



November 16, 2018

VIA ELECTRONIC CORRESPONDENCE

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Acosta:

As a result of President Trump's Executive Orders, 13771 and 13777, the Office of Advocacy (Advocacy) is continuing an effort to hear first-hand from small businesses across the country about specific federal regulatory burdens facing their businesses. As you know, under the Regulatory Flexibility Act (RFA), agencies are required to consider the impact of their regulations on small entities when promulgating federal regulations.¹ We believe the RFA and consideration of small business economic impacts is a good place to start when an agency is selecting rules that are being reviewed for reform or elimination.

We recently hosted roundtables in Virginia, New Hampshire, Massachusetts, Michigan, Wisconsin, Texas, Georgia, California, Florida, Iowa, Wyoming, Colorado, New Jersey, Pennsylvania, and New York. Advocacy also invited small businesses who could not attend the roundtables to submit their comments on Advocacy's website. Advocacy would like to inform you of the specific concerns and regulations that we heard about from small businesses in these regions, and comments we received from our website as we hope they will be of help to your agency as you comply with the aforementioned executive orders.

¹ Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. 5 U.S.C. § 601 et seq.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so. Small Business Jobs Act of 2010 (PL 111-240) § 1601.

Summary of Concerns from Roundtables and Website

Employee Benefits Security Administration

- **Definition of the Term “Fiduciary” - Conflict of Interest Rule - Retirement Investment Advice.**

Small business owners and representatives expressed concerns about the costs and burdens imposed by the new Fiduciary Rule and the rule’s related exemptions. Advocacy issued a comment letter on the subject in July 2015. After the Fifth Circuit mandate vacating the fiduciary rule in June 2018, this issue is still one of concern for small businesses. On May 7, 2018, in Field Assistance Bulletin No. 2018-02, the EBSA announced temporary enforcement procedures, which include not pursuing prohibited transaction claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards. Compliance burdens, costs, and other issues previously raised by small businesses are still a concern moving forward.

- **Electronic Submission of ERISA notices**

While plan administrators are allowed to send notices electronically if certain guidelines are met, the electronic submission of ERISA notices should be the default method of submission.

Employment and Training Administration

- **H-2A Visa Program**

Small businesses expressed concern with the high costs and slow processing times of obtaining H-2A visas for temporary agricultural guest workers. These businesses recommend any changes to lower these costs and expedite this process. Many small businesses have also detailed very costly enforcement actions, and we have referred these cases to the SBA Ombudsman.

- **H-2B Visa Program**

Small businesses recommend that the agency approve any opportunities to increase the worker capacity under this program for temporary non-agricultural guest workers; there is a statutory limit of 66,000 H-2B visa workers per year. In 2018, both the DOL and DHS received more applications than allowed in the first half of the year and these agencies instituted a lottery process for these visas. In March 2018, President Trump signed into law a spending bill which included a provision that allows DHS in consultation with DOL to raise the number of H-2B visas. Advocacy wrote a comment letter to DHS and DOL, recommending that the agencies authorize this increase. In May 2018, DHS, in consultation with DOL, published a final rule creating a one-time increase

in the number of H-2B visas, adding 15,000 more visas and allowing more small businesses to take advantage of this program.

Office of Federal Contract Compliance Programs

- **Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities**

Small business representatives are concerned with the paperwork costs and hiring goals for individuals with disabilities for federal contractors, particularly in certain industries like construction.

- **Federal Paid Sick Leave for Government Contractors**

Small businesses were concerned about this final rule that requires parties that contract with the Federal Government to provide their employees with up to seven days of paid sick leave annually. Small businesses from the construction industry commented that this rule is difficult to implement due to the project-based character of their work; others have had a hard time incorporating their current paid time off programs with the requirements of this rule. This rule has also been problematic for concessionaires and lease holders in federal and military buildings; they cannot recover the costs from the federal government. Advocacy has written a comment letter on this issue.²

- **Moratorium on Enforcement of Federal Contractor Requirements Against Hospitals**

Small business representatives recommend that OFCCP extend the moratorium on enforcement of federal contractor requirements against hospitals receiving TRICARE and other federal health care reimbursement programs. Federal contractor status imposes affirmative action recordkeeping and reporting burdens on small hospitals.

Occupational Safety and Health Administration (OSHA)

- **Communication Tower Safety**

Small business representatives from the communication tower construction and maintenance industry would like OSHA to adopt the new industry consensus standards for communication tower safety, but are concerned that OSHA will deviate from industry standards and promulgate a rule that is unduly costly and burdensome. While OSHA has indicated that it will focus primarily on telecommunication towers, the agency also plans

² Comment Letter from Darryl DePriest, Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Thomas E. Perez, Secretary, U.S. Department of Labor (April. 6, 2016), <https://www.sba.gov/advocacy/4-6-2016-establishing-paid-sick-leave-federal-contractors-proposed-rule>.

to consider including other structures (e.g., buildings, rooftops, water towers, billboards, etc.) that have telecommunications equipment on or attached to them. OSHA convened a Small Business Advocacy Review panel for this rulemaking on August 15, 2018, following several Advocacy roundtable meetings that included presentations by the National Association of Tower Erectors (NATE). The Panel has issued a report and it is available on OSHA's website. We are awaiting the publication of a proposed rule.

- **Electronic Recordkeeping and Reporting**

Small businesses representatives have complained that OSHA is now requiring the electronic submission of injury and illness data by some sectors, and that this information could be made public (notwithstanding current OSHA policy). OSHA has proposed to eliminate the requirement to submit some of the data, but still require the electronic submission of summary data. Small businesses representatives have opposed this and recommended that OSHA consider broader exemptions. Advocacy filed a public comment letter on the proposed rule on September 27, 2018. Advocacy also attended OSHA's public hearing on the original proposed rule, has discussed this rule at several Advocacy roundtables, and attended various Executive Order 12866 review meetings on the rule.

- **Occupational Exposure to Beryllium**

Small businesses representatives complained that construction and shipyards (except abrasive blasting) were not represented in OSHA's SBREFA panel on beryllium and should not have been included in OSHA's final beryllium rule. They also expressed concern that OSHA lacks sufficient information about the health risks from naturally-occurring beryllium in soil, stone, and other construction materials.

OSHA has extended the compliance date several times and on June 27, 2017, it published a proposed rule that would revoke the ancillary provisions for the construction and shipyard sectors, but retain the new, stricter exposure standards for both sectors. OSHA stated that it will not enforce the final rule for shipyards and construction without further notice while the rulemaking is pending. With respect to the final rule for general industry, OSHA has been negotiating with litigants and may propose to clarify revisions to that rule. Advocacy has participated in the rulemaking since its earliest stages in 2008, and the office filed public comments on the latest proposed deregulatory action for maritime and construction.

- **Occupational Exposure to Respirable Crystalline Silica**

Small business representatives, particularly in the foundry and construction industries, have complained that OSHA's new silica rule is not based on a demonstration of significant risk and is not technically or economically feasible to comply with. Small business representatives from the construction industry also complained that Table 1 of the construction standard is not workable in its current form and needs substantial revision.

Advocacy has been continuously involved with this rulemaking since 2003. OSHA has now committed to providing industry with compliance assistance and agreed to work with the construction industry to improve the dust control methods (Table 1). The agency included a formal notification in its spring 2018 Regulatory Agenda that it will publish a Request for Information on revising and expanding the range of control measures.

- **OSHA Inspection and Enforcement Policies**

Small business representatives from both the manufacturing and construction industries have complained that OSHA's inspection and enforcement policies are unduly rigid and unfair. They recommended that OSHA provide greater flexibility and focus more on compliance assistance than fines and penalties.

- **Residential Fall Protection**

Small business representatives from the residential construction industry would like OSHA to reopen its rulemaking on fall protection in the residential construction sector to provide greater flexibility to the six foot standard where compliance would create a greater hazard or alternative means are at least as effective.

- **Severe Violator Enforcement Program**

Small business representatives have complained that the removal criteria for OSHA's Severe Violator Enforcement Program is unfair and unduly complicated, which can result in companies being unable to be removed from the program despite abating hazards and improving their safety and health programs. Others complained about OSHA's increasing use of corporate-wide settlement agreements in enforcement actions.

Mine Safety and Health Administration (MSHA)

- **Examinations of Working Places in Metal and Nonmetal Mines**

Small business representatives have stated that MSHA should amend the agency's final rule on Examinations of Working Places in Metal and Nonmetal Mines that was published in January 2017 to provide mine operators with additional flexibility in managing their safety and health programs and reduce regulatory burdens while retaining adequate safety protections afforded to miners.

Wage and Hour Division (WHD)

- **Application of the Executive, Administrative, Professional, Outside Sales and Computer Employees (EAP Exemption) under the Fair Labor Standards Act (FLSA)**

Small businesses are concerned with a DOL final rule that increased the salary threshold under the EAP exemption to minimum wage and overtime under the FLSA to \$47,476

stating that this rule would have added significant compliance costs and paperwork burdens. In response to a DOL Request for Information, Advocacy recommended that DOL adopt a lower level national salary threshold adjusted to minimize small business impacts to the most adversely affected low wage regions and industries.³ Advocacy was pleased that DOL held Overtime Listening Sessions across the country in September and October 2018 to get public feedback. Advocacy attended these meetings in Georgia, Washington, Missouri, Colorado, Rhode Island, and Washington, D.C. DOL has announced that it will release a proposed rule on this issue in March 2019.

- **Application of the Fair Labor Standards Act to Domestic Service**

In 2015, DOL changed the companion care services exemption to minimum wage and overtime under the FLSA, limiting the use of this exemption to those employed by the family or household using those services. Small businesses providing these services could no longer claim this exemption, and reported business losses in live-in care services and general hourly services due to increased costs. These businesses recommend reform of this rule. Advocacy has written a comment letter on this issue.⁴

In 2018, Advocacy facilitated meetings with DOL and small business representatives from the Private Care Association and the National Association for Home Care & Hospice. These organizations sought to repeal the 2015 final regulations. These organizations also wanted the agency to release new guidance on how to implement provisions such as travel time and health time with these regulations.

In 2018, Advocacy set up another meeting with the Private Care Association and DOL; this organization asked the agency to provide guidance finding that registries are not employers under the FLSA and subject to these requirements; these registries are companies that facilitate matches between clients and caregivers. On July 13, 2018, DOL issued Field Assistance Bulletin No. 2018-4, which reaffirmed DOL's position that registries typically are not employers under the FLSA. This document provided specific examples of common registry business practices which may establish the existence of an employment relationship under the FLSA.

- **Expanding Employment, Training and Apprenticeship Opportunities for 16- and 17- Year Olds**

Small businesses in the health care industry have asked the Department of Labor to amend the Hazardous Occupations Order No. 7, in order to allow 16- and 17- Year Olds to utilize power-driven lifts to make their jobs safer and to provide more employment opportunities. On September 27, 2018, DOL released a proposed rule, which would

³ Comment Letter from Major L. Clark III, Acting Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable R. Alexander Acosta, Secretary, U.S. Department of Labor (Sept. 22, 2017), <https://www.sba.gov/advocacy/9-22-17-re-request-information-defining-and-delimiting-exemptions-executive-administrative>.

⁴ Comment Letter from Winslow Sargeant, Ph.D., Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, U.S. Department of Labor (March 12, 2012), <https://www.sba.gov/content/letter-dated-3122012-department-labor-wage-and-hour-division>.

allow this activity to occur.

- **Tip Regulations under the Fair Labor Standards Act**

Small businesses in the restaurant industry were concerned about a DOL regulation that restricted an employer's ability to pool employee tips; this is regardless of whether the employer takes a tip credit or pays tipped employees the full minimum wage. DOL has announced that it will publish a new rulemaking on this issue this fall.

Summary of Agency Regulatory Reform Efforts

Advocacy applauds DOL for its ongoing regulatory reform efforts that have reduced the regulatory burden to small entities:

- The Administration issued Executive Order 13838 and DOL issued an implementing final regulation; this created an exemption to higher minimum wage requirements under Executive Order 13658 for certain recreational companies on federal lands.
- DOL withdrew Administrator's Interpretation 2015-1 on the definition of independent contractor, which would have narrowed the definition of independent contractor. The prior standard would have expanded the number of employees subject to the Fair Labor Standards Act's requirements, including overtime.
- DOL withdrew Administrator's Interpretation No. 2016-1 on the definition of joint employment, which would have expanded the definition of joint employment. This standard would have made it easier for two employers to be found to share in the control of an employee's activities and liable for the requirements of overtime and minimum wage under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.
- DOL rescinded the Interpretation of the Advice Exemption in the 203(c) of the Labor-Management Reporting and Disclosure Act Rule or the "persuader rule," which expanded the reportable activity that employers and their outside consultants file when they provide advice on unionizing and collective bargaining.

The Office of Advocacy looks forward to working with your agency to continue to reduce the burden of federal regulations on behalf of the small businesses that have asked us to be their voice in this regulatory reform process. We hope that you will include these specific rules when you compile your list of rules to review. Advocacy would be happy to meet with you or your representative so that we may detail the concerns and help suggest less burdensome alternatives for small business as rules are being considered for revision. I have provided the contact information for Assistant Chief Counsels **Janis Reyes**, **Bruce Lundegren** and **Charles Jeane** below.

As we continue to hear from small businesses across the country at our regional regulatory reform roundtables or through our outreach from our regulatory reform website, we will update you with additional summaries from those locations. Thank you for considering small business impacts as a vital part of your regulatory reform efforts and for including the Office of Advocacy as an important part of the process.

Sincerely,



Major Clark,
Acting Chief Counsel
SBA Office of Advocacy

Janis Reyes, Assistant Chief Counsel, Labor and Immigration

Janis.Reyes@sba.gov

(202) 619-0312

Bruce Lundegren, Assistant Chief Counsel, Safety, Security, and Transportation

Bruce.Lundegren@sba.gov

(202) 205-6144

Charles Jeane, Assistant Chief Counsel, Tax, Pensions, and Securities

Charles.Jeane@sba.gov

(202) 205-7168

CC:

Laura Dawkins, Director, Office of Regulatory and Programmatic Policy and Regulatory Reform Officer, U.S. Department of Labor

The Honorable Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget