, especially small and medium size businesses, instead of subjecting them to direct competition from a government entity. Historically, FPI has abused its statutory authority in the government market by arbitrarily expanding its product and service lines without consideration of private sector impact or regard to cost or quality of their output. American businesses have grown leery of FPI's monopolistic practices and now that uncertainty is spilling into the commercial sector as well.

Regulatory Reform Nomination: Administration of Federal Prison Industries

Regulating Agency: Office of Management and Budget

Citation: Federal Acquisition Regulations Subpart 8.6

Authority: 18 U.S.C. 4124 (a)

Description of the Problem:
Under current law, FPI has a preferential status in the government procurement process that forces federal agencies to buy only from FPI rather than using a competitive process. Once a small program focused solely on rehabilitation, FPI is now a large enterprise that has a monopoly in the federal marketplace on over 300 products and services that generated $678 million in sales last year. In this non-competitive environment, issues of cost, quality and timeliness of delivery have been ignored. FPI's preferential status is costing American jobs, sacrificing government efficiency and increasing costs for the taxpayer. Without reform, FPI will continue its unfettered expansion in the federal and commercial markets.

Section 637 of Division F of Public Law 108-199, the Consolidated Appropriations Act, 2004 included a one-year provision that would effectively end FPI's preferential status by allowing federal agencies to decide how to best meet their procurement needs by examining existing marketplace opportunities and purchasing products competitively based on best value. It would require FPI to be a more responsible supplier while allowing the private sector to compete fairly for federal contracts by eliminating the requirement that government agencies purchase products and services from FPI. It also protects Federal prime contractors and subcontractors at any tier from being forced to use products and services furnished by FPI. These changes are reflected in FAR Subpart 8.602 and 8.607.

Proposed Solution:
Make FAR Subpart 8.602 and 8.607 permanent.

Economic/Manufacturing Impact:
Allowing federal agencies to purchase products on a competitive basis will protect American businesses and the jobs of law-abiding U.S. workers, while simultaneously helping the federal government save time and money in its procurement of goods and services. Evidence indicates that FPI will continue its expansionist behavior, by exploiting its mandatory source status and increasingly encroaching on private sector industries in order to be a profitable enterprise, forcing businesses to halt production lines, lay off employees and close their doors for good. Permanent reform is needed and is aligned with the President's Management Agenda, which advocates competition to promote innovation, efficiency and greater effectiveness.

Regulatory Reform Nomination: Uniform Guidelines on Employee Selection: Definition of "Applicant"

Regulating Agency: Equal Employment Opportunity Commission; Department of Labor; Department of Justice; Office of Personnel Management

Citation: 29 C.F.R. Part 1607; 41 C.F.R. Part 60-3; 28 C.F.R. Part 50; 5 C.F.R. Part 300

Authority: 42 U.S.C. §§ 200e-200e-17; Executive Order 11246

Description of the Problem:
Many of our nation's discrimination laws apply to recruiting employees as well as to an existing employment relationship. To provide guidance to employers seeking to comply with these requirements, a multi-agency task force issued the Uniform Guidelines on Employee Selection Procedures (UGESP) in 1979 and 1980. The guidelines have not kept pace with developments in case law nor developments in the workplace.

For example, the guidelines do not account for the increased use of the Internet in recruiting. Employers today may receive thousands of resumes or other expressions of interest for a single job opening. Often employers receive expressions of interest even where no job opening is available or identified. Yet, under the guidelines, employers may still be required to include every expression of interest in their applicant pool, thus triggering burdensome paperwork and recordkeeping requirements even though the individuals expressing interest are not minimally qualified for the position or even if there is no identified position available. In addition, employers seeking to comply with discrimination laws may be required to seek race and ethnicity information from job seekers, a burden which makes little sense when applied to job seekers who have no potential for being hired since they do not meet minimum qualifications or who have not applied for an identifiable job opening.

The multi-agency task force, on March 4, 2004, proposed adding additional questions and answers to UGESP to provide further guidance about how employers should comply in light of increased use of the Internet. In general, the proposal addresses many of the problems with the outdated guidelines in the context of Internet recruiting. However, they do not address problems specific to other methods of recruiting. This failure leaves the guideline inconsistent with modern case law and the realities of modern recruiting. A related proposal was issued by the Office of Federal Contract Compliance Programs (OFCCP) on March 29 that the Chamber is still reviewing.

Proposed Solution:
The agencies should finalize their proposed additional questions and answers. However, the proposal should be modified to expressly apply elements of the proposal applicable to Internet applicants to non-Internet applicants, such as the recognition that the employer may establish minimum qualifications.

Economic/Manufacturing Impact:
Adopting the agencies' proposal with our recommendations will help reduce recordkeeping and paperwork burdens on manufacturers and other employers, especially federal contractors who must also comply with OFCCP requirements. Adopting the proposal should also help remove disincentives to use Internet or web-based recruitment and thus decrease recruitment costs for manufacturers and other employers.

PROPOSED RULES

Regulatory Reform Nomination: Employer Information Report (EEO-1) Requirements

Regulating Agency: Equal Employment Opportunity Commission (EEOC)

Citation: 29 C.F.R. Part 1602.7

Authority: 42 U.S.C. Sections 2000e-8, 2000e-12; 44 U.S.C. section 3501 *et seq.*; 42 U.S.C. Section 12117

Description of the Problem:
The regulation requires every employer subject to Title VII of the Civil Rights Act of 1964 that has 100 or more employees, or is a federal government contractor meeting certain criteria, to annually file an EEO-1 with the EEOC. Currently, employers must report employee data in nine occupational categories, subdivided by five racial/ethnicity categories, which are further subdivided by gender.

On June 11, 2003, the EEOC proposed significant changes to the Report that would expand the occupational and the racial/ethnicity categories, increasing the time and cost associated with filing the EEO-1. The proposed changes would also require employers to classify "officials and managers" into three subcategories. While some of these changes may be necessary to ensure the EEO-1 data is reflective of the workforce, many of them are unnecessary and over-burdensome. In particular, the proposed changes regarding the classification of "officials and managers" are likely to lead to inconsistent data collections and confusions.

Proposed Solution:
Make as few changes that increase employer burdens to the form as possible. In addition, do not subdivide the "officials and managers" category, or at a minimum, limit the subdivision to two groups only.

Economic/Manufacturing Impact:
The proposed recordkeeping requirements will increase the costs and burdens to businesses, including manufacturers.

Regulatory Reform Nomination: Revise Sponsorship Process for Permanent Labor Certification

Regulating Agency: Department of Labor (DOL)

Citation: Proposed Rule, 67 Fed. Reg. 30466 (May 6, 2002), RIN 1205-AA66, amending 20 C.F.R. Parts 655 & 656

Authority: 8 U.S.C. Sections 1101 *et. seq.*

Description of the Problem:
Since the conception of the "attestation-type" reengineering of the program, DOL has been informed that any reengineering that does not address the underlying assumptions and concepts of individual recruitment as a labor market test, the issues of prevailing wage determinations, and that ignores the real-world recruitment practices of the business community would be problematic. The proposed rule, while creating a new, streamlined attestation-based certification system, does not adequately address those other concerns.

Proposed Solution:
Promulgate final regulations that use a broader approach to the issue of certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored, including integrating concepts such as those outlined in the Labor Market Information Pilot Program enacted in the Immigration Act of 1990, but never implemented by DOL. The Department could improve the current proposed rule also by incorporating practices it accepts in the current Reduction in Recruitment program that has been operating successfully for several years, and recognizing legitimate employer recruitment efforts as a baseline.

Economic/Manufacturing Impact:
Many foreign nationals are employed in the U.S. manufacturing sector. The inability to hire and retain employees with necessary skills harms the competitiveness of U.S. firms. Further, the current sponsorship process is time-consuming, expensive, and creates uncertainty. A properly formulated rule that streamlines the sponsorship process would improve manufacturing by reducing costs, eliminating uncertainty, and enhancing competitiveness.

Regulatory Reform Nomination: Commercial Facsimile Rule

Regulating Agency: Federal Communications Commission (FCC)

Citation: 68 Fed. Reg. 44144; 47 C.F.R. Parts 64 & 68

Authority: 47 U.S.C. Section 227

Description of the Problem:
The FCC recently proposed regulations under the Telephone Consumer Protection Act of 1991 to govern commercial facsimile communications between associations and their members as well as businesses and preexisting customers. The new rules would outlaw any "commercial faxes" unless the recipient has provided written authorization to the sender. The new rules would place a monumental and costly administrative burden on associations and other businesses by compelling them to obtain the signed written consent of each recipient before any commercial fax may be sent. This would severely impede the ability of associations and businesses to communicate with their customers or make them aware of events and products that would be of interest to them.

Proposed Solution:
The FCC should permanently withdraw the proposed rule.

Economic/Manufacturing Impact:
The U.S. Chamber of Commerce recently conducted a survey of its small business members in order to evaluate the economic impact of the FCC's proposed rule. The results of the survey showed that the cost to the average small business would be at least $5,000 in the first year, and more than $3,000 each year thereafter. Small business owners indicated that it would take, on average, more than 27 hours of staff time to obtain the initial written consent from their customers and an additional 20 hours each year to keep the forms current. This far exceeds the FCC's estimate that paperwork compliance would take 30 minutes per year. The survey also showed that one of the sectors most heavily impacted by the proposed rule would be manufacturing.

Regulatory Reform Nomination: Proposed Guarantees for Bonds and Notes Issued for Electrification or Telephone Purposes Regulating Agency: Rural Utilities Services (RUS), U.S. Department of Agriculture

Citation: 68 Fed. Reg. 75153; 7 C.F.R. Parts 1720

Authority: P.L. 107-171, Title VI, Subtitle B, 1601(a); 116 Stat. 413

Description of the Problem:
In order to implement an obscure rider to the 2002 Farm Bill, the RUS has proposed a rule that would make certain private, not-for-profit lenders eligible for billions of dollars in federal government guarantees if the proceeds of the loans are used for electrification or telephone projects. These loans would be guaranteed by the *full faith and credit of the United States*.

While the RUS action is required by statute, its proposed rule is fundamentally flawed for numerous reasons. First, it fails to require that the guarantees be fully collateralized throughout the life of guarantee, does not require that "investment-grade quality" loans be used by these private co-op's for collateral, and does not require that these private, not-for-profit lenders be subject to annual examinations by a qualified bank regulator. These obvious deficiencies could expose taxpayers to billions of dollars in losses. Second, the RUS lacks the competence or "independence" needed to assess the co-op's loan guarantee applications, as well as the financial condition of the private, not-for-profit lenders. Further, the RUS does not have the capability to assess the loan loss risk, an assessment that is essential to protect taxpayers against losses. Finally, the RUS proposal completely failed to comply with the numerous regulatory process requirements (e.g., small business impact analysis, cost-benefit analysis, public participation, environmental impact statement, energy impact analysis) that federal agencies are obligated to follow when promulgating regulations.

Proposed Solution:
RUS should immediately withdraw its proposed rule and issue a revised proposal after following all applicable regulatory requirements.

Economic/Manufacturing Impact:
The RUS proposal represents an unprecedented federal action that will utilize the *full faith and credit of the United States* to support the financial operations of private, not-for profit lenders, which could include unregulated private lenders and other private banking entities. The proposed rule would extend below-market financing to these lenders, allowing them to heavily subsidize rural electric co-ops and telephone companies and giving them an unfair competitive advantage over private businesses and industries in the marketplace. It should be noted that these co-ops operate in broad geographic areas and have diversified their operations into energy, high technology, and other activities. The proposed regulation is misguided and could result in malfunctions in the energy and telecommunications markets, harming not only taxpayers, but also manufacturers and other private-sector entities.

Proposed Regulatory Reform: Regulation of Mercury Emissions

Regulating Agency: Environmental Protection Agency (EPA)

Citation: 40 C.F.R. Part 261.2(c); 65 Fed. Reg. 79825 and 69 Fed. Reg. 4652

Authority: 42 U.S.C. Section 7412(n)(1)(a)

Description of the Problem:
EPA has proposed a rule to control the emission of mercury from power plants. EPA's proposed action is based on a preliminary finding, made in December 2000, that mercury emissions are believed to present a potential risk of adverse health effects through the consumption of contaminated fish. EPA's finding, as well as its proposed emissions standards, ignores sound science and the best-available data, fails to adequately consider actual health risks, and does not consider the impacts of the proposed rule on energy supplies or the economy. Further, if adopted as proposed, EPA's regulation would require power plants to utilize the most stringent "maximum achievable control technologies" standard, a regulatory requirement that is estimated to cost in excess of $19 billion per year.

Both EPA's initial finding and its proposed regulation are gravely deficient. First and foremost, the presence of a senior policy advisor in EPA's Office of Air & Radiation during the period leading up to the December 2000 finding on mercury presents a possible conflict of interest that needs to be investigated. This potential conflict, emanating from the fact that the senior official had previously served as opposing counsel in the litigation against EPA that resulted in the proposed rulemaking, might have violated the constitutional due process rights of the regulated community because of potential bias and prejudgment by the agency. Second, the rulemaking process itself was deficient because EPA failed to provide an adequate opportunity for public review and comment of its December 2000 finding. Third, EPA's decision to regulate mercury is simply not supported by current scientific studies. Finally, EPA's proposed rule does not conform to the clear dictates of §112(n)(1)(a) of the Clean Air Act, which states that if a regulation is appropriate and necessary, EPA is required to utilize alternative controls strategies other than scrubbers.

Proposed Solution:
EPA should immediately halt the rulemaking process until an inquiry into the potential conflict of interest of the senior official at the agency can be completed. Further, EPA should review and revise its December 2000 finding by including the most recent scientific data on mercury. Finally, EPA should revise its proposed rule to more adequately rely on co-benefits by other air emission programs as well as the nationwide emissions trading system.

Economic/Manufacturing Impact:
Reform of this regulation will result in significant economic and manufacturing benefits by efficiently reducing mercury emissions through reliance on co-benefits and emissions trading, and by ensuring that coal retains its prominent place in the nation's diverse market of energy sources.