



October 4, 2017

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) has begun 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 Baton Rouge and New Orleans, Louisiana; Boise and Coeur d'Alene, Idaho; Cincinnati, Cadiz, and Cleveland, Ohio; Lexington, Kentucky; St. Louis, Missouri; and Overland Park, Kansas. 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.

Employment and Training Administration

- **H-2A Visa Program**

One small dairy business recommended that the dairy industry be allowed to utilize the H-2A visa program for temporary agricultural foreign workers, as this industry is struggling to obtain the necessary workforce for their operation. Advocacy realizes that this would require a statutory change.

- **H-2B Visa Program**

Small businesses have commented on the importance of this program to obtain temporary non-agricultural foreign workers for their seasonal businesses; and recommend that the agency continue this program and approve any opportunities to increase the worker capacity under this program. Some small businesses cited concern with recent Executive Orders that have specifically targeted this program for reform and potential cuts.

Office of Federal Contract Compliance Programs

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

Small business representatives were 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 in their 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.

Office of Labor-Management Standards

- **Persuader Rule - Interpretation of the Advice Exemption in the 203(c) of the Labor-Management Reporting and Disclosure Act**

Small businesses were concerned about this final rule that expands the reportable activity that employers and their outside consultants file when they provide advice on unionizing and collective bargaining. Small businesses have stated that this rule would have resulted in paperwork costs and would have deterred these entities from seeking legal advice. In June 2017, DOL published a proposed rule that proposes to rescind this final rule.

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 exceed industry standards and promulgate a rule that is unduly costly and burdensome.

- **Electronic Recordkeeping and Reporting**

Small businesses representatives have complained that OSHA is now requiring the electronic submission of injury and illness data by certain businesses and that OSHA is planning to make that data publicly (which they oppose because they say it can create a false impression of the safety record at a company). Other sectors, such as automobile dealers, have complained that they are required to report to OSHA for the first time even though their injury and illness rates continue to decline.

² Comment Letter from Daryl 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>.

- **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.³

- **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.⁴

- **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.

- **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

³ Comment Letter from Major L. Clark, III, Acting Chief Counsel for Advocacy, and Bruce E. Lundegren, Assistant Chief Counsel, SBA Office of Advocacy to William Perry, Director, Directorate of Standards and Guidance, Occupational Safety and Health Administration, U.S. Department of Labor (August 28, 2017), <https://www.sba.gov/advocacy/08-28-17-comments-oshas-proposed-occupational-exposure-beryllium-and-beryllium-compounds>.

⁴ Comment Letter from Winslow Sargeant, PhD, Chief Counsel for Advocacy, and Bruce E. Lundegren, Assistant Chief Counsel, SBA Office of Advocacy to The Honorable David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor (February 11, 2014), <https://www.sba.gov/content/2112014-comments-ohsa%E2%80%99s-proposed-occupational-exposure-respirable-crystalline-silica-rule>.

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 increases 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.⁵

- **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.⁶

- **All Agency Memorandum (AAM) No. 212- Applicability of Davis-Bacon Act labor standards to members of survey crews**

Small businesses in the surveying industry were concerned with DOL's 2013 AAM No. 212, which reversed long standing labor policy and determined that survey crews working on Federal projects were "laborers and mechanics" subject to the Davis-Bacon Act and prevailing wages. Small businesses stated that this imposed paperwork burdens and increased the compliance costs to these firms and the government agencies that contract for these services.

- **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. These

⁵ 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>.

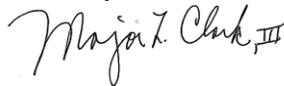
⁶ Comment Letter from Winslow Sargeant, Ph.D., Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, U.S. Department of Labor (March 12, 2012), <https://www.sba.gov/content/letter-dated-3122012-department-labor-wage-and-hour-division>.

businesses were encouraged and supported efforts by the current DOL to rescind this regulation in the current regulatory agenda.

The Office of Advocacy looks forward to working with your agency 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 **Dillon Taylor** 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 L. Clark, III
Acting Chief Counsel for 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

Dillon Taylor, Assistant Chief Counsel, Tax, Pensions, and Securities
Dillon.Taylor@sba.gov
(202) 401-9787

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