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Divider Title: **Labor Law**

LABOR LAWS

Limits on the Use of Union Dues for Political Purposes
Right to Work Act
TEAM Act
Teamsters Election

Limits on the Use of Union Dues for Political Purposes: Beck; Worker Right to Know Act

Issue: Proposed legislation restricting the use of union dues for political purposes. In essence, this proposal would extend "Beck"-- rights of non-union agency-fee payers to deduct the portion of the fee determined to pay for union political activity--to union members.

Background: Proponents of this legislation often refer to it as "Beck" legislation, after the Supreme Court decision in Communications Workers of America v. Beck, which protected **non-union employees** from having their "agency fees", the equivalent of dues, spent for political activity.

Increased spending on political activity by organized labor has inspired Congressional efforts to restrict the use of the dues of **union members** for political purposes. Supporters argue that current law does not adequately protect the rights of union members who disagree with their union's support for certain political candidates or causes. They often refer to polls suggesting that 30-40% of union members support Republicans for public office, while over 90% of union contributions go to Democrats.

Opponents of the measure argue that it would undermine the autonomy of unions as democratic organizations. Union members have democratic rights within their organizations, and participate in deciding which issues and which candidates to support and how much money the union will spend. Unions also argue that restricting the use of dues money would place them at a competitive disadvantage with other institutions that engage in political activity, such as businesses and other special interests which are not held to the same standard.

Current Law. Under current law, no employee can be compelled to join a union. However, a union may charge a non-union employee an "agency fee", the equivalent of dues, to cover the costs of collective bargaining and other representational and educational activities, including political education. In its 1988 Beck decision, the Supreme Court ruled that unions have to set up procedures allowing non-union employees to pay reduced "fees" if they object to the use of their "fees" for political purposes. Beck permits non-union employees to "opt-out" of fees not related to collective bargaining, enforcement and contract administration. These so-called Beck rights are enforced by the National Labor Relations Board, not the Department of Labor.

In addition, federal election law prohibits unions from using dues money to make federal candidate contributions. Dues money ("soft money") may be used for partisan, non-candidate contributions, i.e. contributions to national and state parties. Permissible use of union dues for contributions to non-federal candidates varies according to state law. Contributions to non-partisan electoral activity, such as voter education or "get-out-the-vote" efforts are permissible. For example, the AFL-CIO's reported expenditure of \$35 million in the 1996 campaign was for nonpartisan voter education, and did not

advocate the election of individual candidates.

Labor Department Interest. As a general matter, the Department of Labor takes the lead for the Administration on all labor issues, even when we do not have administrative or enforcement responsibility. In December 1993, the Clinton Administration reversed two Bush Administration actions: (1) citing the high cost of compliance, the Department of Labor revoked "functional reporting" rules that would have required union locals to provide detailed spending reports on political activities; (2) the Administration also revoked an Executive Order requiring all government contractors to post a notice informing workers of their Beck rights. The effect of this order was clearly anti-union as it did not require contractors to notify their workers of any of their other rights protected by the National Labor Relations Act, such as the right to organize and bargain collectively.

Legislative Action. The Worker Right to Know Act (H.R. 3580), sponsored by Rep. Fawell, was incorporated in a campaign finance reform bill (H.R. 3820) defeated in the House (259-162), in July 1996. The Fawell bill would have prevented unions from collecting full dues and fees from **union members and non-members alike** unless they signed individual authorizations every year. This would not only expand Beck rights to union members, but it would reverse the current "opt-out" procedure to one where all employees would have to "opt-in". This would have the likely effect of decreasing the dues income available for union political activity. The Fawell bill would also imposed stricter financial reporting requirements on unions, similar to those revoked by the Department in 1993.

Current Status:

Upcoming Actions. Recent press reports suggest that Rep. Fawell will reintroduce the Worker Right to Know Act, and that Rep. Peter Hoekstra, chairman of a House Oversight Subcommittee, may hold hearings on the enforcement of the Beck decision. Meanwhile, issues related to Beck are before the NLRB and the courts.

Administration Position. The Administration has opposed new initiatives in this area. On October 10, 1996, Secretary Reich wrote to Rep. Fawell opposing the Worker Right to Know Act. He observed that "there is no need for legislative intervention as the current system is working well."

Key Constituents:

Organized labor has opposed all legislation in this area.

Hill Positions:

Senator Mitch McConnell and Senator Judd Gregg are strong supporters of limiting union use of dues money. Senator Gregg introduced a bill similar in intent to Rep. Fawell's, that was not acted upon, which would have required prior written consent ("opt-in") before an employee's dues could be used for political purposes. These types of proposals will be hotly contested during the Campaign Finance Reform debate.

Pros/Cons:

The Administration's position is a matter of record. It reflects the view that current law protects the democratic rights of union members, while allowing unions to be governed by majority-rule and to participate in political and social affairs.

Issue: Federal "Right-to-Work" legislation.

Background: Federal labor law authorizes - but does not require - collective bargaining agreements that compel workers to pay the equivalent of union dues as a condition of employment. These provisions are called union security clauses. Since the enactment of the Taft-Hartley law in 1947, the decision to prohibit union security clauses has been left up to the states. Twenty-one states, mostly in the south, have opted to become so called "right-to-work" states.

Opponents of state "right-to-work" laws argue that they deter unionization and allow "free riders" to enjoy the benefits of collective bargaining without paying their fair share of the costs.

Opponents of federal right-to-work legislation further argue that this has been a matter left to the states for almost 50 years, and only 3 states have become right-to-work states since 1959.

Notably, in no state can a worker be compelled to join a union as a condition of employment. Thus compulsory or forced unionism is a myth. And workers in every state are free, by majority vote, to deauthorize a union security clause. Moreover, workers can never be required to pay for a union's **non-representational** activities, such as political activity. (See briefing on Communications Workers of America v. Beck.)

During the last session of Congress, Sen. Lauch Faircloth introduced a bill, the National Right to Work Act (S. 1788), that would have outlawed union security clauses nationally. The Faircloth bill was defeated on a Senate procedural vote (68-31) on July 10, 1996.

Current Status: It is not clear whether "right-to-work" legislation will be introduced in the new Congress. The Administration strongly opposed the National Right to Work Act. A Statement of Administration Policy, issued on July 9, 1996, observed that enactment of the bill "would seriously undermine the ability of unions to represent American workers and to protect workers' rights."

Key Constituents: Organized labor strongly opposes federal "right-to-work" legislation. The National Right-to-Work Committee is its principal proponent. This is not a top priority for the organized business committee.

Hill Positions: Senator Kennedy led the fight against S. 1788. Chairman Jeffords voted to deny cloture and defeat the bill.

Pros/Cons: The Administration's position is consistent with a well-established--and fundamentally fair--principle of labor law.

TEAM Act

Issue:

The Teamwork for Employees And Management Act

Background:

The TEAM Act would eliminate the 60-year-old ban against company-dominated unions by amending Sec. 8(a)(2) of the National Labor Relations Act (NLRA). Under Sec. 8(a)(2), it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization. Typically, employer domination has been found where a company establishes an employee committee to deal with topics reserved for collective bargaining -- such as pay and benefits, hours of work and other working conditions -- and retains the right to pick the employee-members of the committee, determine the agenda, and eliminate the committee at will. It was the widespread creation of these types of "company unions" or shams that led to the enactment of Section 8 (a)(2). In contrast to company dominated labor organizations, labor-management partnership type committees that are established to improve quality, efficiency and productivity generally do not violate Sec. 8(a)(2) and have in fact proliferated among businesses interested in promoting genuine teamwork with their employees. According to one recent survey, 96 percent of large employers have established such programs.

Nonetheless, business groups allege that the law is unclear and has had a chilling effect on employers interested in forming labor-management partnerships. They have been pressing Congress to amend Sec. 8(a)(2) to give employers greater latitude in establishing and dealing with employee organizations.

The Dunlop Commission, a bipartisan labor-management group, appointed by Secretaries Reich and Brown, specifically rejected the TEAM Act. The Commission recommended that §8(a)(2) should only be clarified in the context of a package of labor law changes that maintains the balance between labor and management.

Although the NLRB is an independent agency charged with interpreting and enforcing the NLRA, the Department of Labor is generally called upon to articulate the Administration's views on important labor-management policies.

Current Status:

The Team Act was passed the House by a vote of 221 to 202 on September 27, 1995. It passed the Senate by a vote of 53 to 46 on July 10, 1996. President Clinton vetoed the bill, and no attempt was made to override his veto.

Key Constituents:

The AFL-CIO, the ACLU and several hundred academics in the fields of labor law and labor economics opposed the bill, along with a few

companies and management-side labor lawyers.

Virtually the entire organized business community (NAM, LPA, Chamber, etc.) supported the TEAM Act. Many companies, including IBM, Caterpillar, Polaroid and Kodak lobbied extensively for the bill.

Hill Positions:

In the Senate, the leading opponents were Sen. Kennedy, Sen. Harkin, and Sen. Simon. The leading proponents were Sen. Kassebaum, Sen. Jeffords, and Sen. Ashcroft. Sen. Bingaman attempted to negotiate and draft a compromise amendment but never succeeded. Senator Dorgan offered the Democratic leadership alternative.

In the House, the leading opponents were Rep. Clay, Rep. Owens, and Rep. Bonior. The leading proponents were Rep. Gunderson, Rep. Fawell, and Rep. Talent. Rep. Moran offered a compromise amendment that the business community and the unions both opposed. Representative Sawyer offered the Democratic leadership alternative.

Pros/Cons:

Pro: Employer groups argue that there is a great deal of confusion regarding the legality of labor management cooperative efforts due to NLRB decisions. They believe this legislation serves to clarify the rules.

Con: Sec. 8(a)(2) was enacted to outlaw the then common practice of setting up sham unions to defeat union organizing drives. In fact, the authors of the NLRA considered the prohibition against company-dominated labor organizations to be essential to the goals of the Act. It is no less true today. Rather than encouraging real teamwork, the TEAM Act would abolish protections that ensure independent and democratic representation in the workplace.

DOL involvement in the December 1996 election for officers of the International Brotherhood of Teamsters.

Background:

The recent Teamsters election was conducted under the supervision of the U.S. District Court for the Southern District of New York pursuant to a Consent Decree resolving litigation the Department of Justice (DOJ) filed against the IBT in June 1988. The Consent Decree provided for court-supervision of both the 1991 and 1996 IBT elections.

The Office of Labor Management Standards enforces the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which includes provisions governing union elections. OLMS worked with the court-appointed election officer and, pursuant to fiscal year 1995 appropriations language, shared with the Department of Justice the cost of government supervision of the 1996 IBT election. DOL transferred \$5.6 million in FY 1996 and \$3.8 million in FY 1997.

Formal procedures for filing complaints regarding the 1996 IBT officer election include successive appeals to the court-appointed election officer, a court-appointed election appeals master, and the District Court. Following exhaustion of those complaint procedures, a member of the IBT would be able to file a complaint with the DOL under the LMRDA. The Office of Labor-Management Standards (OLMS) would investigate a properly filed complaint and would take action to seek a remedial election if it were determined that a violation had occurred which may have affected the outcome of the election. Issues concerning the jurisdiction of DOL over a complaint regarding the 1996 IBT officer election will require discussion with DOJ in view of the District Court's supervision of and continuing jurisdiction over that election.

Current Status:

A report on the results of the December 1996 court-supervised election of officers of the IBT remains pending. Initial press reports indicate that incumbent IBT President Ron Carey has defeated challenger James Hoffa for the office of president pending the resolution of challenged ballots and any protests filed. No complaint has been filed with DOL. It should be noted that no complaint was filed with DOL following the 1991 IBT officer election.

Key Constituents:

IBT union members. The Carey forces within the Teamsters union pushed for funding of the election, while the Hoffa forces lobbied against it.

Hill Positions:

There has been controversy in the Appropriations Committee around funding for the activity over the past 3 years. In particular, the House Commerce, State and Justice Appropriations Subcommittee (chaired by Rep. Rogers) refused to authorize these funds until final negotiation on the overall bill.

Pros/Cons:

No options are presented for decision. Background is provided on a high-profile matter in which DOL may become involved in exercising statutory enforcement responsibilities.

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Divider Title: **Labor Standards**

LABOR STANDARDS

Affirmative Action
Child Labor
Davis-Bacon Helpers Regulation
Davis-Bacon Repeal Efforts
Davis-Bacon Wage Determination Reinvention
Employee Choice Flex-Time and FMLA Expansion
Firefighters
FLSA Enforcement Review
Garment
Prison Labor
Reauthorization of ISTEA
Section 541
Section 13(c) Transportation Employee Protection Program

EMPLOYMENT STANDARDS ADMINISTRATION

MISSION STATEMENT

The Employment Standards Administration (ESA) protects the Nation's workers by achieving compliance with labor standards through enforcement, administrative, and educational programs; ensuring that Federal contractors have nondiscriminatory employment practices; promoting internal union democracy and fiscal integrity; and providing disability assistance to certain workers to resolve injuries, return to work, and receive appropriate benefits.

To achieve its mission, ESA administers a number of diverse programs designed to reflect the goals and priorities of the different divisions of ESA -- Wage Hour, Office of Federal Contract Compliance (OFCCP), Office of Workers Compensation Programs (OWCP), and Office of Labor Management Standards (OLMS).

BUDGET

(dollars in thousands)

FISCAL YEAR	DISCRETIONARY \$	MANDATORY \$	FTE
1997	\$321,276	\$1,324,682	3,942
1998	\$380,120	\$1,340,326	4,268

Affirmative Action/Executive Order 11246

Issue: Whether the federal government should continue to require its contractors to meet affirmative action/equal opportunity requirements as contained in Executive Order 11246 and its implementing regulations.

Background: Under E.O. 11246 (signed by President Johnson), every non-exempt government contract requires Federal contractors and subcontractors to take affirmative action to ensure that "applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Failure to comply with EEO or affirmative action provisions is a violation of the contract, and can, under extreme circumstances, result in debarment from federal contracting.

By regulation, nonconstruction contractors with 50 or more employees and contracts of \$50,000 or more are required to develop and implement a written affirmative action program for each covered establishment. As part of this plan, contractors may establish numerical goals (benchmarks) to reduce underutilization of certain population groups (participation of minorities and women in the contractor's workforce as measured against their availability in the relevant labor market). Contractors need not achieve these goals to show that they have taken affirmative action; they may show good faith efforts in outreach, recruitment, and training to increase the pool of qualified minorities and women. Construction contractors need not develop written affirmative action plans, but must comply with the regulations regarding good faith steps to increase participation of women and minorities. In the construction industry, numerical goals are set by OFCCP instead of by individual contractors.

The so-called "Equal Opportunity Act of 1995" co-authored by former Senator Dole and Congressman Canady, would have banned the use of numerical goals in any affirmative action program. Questions have been raised about the impact of California's Proposition 209, banning any "preferential treatment," on the obligations of Federal contractors.

Current Status: Congressman Canady plans to reintroduce his legislation in the House Judiciary Committee and Chairman Fawell of the Subcommittee has stated his desire to have OFCCP serve as an information service, rather than an enforcement agency.

The Administration has defended OFCCP, threatened to veto Dole-Canady, and has opposed Proposition 209 on policy and more recently, on legal grounds. The President's pledge to "mend, not end" affirmative action has been followed by OFCCP which has taken the

following actions: 1) issued a goals directive clarifying the difference between the lawful use of goals and the improper use of quotas; 2) implemented quality assurance training to guarantee consistent enforcement of this directive; 3) improved outreach and technical assistance to the contractor community.

Key Constituents: OFCCP constituents include the civil rights and women's groups, and many sectors of the business community. Some women's groups have advocated raising the goals for women in construction, and have opposed raising the thresholds for coverage. Many contractors support the Executive Order program. Some concerns include: uniform enforcement, increased flexibility, and confidentiality of documents disclosed to OFCCP. OFCCP has taken positive steps, including the development of two significant regulatory packages, to address these concerns and reduce paperwork and compliance burdens, and improve targeting.

Hill Positions: The Administration has opposed Dole-Canady, but repeated its pledge to implement affirmative action consistent with Supreme Court precedent and fairness principles. To this end, the Justice Department reviewed federal affirmative programs and supported those that are flexible and tailored narrowly. The Administration has conducted extensive briefings for Members on affirmative action to clarify its scope and to eliminate misconceptions about the existence of "quotas." Women's groups and civil rights groups have also lobbied the Hill to emphasize the importance to their concerns.

Even though the issue is divisive, some Members clearly would like to cast a vote for eliminating unlawful "preferences" or to ferret out alleged fraud in minority set-aside programs. This issue is likely to draw continued activity in the next Congress.

Pros/Cons: Pros: Recent media revelations, like Texaco, Mitsubishi, and the sex harassment allegations involving the military, emphasize that discrimination persists in the 1990s. OFCCP recently publicized its own list of "egregious" cases to highlight recent findings of overt discrimination. Affirmative action by Federal contractors is a valuable, proactive tool to prevent discrimination. Contractors who take their Executive Order affirmative action responsibilities seriously may avoid discrimination, negative exposure, and the costs of litigation.

Affirmative action and equal employment opportunity are good for the bottom line. Contractors who practice aggressive outreach and training find new sources and larger pools of highly qualified workers. Real life successes are found in OFCCP's EVE and Opportunity 2000 award

winners, who have been recognized for their innovative affirmative action programs.

Cons: Numerical goals, even as practiced under Executive Order 11246, remain highly controversial. Despite the emphasis in OFCCP's regulations and policies on good faith effort, many continue to believe that goals are tantamount to quotas. Opponents argue that the existence of a numerical target, per se, causes contractors to discriminate. Others assert that any focus on racial or gender minorities runs contrary to the notion of a color-blind society. Continuation of the program will continue the controversy. Additionally, the possibility of other state initiatives to replicate Proposition 209 may heighten the perception that federal law conflicts with state and popular will.

Child Labor in the U.S.

Issue: Proposals are being developed within Wage and Hour to revamp the child labor enforcement program and to revise the child labor regulations which restrict the hours that minors under 16 may work and prohibit minors from working in certain hazardous occupations.

Background: Two recent child labor cases have been the subject of disparaging stories in major newspapers (Chicago Tribune, San Francisco Chronicle, and the Wall Street Journal). These stories have painted Wage and Hour's child labor enforcement efforts as excessive and misplaced. Wage and Hour's child labor enforcement and outreach efforts have maintained a very high profile since the early 1990's when enforcement sweeps were conducted to address a dramatic rise in the incidence of illegal child labor. Civil money penalties for child labor violations have been increased three times since the early 1990's (once statutorily and twice administratively) to strengthen the value of this tool as a deterrent to further violations. In part because child labor penalties are so high, an increasing number of employers are choosing to contest their citations.

Moreover, employers who object to penalties complain to the Hill, citing excessive enforcement. A few cases have caught Members' attention, such as cases enforcing against teenagers driving golf carts. Child labor violations have dropped significantly--from a high of around 40,000 minors found illegally employed in 1990 to slightly more than 7,000 minors found illegally employed in 1996.

In addition to the enforcement concerns, the child labor regulations, some of which were written over fifty years ago, are in need of review and updating. Over the years regulatory proposals were developed but were later either withdrawn or not published by the Department because of the strong competing interests in this area. The Department is in the process of reviewing its child labor regulations and has issued an Advanced Notice of Proposed Rulemaking. To force the Department to deal with these issues more quickly, Congress has considered legislative changes to the Fair Labor Standards Act (FLSA) that would amend the Department's child labor regulations. These bills related to the employment of young people in motor vehicle driving and the loading of scrap paper balers. Of these proposals, FLSA amendments were, in fact, enacted in 1996 that permit 16 and 17-year-old teenagers to load scrap paper balers under certain circumstances.

Current Status: Wage and Hour has undertaken a review of its overall child labor enforcement intervention and penalty assessment policies, child labor civil money penalty schedule, and child labor regulations. In reviewing its enforcement intervention policy, Wage and Hour is developing a new approach to deploying its resources so that more serious child labor

offenses are the primary focus. Possible revisions to the assessment policy and penalty schedule are under discussion within the Department.

Key Constituents:

Child labor advocates (*e.g.*, Child Labor Coalition, National Consumers League, National Education Association, and Parent Teachers' Association) would oppose any efforts that appear to weaken child labor enforcement or regulatory protections. A number of the enforcement and regulatory proposals under consideration, such as excusing first-instance violations would likely generate controversy among the advocates because they would be perceived to weaken protections for young workers. These proposals would likely be supported by employer associations (*e.g.* National Restaurant Association, National Grocers' Association, and the Chamber of Commerce).

Hill Positions:

There is some sense, particularly among majority Members, that Wage and Hour has been too slow to make changes to the child labor regulations, particularly regarding restrictions on the use of power-driven paper balers and motor vehicle operation. Congress was unsuccessful in bringing about the changes through the appropriations process. After these attempts, paper baler legislation was ultimately enacted. We expect these legislative efforts to continue with respect to motor vehicle driving. In addition, there has been concern in the past expressed regarding what are considered stiff fines and enforcement actions related to *de minimus* violations.

Employee Choice Flex-Time (FLSA) and FMLA Expansion

Issue:

Last June, the President announced his intention to propose legislation to:

Amend the Fair Labor Standards Act (FLSA) to allow private sector workers to receive employee choice flex-time, or paid time off, in lieu of overtime pay when they work more than 40 hours in a workweek if they choose ; and

Expand the Family and Medical Leave Act (FMLA) to provide additional time off for certain additional parental involvement and elder care reasons.

Background:

FLSA requires the payment of "time and one-half pay" for overtime to most hourly workers (some employers are not covered by the Act and some employees are exempt from one or both of its basic requirements). Public sector workers are currently permitted to receive compensatory time ("comp. time") in lieu of overtime pay. (Like overtime, comp. time would be offered at a time-and-a-half rate.) There are limits on the number of comp. time hours that public sector workers can accumulate and certain restrictions and safeguards on the use of such hours and cashing out of accumulated hours. The President's proposed legislation would authorize the use of employee choice flex-time for most private sector workers who are now covered by the FLSA overtime provision. Unlike "comp. time" proposals, the President's proposed "employee choice flex-time" amendment includes strong protections against coercion of employees (e.g. safeguards against employers forcing employees to "choose" comp. time in lieu of cash or favoring those employees who "choose" comp time instead of cash) and against abuses or risks to employees if they are considered "vulnerable" employees (such as part-time and seasonal workers) or if their employer is at risk of going bankrupt. In the closing days of the last Congress, the House passed legislation proposed by Congressman Ballenger (R-NC) which would authorize compensatory time-off but which is less protective of workers' rights than the President's proposal. The President has promised to veto the Ballenger bill. The Senate has not acted on this matter, but bills have been introduced – most notably, by Senator Ashcroft (R-MO) – that would have similar effect.

FMLA assures up to twelve weeks of unpaid, job-protected leave each year for eligible employees of covered employers for certain family and medical reasons. Only workers who have worked for 1,250 hours and a full year for a company with 50 or more employees are eligible for FMLA leave. The President has advocated and proposed legislation to modestly expand FMLA to provide twenty-four additional hours of unpaid leave for parental

involvement in children's education and elder care. Senator Dodd (D-CT) and former Congresswoman Schroeder (D-CO) introduced legislation in the last Congress that addresses dramatically those situations but goes further to expand FMLA by dropping the coverage threshold to companies with 25 or more employees.

Current Status:

The Administration sent the Congress the Employee Choice Flex-Time expansion bill at the end of the session. The President's bill was never formally introduced, but was referred to committee. These issues were repeatedly emphasized by the President during the recent campaign and will likely arise early in the new Congress. It is expected that a variety of bills amending the FLSA will be introduced in both Houses of Congress, particularly regarding comp. time which has been declared a priority by some members of both Houses of Congress. Legislative strategy needs to be coordinated with the White House which played a large role in constructing these proposals. Gene Sperling, John Hilley, John Angel and Harold Ickes participated.

Key Constituents:

Labor unions, worker advocates and the women's organizations strongly oppose authorizing comp. time because of the potential for abuse, and because it will likely serve to reduce employees' earnings. For the same reasons, they opposed even the President's Employee Choice Flex-Time bill. On the other hand, this issue has long been of great importance to the business community because of its potential for both satisfying some employees and reducing costs and increasing their workforce flexibility. These same constituencies would likely come out on the opposite sides regarding FMLA expansion, with worker and women's organizations favoring and the business community in opposition, but there has been little public reaction so far regarding the President's proposal.

Hill Positions:

Movement on these issues will require significant cooperation and compromise between the Administration and the new Congress, and are likely to be the subject of early action by the Administration or Congress (or both) when the Congress convenes. There will likely be bipartisan support in the Congress for employee choice flex time - with strong dissent from some in the minority - but first steps will involve efforts to forge mutually acceptable legislative compromise between the Administration and the Congress.

Pros/Cons:

The issues of increased wages and flexibility at the workplace are key to articulating the work and family agenda. The controversy is over how best to strike a balance without undercutting long-standing labor protections. The Republicans realize this is a divisive issue for us, and, therefore, have made it a priority.

Pros: The President has made these proposals his top priority in response to perceived needs of workers for more flexibility.

Cons: If the wrong proposals are enacted, without sufficient protections, workers, particularly low wage workers, could lose income.

DAVIS BACON: Helpers

Issue: Whether and under what circumstances to recognize "helpers" as a separate classification on projects covered by the Davis-Bacon Act (DBA), an issue that has been the source of much controversy for 15 years. Regulations allowing expanded use of helpers have been suspended through rulemaking while the Department considers whether and how to amend the regulations.

Background: Prior to 1982, the Department's policy permitted the use of helpers on DBA projects only in limited circumstances - when the helper classification was a separate and distinct class of worker whose duties were distinguishable from those of journeypersons and laborers and their use prevailed in an area. In 1982, the Reagan Administration amended the regulations to allow expanded use on DBA projects of "semi-skilled helpers" whose duties could overlap with those of skilled journeypersons, but who are paid at a wage rate lower than the journeylevel rate. The Building and Construction Trades Department, AFL-CIO, and the Laborers International Union of America, AFL-CIO, sued the Department over the regulations, which were enjoined and caught up in litigation for the rest of the decade.

A final rule was implemented in 1991, but subsequent appropriations riders, sponsored by Senator Harkin as Chairman of the Labor/HHS Appropriations Subcommittee, barred the Department from implementing the regulation for most of the period since then. In November 1993, the Department suspended the regulations by notice in the Federal Register in light of the appropriations ban. The current appropriations act, signed by the President in April 1996, contains no such rider. The Department is currently being sued by the Associated Builders and Contractors (ABC) for failing to implement the suspended regulation given that there is no longer an appropriations rider banning implementation.

Current Status: On December 30, 1996, the Department published in the Federal Register a final rule (completing rulemaking begun with the Notice of Proposed Rulemaking in the Federal Register on August 2, 1996) which continues the suspension of the helpers regulation while the Department engages in rulemaking to consider changing the regulations. Staff from Wage and Hour, ESA, ASP and SOL are developing such a notice of proposed rulemaking with options for changing the suspended regulation. Options under consideration include changing the definition of "helper" and implementing a helper-to-journeyperson ratio. The Department has publicly committed both in the 1996 final rule and before the court in the ABC lawsuit that it expects to complete rulemaking to amend the regulation by August 1997.

Key Constituents: The construction trades unions vehemently oppose any expanded

recognition of helpers on DBA projects. Unionized contractors generally share that opposition. Non-unionized contractors just as strongly favor immediate implementation of the suspended regulation.

Hill Positions:

We expect Members' positions on this issue will reflect their views of DBA in general: DBA opponents will favor the suspended regulations and DBA supporters will favor amending the regulations, with many of those preferring a return to the policy in effect prior to 1982.

Pros/Cons:

The parties that care about this issue have very clear, entrenched and opposing positions and any action taken by the Department in this area will be highly controversial. Staff are now working on options for amending the regulations, and will present those options, with pros and cons, to senior Department staff during the decision making process.

Davis-Bacon Repeal Efforts

Issue: Congressional attempts to repeal the labor standards protections of the Davis-Bacon Act.

Background: The Davis-Bacon Act, enacted in 1931, requires contractors and subcontractors on Federal construction projects to pay their workers no less than the wage rates that prevail in the local area for the same type of construction. Approximately 60 related Federal statutes require the payment of prevailing wage rates in accordance with the Davis-Bacon Act as a condition of Federal assistance to States, local governments and others. The basic purpose of the Davis-Bacon Act is to ensure that the Federal government's massive purchasing power does not have the unintended or unwanted consequences of undercutting local prevailing wages in the construction industry or of putting local contractors at a competitive disadvantage.

Throughout the last decade, there have been numerous unsuccessful efforts to repeal the Davis-Bacon Act. Congressional leadership for repeal has traditionally followed party lines with Republican Members at the forefront. However, the ability to defeat the repeal has been consistently bipartisan. Davis-Bacon repeal gained momentum when the 1994 elections resulted in a Republican-controlled Congress. In early 1995, Congressman Cass Ballenger (R-NC), Chairman of the House Economic and Educational Committee's Subcommittee on Workplace Protections, and Senator Nancy Kassebaum (R-KS), then Chairperson of the Senate Labor Committee, introduced legislation to repeal the Davis-Bacon Act (H.R. 500 and S. 141). In February 1995, the Administration testified before both the Senate and House Committees against the repeal legislation. The House Subcommittee and the Senate Committee reported repeal bills, but no floor action was taken.

In the summer of 1995, Senator John Warner (R-VA) attempted to use the National Highway System Designation Act of 1995 to exempt highway projects from the provisions of the Davis-Bacon Act. The effort failed in the face of a Democratic filibuster. During this past year, proposed streamlining initiatives, privatization programs, public/private partnership ventures, and appropriation bills have provided continuing opportunities for parties who wish to roll back the labor standards protections of the Davis-Bacon and related Acts to use the legislative process to effect piecemeal Davis-Bacon repeal. For example, recent legislative proposals would have exempted public housing

residents, workers who construct military housing, and individuals who work on Native American construction projects from existing Davis-Bacon prevailing wage protections.

Advocates of Davis-Bacon repeal have long argued that repeal would result in savings to the taxpayers. Although there is no general consensus about how much, if any, savings would result, the FY 1997 Budget Resolution reported out by the House Budget Committee assumed budgetary savings of \$4.6 billion over six (6) years from the repeal of the Act. Associated cuts in agency funding were assumed to be \$20 million in FY 1997 and \$120 million over a six (6) year period for repeal of both the Davis-Bacon and the Service Contract Act (companion prevailing wage legislation). The Senate Budget Committee's FY 1997 Budget Resolution also assumed repeal of the Davis-Bacon Act and the Service Contract Act. The Senate Resolution assumed savings of \$13.6 billion over six (3) years associated with repeal of both labor standards statutes. Subsequently, Sense of the Senate resolutions rejected the repeal assumption but called for Davis-Bacon reforms.

Current Status:

The President has stated his intention to veto legislation repealing the Davis-Bacon Act. While the Vice President is interested in reform as part of a reinvention effort, no such effort will get serious consideration until proponents no longer have the votes to block repeal.

As a general rule, the House Budget Committee usually assumes repeal of Davis-Bacon, and we go through the exercise of restoring the program. Davis-Bacon has been the subject of oversight investigation addressed in other fact sheets. The new attacks may come from those quarters.

Key Constituents:

Construction trade unions – represented principally by the AFL-CIO's Building and Construction Trades Department – are important constituents, as are a variety of construction industry employer associations, primarily the Associated Builders and Contractors and the Associated General Contractors. The federal contracting agencies have a keen interest in the status of Davis-Bacon labor protections particularly in those cases where the Act applies to Federal assistance programs (grants, loans, and loan guarantees).

Hill Positions:

The traditional Davis-Bacon debate is usually resolved by a filibuster. As long as proponents can prevent "cloture", no vote can ever be taken. Thus far, the votes have always been there.

However, during the 104th Congress, there was a bi-partisan working group that began looking at reform as an option. This discussion is at the preliminary stage. Retiring Senator Mark Hatfield (R-OR) and Rep. Curt Weldon (R-PA) provided "moderate" leadership. Reform efforts will only gain momentum if the threat of repeal is imminent.

DAVIS-BACON: Wage Determination Reinvention

Issue: How to spend newly appropriated FY 1997 funds to begin to improve the process for determining prevailing wages for Federal construction under the Davis-Bacon Act.

Background: The Davis-Bacon Act, enacted in 1931, requires the payment of at least locally prevailing wages and fringe benefits to all "mechanics and laborers" employed on federal and certain federally-financed construction projects. The purpose of the Act is to assure that the Federal government's massive purchasing power does not depress local construction industry wages. Based on DOL-conducted surveys of "prevailing wages" in different areas, the Department of Labor sets the minimum wage and fringe benefits that must be paid as "prevailing" for occupational classifications in an area ("wage determinations").

Davis-Bacon has long been the subject of controversy and there have been many efforts to have it repealed, as well as some recent attempts at reform. Repeal efforts have been based primarily on the perception that the Act is inflationary and adds unnecessarily to the cost of government construction. In recent years, however, additional arguments have been advanced in support of repeal including charges that the wage determinations issued by DOL are inaccurate and subject to fraud. This allegation arises from a DOL review of wage surveys conducted in 1993-1994 in Oklahoma which resulted in issuance of new wage determinations with significantly increased wage rates. The Oklahoma State Labor Commissioner asserts the original wage rates were based on fraudulent survey responses submitted by local unions. The fraud allegations are currently under investigation by the FBI, on referral from DOL. Based on the review of the Oklahoma surveys and an analysis of the Davis-Bacon survey process, Wage and Hour has modified the wage survey process and provided training to those Department personnel conducting and reviewing surveys.

The current wage survey process is, nonetheless, in need of significant improvement in order to improve its accuracy. The scope of the survey task is well beyond the capacity of available resources. It involves surveying many occupational classifications for four different types of construction in more than 3,000 counties in the U.S. The difficulty of this task is reflected in the fact that the average wage determination is seven years old. In addition, the GAO has identified systemic weaknesses that call into question the underlying validity of the survey process. There is also an OIG investigation in process. For these reasons, Wage and Hour has been working for some time to develop options for reinventing or re-engineering the Davis-Bacon wage survey/determination process. Wage and Hour recently received a requested additional \$3.75 million in appropriations for FY 1997 to develop and begin implementing wage survey/determination system improvements.

Current Status:

Wage and Hour has developed five options for reinventing the Davis-Bacon wage survey/determination process and is currently briefing interested parties (including Congressional oversight and appropriations committees staff) regarding these options and the advantages/disadvantages of each. Based on feedback from the current discussions, a decision needs to be made within the next two months on how the additional FY 1997 resources will be expended.

Key Constituents:

Construction unions, represented principally by the AFL-CIO's Building and Construction Trades Department, are important constituents, as are the construction industry employer associations, primarily the Associated Builders and Contractors and the Associated General Contractors. While we are still in the midst of the consultation process, we expect that the various constituencies' ultimate reactions to changes in the current survey/determination process will be sharply divided – largely along the lines favoring repeal or retention of Davis-Bacon. Those parties which support Davis-Bacon are expected to oppose any basic change to the current survey system, favoring an option that would re-engineer the existing system primarily through investment in technology and advanced information systems. On the other hand, those parties which favor repeal of the Act may well wish to see the status quo continue since fixing the survey process would remove one argument for repeal. The constituents in favor of the changes are the "good government" advocates.

Hill Positions:

Feedback has also been sought from Congress and is expected to fall along lines similar to the constituents. The principal issue will involve the Department's FY 1997 plans for the \$3.75 million. The Secretary-designate will likely face questions about this issue in confirmation hearings as well as broader Davis-Bacon issues. In addition, this issue will certainly arise during the spring FY 1998 budget hearings in both the House and Senate. We need to have decided on FY 1997 expenditures and be in the process of implementing that decision before the budget hearings. This decision could be an interim one, that is, it could involve investing in testing and/or developing more than one of the improvement options currently under consideration.

Pros/Cons:

Each option under consideration has advantages and disadvantages which have been carefully analyzed and may be further developed through the current consultation process with interested parties. These should be presented as part of the upcoming decision-making process.

Fair Labor Standards Act: Volunteer Firefighters

Issue: How the Fair Labor Standards Act applies to employed firefighters who also "volunteer" their services for the same public agency by which they are employed.

Background: The Fair Labor Standards Act (FLSA) explicitly does not permit employees of a State or local government to volunteer additional hours of service without compensation to perform the same type of duties or services that the individuals are employed to perform. This principle applies to employed firefighters, where problems most often arise. In 1991, in response to a complaint, the Wage and Hour Division investigated Montgomery County, Maryland's Department of Fire and Rescue Services for possible violations of the FLSA. The Department ruled that the County's practice of permitting its firefighters and rescue employees to volunteer additional hours of service at fire stations throughout the County without compensation was in violation of the FLSA.

In 1995, Congressman Bateman (R-VA) introduced legislation which would allow firefighters and rescue squad members to volunteer their services to their employer so long as they volunteered at a location where they are not regularly employed (H.R. 94, "Volunteer Firefighter and Rescue Squad Worker Protection Act"). Senator Warner (R-VA) introduced similar legislation (S. 324). Under the bill, an employer would not be obligated to pay overtime compensation for such time an individual volunteered if the individual signed a legally binding waiver of such compensation. Both the Congressman and the Senator cited the Montgomery County, Maryland, case as the impetus for their proposed legislation.

Current Status: The Subcommittee on Workforce Protection of the House Economic and Educational Opportunities Committee held hearings on H.R. 94 in October 1995. The Department, although not invited to testify, opposed the legislation. Congress' initial concerns (in 1985) over the potential for abuse and its desire to prevent any manipulation through coercion or undue pressure on employees to volunteer remain legitimate. Employers still have substantial advantage in any dealings with employees. The difficulties inherent in determining when an employee is freely "volunteering" would effectively permit local governments to encourage employees to volunteer their services without compensation. Moreover, the U.S. Supreme Court has held that individuals may not waive their rights to statutory compensation under the FLSA because such waivers would thwart the law's public policy goals. Resulting questions over the legitimacy of the waivers and whether and how they could be revoked by employees would increase uncertainty in the application of the law.

Key Constituents: The International Association of Fire Fighters (representing over 225,000 professional firefighters) testified against H.R. 94. The Association cited its belief that the proposed legislation unfairly removes vital job protections for firefighters and simply provides a mechanism for local government to avoid paying firefighters for the hours that they work. Congressman Bateman stated that his bill has the support of the International Association of Fire Chiefs and the National Volunteer Fire Council.

Hill Positions: Congressman Bateman has stated that his bill has bipartisan support in the House of Representatives where it had been co-sponsored by 47 members. Also in 1995, Senator Gregg (R-NH) introduced similar legislation which would allow a State or local government agency to pay no overtime or provide compensatory time-off for any time during which an employee volunteers if the employee signs a legally binding waiver.

Pros/Cons: Opposition to the various proposals to ease FLSA restrictions on volunteering by public employees may be viewed as contrary to the spirit of volunteerism and a deterrent to community-based activities and responsibilities. However, the inherent dangers of employee abuse coupled with the overall public policy goals of the FLSA argue in favor of continued protection of workers.

Fair Labor Standards Act (FLSA) Enforcement Review

- Issue:* The report of the House Committee on Appropriations regarding DOL's FY 1997 budget requested the Office of Inspector General (OIG) to examine how the Wage and Hour Division selects employers for investigation, particularly under the FLSA, and how decisions are made concerning the amount of time and resources devoted to individual investigations.
- Background:* This matter appears to arise from a report and testimony from the Inspector General last year (April 1996) regarding allegations of possible political influence on Wage and Hour enforcement actions. Based on the OIG's review, a DOL official was dismissed because he was found to have sought to improperly influence the conduct of an ongoing Wage and Hour compliance investigation of a particular company at the behest of the Service Employees' International Union (SEIU). The House Committee appears interested in developing information regarding how Wage and Hour targets its enforcement actions and manages the investigative time devoted to these actions to determine whether there are appropriate safeguards against any improper influence on enforcement actions.
- Current Status:* The OIG is currently conducting an audit in response to this request. We understand that their intention is to complete the audit so that they can have a report of findings ready to submit to the Congress by February.
- Key Constituents:* The principal – if not only – interest in this matter arises from some majority Members of the House Appropriations Subcommittee.
- Hill Positions:* Not known, but it may be that this initiative is intended to uncover a potential source of embarrassment for the Administration.
- Pros/Cons:* Not applicable.

Garment Industry Initiative

Issue: Sweatshops still exist in the U.S. garment industry today. Although the industry is showing some signs of modest improvements, serious compliance problems and abuse of workers (mostly immigrant women) who work long hours at subminimum wages with no overtime in often deplorable working conditions continues to exist.

Background: Beginning in 1992, the Wage and Hour Division began focusing on the garment industry as one of the low-wage industries targeted for enforcement sweeps and education/outreach activities. Instead of the traditional approach of investigating one contractor shop at a time, Wage and Hour began applying a number of innovative strategies, including expanded use of the "hot goods" provision of the Fair Labor Standards Act (FLSA) which generally prohibits the shipment of goods in interstate commerce made in violation of the FLSA. The effect of using the "hot goods" provision is to prevent manufacturers from deriving a financial benefit from goods illegally made by contractors. Routinely, Wage and Hour started notifying manufacturers of contractors' violations and of potential "hot goods" actions. Subsequent to the discovery of slave-like conditions at a sweatshop in El Monte, CA, in the summer of 1994, the Department's Wage and Hour Division stepped up its enforcement activities and called on the industry, especially retailers, to take steps to assist in efforts to improve compliance in the industry. In September 1994, the Department held a Retailers Summit to initiate a dialogue with the major retailers. During this time, the Department also continued to encourage manufacturers to institute compliance monitoring programs to ensure that their contractors comply with the FLSA. The spotlight, once again, was directed on the garment industry in May, 1996 when goods produced for Kathie Lee Gifford's clothing line sold at WalMart were found in a New York City sweatshop. This very highly publicized revelation provided momentum and public attention which resulted in the Department's July Fashion Industry Forum. The Forum brought together for the first time all levels of the industry to participate in a public event focusing on this problem and potential solutions. Following this event, the President convened a group of industry, labor, and other interested parties and asked them to explore means to assure consumers that goods are not made under sweatshop conditions. This industry driven partnership, known as the Apparel Industry Partnership, committed to report their progress to the President in February, 1997. The Department was named a winner of the 1996 Innovations in American Government awards program by the Ford Foundation and the John F. Kennedy School of Government at Harvard University for its accomplishments in this initiative.

Current Status: Wage and Hour is continuing its "No Sweat" initiative – an innovative three-prong strategy of **enforcement**, **education**, and **recognition** to eradicate sweatshops in the U.S. **Enforcement** includes targeted

enforcement sweeps in major garment centers, the notification to manufacturers of "hot goods" produced by their contractors, and the identification of retailers where "hot goods" can be traced. Wage and Hour will continue to issue quarterly enforcement reports and will this year conduct compliance surveys in the New York City and San Francisco Bay areas. As a result of a recent evaluation of Guess?, Inc.'s monitoring program, Wage and Hour is working with this manufacturer to modify its program to make it more effective. On the **education** front, Wage and Hour will conduct more Compliance Monitoring Workshops to inform the industry on how to implement effective monitoring programs to ensure that goods are made in compliance with the FLSA. The Department will also continue publicizing activities to encourage public interest in our efforts to convince the industry to assume greater responsibility to help improve compliance. Wage and Hour will also work to advance partnerships with socially responsible businesses and religious leaders that support the "No Sweat" initiative. The Apparel Industry Partnership, consisting of industry representatives and other community interests, is expected to make its recommendations at the end of February to President Clinton on how the industry can assure consumer confidence that the goods they purchase are not made under sweatshop conditions here or abroad. Wage and Hour will also continue with its Trendsetters List, which **recognizes** retailers and manufacturers that have assumed responsibility for monitoring the labor practices of their contractors. Finally, Wage and Hour will be carrying out and participating in a number of activities as a result of being named a winner of the 1996 Innovations in American Government award.

Key Constituents: The Union of Needletrades, Industrial and Textile Employees (UNITE) is generally very supportive of the "No Sweat" initiative. However, UNITE has expressed some concern about our working relationship with INS which they claim causes workers to be reluctant about providing information on alleged violations. In addition to UNITE, there are several local worker advocate groups, such as the Asian Immigrant Women Advocates (AIWA) in California and the Latino Workers Center in New York, who continue to press for stepped up enforcement. Also, more than three dozen religious groups have pledged to remind Americans that they have a moral responsibility to do everything they can to ensure that garment workers are treated fairly and with dignity.

The National Retail Federation (NRF) has published a list of more than 200 of its members which have signed NRF's Statement of Principles on Supplier Legal Compliance. However, NRF continues to publicly state that the Department of Labor, not retailers, should be responsible for enforcement of labor laws in the industry and should be given additional resources for this purpose. The American Apparel Manufacturers Association, on occasion, has also echoed this same sentiment and is concerned about the Department's use of the "hot goods" provision of the FLSA against manufacturers. Consumers also have become increasingly more interested in the Department's program to eradicate sweatshops. In

November 1995, a consumers' coalition announced a nationwide education initiative to inform the public about sweatshops and published "Clues for Consumers." Two Marymount University surveys have validated consumers' desire to not purchase goods produced in sweatshops. Finally, major socially responsible investment firms have committed to working on this issue and providing an additional pressure point on companies to take action against sweatshop made goods.

Hill Positions:

At the end of the 104th Congress, Senator Kennedy (D-MA) and Congressman Clay (D-MO) introduced legislation to amend the FLSA to make manufacturers in the garment industry liable, along with their contractors, for FLSA violations.

Senator Harkin and Representative George Miller (D-CA) have proposed a labeling system similar to the recent "rugmark" label to assist consumers in identifying wearing apparel that was not made with child labor.

Congresswoman Velasquez was successful in adding \$5 million to the Wage and Hour Appropriations to support enforcement against sweatshops. Appropriations staff have indicated an interest as to how these funds are being used.

Pros/Cons:

However, the Department's activities in this area have created controversy among employers who believe the Department's use of "hot goods" and other enforcement mechanisms is too tough. Employee advocates, on the other hand, think enforcement should be even tougher. While the "No Sweat" initiative is not without controversy, it is important to maintain and build on the current momentum. The Department finally has made headway in getting the attention of "asset-holders" -- manufacturers and retailers -- and is beginning to see some improvement in the compliance level in the industry. Absent the active cooperation of all levels of the garment industry, Wage and Hour will be unable to effectively assure minimum labor standards compliance in the industry.

Prison Labor

Issue: Proposed amendments to the Fair Labor Standards Act (FLSA) to exclude inmates from minimum wage and overtime coverage.

Background: In several recent Congresses, including the 104th, Sen. Bob Graham (D-FL) and Sen. Harry Reid (D-NV) have introduced bills and offered amendments to other bills that would deny FLSA coverage to prison inmates. They are motivated by requests from the prison industries in their states and others that want to be shielded from lawsuits filed by inmates seeking back pay for minimum wage and overtime violations. The Florida prison industry program Senator Graham established when he was Governor has been sued several times, always unsuccessfully. Graham says he wants to prevent the filing of such frivolous suits.

The Ashurst-Sumners Act makes it a crime to ship prison-made goods in interstate commerce, but an exception was created for goods produced in state prisons participating in the Prison Industry Enhancement Certification Program (PIE), which is administered by the U.S. Department of Justice. To be certified, the prison industry must demonstrate that it has no adverse impact on private industry and private sector employment, and that it pays the inmates locally prevailing wages for that industry (from which 80% may be deducted for victim compensation, the prisoners' room and board, and the cost of the program).

Current Status: A Graham-Reid amendment was added to the Labor-HHS Appropriations bill in the Senate, but the bill was not taken up by the full Senate. Graham and Reid tried to add their amendment to the Omnibus Appropriations bill, but after attempts to negotiate a compromise failed, the Administration succeeded in keeping it off. The two Senators will try again in the 105th Congress.

Key Constituents: The Prison Industries Alliance, an organization representing the state prison systems, strongly supports the amendment.

The AFL-CIO and some small business organizations oppose the bill.

Hill Positions: Senator Kennedy led the fight against the amendment. Senator Bumpers expressed concerns about the amendment on behalf of small businesses in the past. Senators Graham and Reid have been the main proponents, but Senator Thurmond and others have expressed support from time to time.

Pros/Cons: Pro: Prison inmates, working as part of their sentence to hard time, are not employees and should not receive FLSA coverage. More

should be done to discourage suits seeking coverage, since they are expensive to defend.

Con: No court has ever held that inmates working as part of their sentence to hard time are entitled to the minimum wage. The amendment is unnecessary and overly broad. It would allow businesses to employ unpaid prisoners in the production or delivery of services in interstate commerce. State prison systems have already allowed private businesses to use inmates to make telephone hotel and airplane reservations and to provide computer and data processing services. No change in the law should be made that would allow unpaid prisoners to displace law-abiding citizens from jobs in the private sector.

International treaties to which the U.S. is a party outlaw the use of prison labor by private individuals, companies, and associations, unless the kinds of labor standards protections guaranteed by the PIE program are provided. Removing minimum wage protection for such employment would probably not be compatible with those treaties.

Fair Labor Standards Act: "541 Exemption"

Issue:

The FLSA contains a provision that exempts from its minimum wage and overtime pay requirements "executive, administrative, professional and outside sales" employees, as such terms are defined by the Secretary of Labor. The Department's regulations (29 CFR Part 541) define these terms and establish the criteria for minimum wage and overtime pay exemption for such employees. These regulations are a source of continuing controversy and contention and need to be substantially modified because of recent court decisions and because they are embarrassingly out-of-date -- for example, the amount of the salary test to qualify for the exemption (\$155 per week) is less than the Federal minimum wage for 40 hours.

Background:

The Part 541 regulations establish three tests to qualify for this minimum wage and overtime pay exemption. Exempt workers must

- (1) be paid "on a salary basis" (i.e., the employee must receive a salary of a predetermined amount and this salary must be paid in full in a workweek when any work is performed);
- (2) receive a salary that is not less than a specified amount (now less than the minimum wage for a 40-hour workweek); and
- (3) pass specified tests relating to job duties and responsibilities (such as supervising other workers and participating in management decisions).

The salary tests in the regulations have not been updated since they were raised to "interim" levels in 1975, and the duties and responsibilities tests have remain essentially unchanged since the early 1960s. Moreover, since state and local government employees became subject to the FLSA in 1985, the rules have not fully taken into account possible differences found in the public sector. In addition, some recent court cases have applied the regulatory requirements in ways that conflict with DOL positions and those of other courts. The bottom line is the regulations are out of date and being interpreted inconsistently -- thereby exposing both workers and employers to unnecessary uncertainties or large monetary liabilities.

However, any changes to these lengthy and complex regulations will have a profound impact on the rights of workers and the obligations of employers. The regulations affect whether or not more than 20 million workers are entitled to receive minimum

wage and overtime pay.

Current Status:

Over the years, a variety of options for rulemaking modifications have been developed. While action in this area is scheduled in DOL's regulatory agenda, no action is currently being taken. A decision on whether to proceed with a 541 rulemaking initiative must take into account likely legislative developments on the FLSA employee choice flex-time/FMLA fronts (which could well preclude Wage and Hour from having sufficient resources to deal with the 541 issues simultaneously) and by the outcome of Auer v. Robbins, a 541 case currently before the U.S Supreme Court. In Auer, the Court will consider specifically the application of the 541 salary basis test to public employees and the circumstances under which the salary basis test results in an otherwise exempt employee becoming entitled to overtime pay.

Key Constituents:

Any changes to these regulations will have a significant effect on all industries and every sector of the economy, as well as all levels of government. The labor movement is contentiously divided on how to approach this problem. State and local governments would like to see changes but are divided on which changes ought to be made.

Hill Positions:

Failure to address these regulations through rulemaking may encourage legislative changes that would be detrimental to workers (i.e., fewer workers will be entitled to overtime). Several bills have been introduced in recent years that address specific issues relating to the criteria for exemption, virtually all of which would serve employer interests. However, none of this legislation has moved in the Congress.

Pros/Cons:

Pro: Rewrite of the 541 regulations would resolve inconsistent court interpretations and provide certainty to employers and employees. The salary test is outdated and must be modernized. Failure to act could provoke unfavorable legislative changes.

Con: Any change will be controversial, with huge financial implications for employers and employees.

Reauthorization of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)

Issue: Reauthorization of the Intermodal Surface Transportation Efficiency Act of 1991(ISTEA)

Background: The Intermodal Surface Transportation Efficiency Act of 1991(ISTEA) must be reauthorized by September 30, 1997. ISTEA authorized \$155 billion over six years for highway, bus and rail projects. Several DOL employee protection and labor standards regulatory programs currently apply to ISTEA projects. DOL wants to insure that these worker protections will be continued in the provisions of current programs and extended to cover any new programs enacted as part of the reauthorization process.

In particular, DOL is concerned about:

Davis Bacon and 13(c) -- The prevailing wage standard, enforced by DOL's Wage and Hour Division, and the employment protections for transit workers, enforced by DOL's Employment Standards Administration, both currently apply to highway and mass transit construction projects funded under ISTEA. DOL wants to make sure that the new programs and innovative financing ideas that DOT is putting into the new bill also provide Davis-Bacon and 13(c) protections to workers.

Affirmative Action: E.O 11246 requires federal contractors to engage in affirmative action and prohibits employment discrimination. It is enforced by DOL's Office of Federal Contract Compliance Programs. E.O. 11246 applies to most highway and mass transit construction projects. DOL is concerned that this program continues to be applied to ISTEA funded projects and expanded to include any new ISTEA programs created by the reauthorization legislation.

Current Status: The Department of Transportation is drafting the Administration's legislative proposal. DOL is attempting to negotiate these issues with DOT.

Key Constituents: Because ISTEA is the federal highway bill, cities and states and their Hill representatives have a huge interest in the bill; they won't share a huge interest in maintaining the labor protection provisions. The major transit and rail unions view the labor protections as enormously important and could cause a showdown over the entire bill if they are eliminated.

Hill Positions: The leadership of the House Transportation Committee has opposed the continuation of Davis Bacon, Section 13(c), and affirmative action.

However, a majority of the members of the Committee have voted, at least on one occasion, to continue these programs. No similar vote has occurred on the applicability of E.O. 11246.

In the Senate, the Banking Committee has jurisdiction over Section 13(c) and Committee Chair D'Amato has been generally supportive of Section 13(c). Davis Bacon and affirmative action are most likely the issues that will be "in play".

Pros/Cons:

Although transit authorities and their states and localities would prefer not to have the federal "strings" attached to these funds, the labor community will rally to protect these programs as they provide important protections for workers.

Section 13(c) Transit Employee Protection Program

Issue:

The TRANSIT EMPLOYEE PROTECTION PROGRAM, commonly referred to as the Section 13 (c) Program, is administered by the Department of Labor (DOL). It is the basic job protection law for transit employees in the nation. It is contained in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA I) which must be reauthorized by September 30, 1997. The 13(c) Program has been the subject of Congressional criticism, the topic of hearings before the House Transportation Committee, and the subject of an investigation by the House Gov Ops Committee. New guidelines were promulgated in January, 1996 and Congress will be reviewing the effectiveness of the new Guidelines as it considers reauthorizing this program.

Background:

The 13(c) program requires DOL to certify that the rights of affected mass transit employees have been protected before the US Department of Transportation can release transit funds to grantees. Most of the criticism of the program stemmed from delays in certification which affected the release of some of the nearly \$3 billion authorized by ISTEA. Although repealed by the House Appropriations Committee in 1995, the Section 13(c) program was restored by the full House largely on the grounds that the Department had pledged to implement new guidelines to administer the program. The protective arrangements DOL certifies include: preservation of rights and benefits under existing collective bargaining agreements, continuation of collective bargaining rights, protection of individual employees against a worsening of their positions related to employment, assurances of employment to employees of acquired transit systems, priority of reemployment, and paid training or retraining programs.

Current Status:

The new Guidelines have been in effect since January 1996. They were designed to expedite the certification process and make it more predictable, while assuring that the required protections are in place. Program data indicate that on average, 98% of all certifications issued since January 1996 have been issued within the 60 days required by the new Guidelines.

Key Constituents:

Over 300,000 union and non-union transit employees at approximately 5,000 transit systems around the country are protected by this program. Major unions involved in this program include ATU, TWU, UTU, AFSCME, IAM, IBT, IBEW, TCU, UAW, LIUNA, OPEIU, SEIU, RLEA, BRAC and the Transportation Trades Department of the AFL-CIO. Their objective is to assure that the full range of protections required by the law are in place.

Opposite the unions on these issues are the transit authorities and the American Public Transit Association. Some transit authorities see 13(c) as a drain on resources and a constraint on the management of their systems.

The Department of Labor works closely with the Federal Transit Administration (FTA) of the US Department of Transportation in administering this program. Although there is an inherent tension within the statute between the transit goals and the employee protection goals, in recent years DOL has had a much more cooperative relationship with FTA.

Hill Position:

This program has long been a target of certain members on the House Transportation and Infrastructure Committee and the House Transportation Appropriations Subcommittee. However, in August 1995, the House voted 233-186 to continue the 13(c) program. The proponents included a majority of current House Transportation Committee members. The authorizing committee on the Senate side, the Senate Banking Committee, has not been actively opposed to the program.

Pros and Cons:

Pros: This program, first enacted in 1964 when the Federal government provided funds to cities to acquire failing private transit companies, assures that transit employees will not lose the rights they had as private sector employees.

Cons: The program places burdens and costs on state and local transit authorities.

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Divider Title: **Pension and Health**

PENSIONS AND HEALTH CARE

Economically Targeted Investments (ETIs)
Employer Stock & Employer Real Property to 401(k) Plans
ERISA Enforcement Improvement Act - Audit Bill
Health Care Commission
Health Care Coverage for the Unemployed
Kennedy-Kassebaum Health Care Legislation Implementation
Multiple Employer Welfare Arrangements - MEWAs
Pension Abuse Project
Retiree Health Care
Retirement Security Act - Senator Daschle's Pension Bill

PENSION AND WELFARE BENEFITS ADMINISTRATION

MISSION STATEMENT

The Pension and Welfare Benefits Administration (PWBA) protects the integrity of pensions, health plans, and other employee benefits for over 200 million people. PWBA ensures that workers get the information they need to protect their benefit rights, assists plan officials to understand the requirements of the relevant statutes in order to meet their legal responsibilities, develops policies and laws that encourage the growth of employment-based benefits, and deters and corrects violations of the relevant statutes.

PWBA has enormous responsibilities to the majority of American workers and their families who are covered by private sector pension and health benefit and other employee benefit plans. There are over 6 million private employee benefit plans, which cover approximately 200 million people, including workers, their families, and retirees, and control of more than \$3.5 trillion in assets.

BUDGET

(dollars in thousands)

FISCAL YEAR	DISCRETIONARY \$	MANDATORY \$	FTE
1997	\$77,083	0	652
1998	\$92,651	0	879

Economically Targeted Investments (ETIs)

Issue:

The Department's activities related to pension fund investments that seek competitive financial returns as well as economic benefits such as job creation or affordable housing.

Background:

Public and private pension fund investments total roughly \$5 trillion in overall assets and comprise approximately one-fifth of the total financial assets in the U.S. today. The Clinton Administration has supported strategies to invest these assets to produce competitive rates of return while boosting the economy and creating stable jobs so that workers can retire with adequate pensions. These investment strategies have been pursued by many state public employee pension funds and several private sector plans.

ETIs have been studied by reputable organizations, including the GAO and the SBA, which have found that these investments performed comparably to other types of pension fund investments. Furthermore, in 1992 and 1993, the Department's ERISA Advisory Council, a bipartisan body of recognized benefits policy experts, recommended that the Department (a) clarify its position on ETIs, and (b) collect and distribute information on ETIs. In 1994, the Department issued its interpretive bulletin on ETIs which made clear that properly structured ETIs were permissible under federal law. This bulletin codified the same position that the Department has taken for over twenty years through Democratic and Republican administrations. In 1995, the Department also provided seed money for the establishment of an ETIs information clearinghouse.

In 1995, Congressman Jim Saxton (R-NJ) introduced the "Pension Protection Act of 1995," which purported to revoke the Department's interpretive bulletin on ETIs, prohibit certain DOL actions relating to ETIs and terminate the contract for the ETIs clearinghouse. After considerable debate in committee and on the House floor, the bill passed the House. A companion bill was introduced by Senator Connie Mack (R-FL), but no Senate hearings were held on the bill, nor was it ever voted on by the Senate. The Department also responded in writing to three Congressional inquiries in 1995 and 1996 regarding ETIs.

ETIs was also considered briefly during the FY 96 appropriations process. The final Senate Appropriations Committee report recommended that the Department terminate its contract for the ETIs clearinghouse. This language did not require the Department to take such action, but clearly made known the views of certain members of Congress on this issue.

Current status:

The Department's seed money for the clearinghouse was provided through a contract which expired in September, 1996; the contractor submitted its first major collection of ETIs-related data to the Department at that time. The clearinghouse itself continues to operate.

Key Constituents:

ETIs have been vigorously supported by state and local public pension funds, including statewide pension funds of California, Massachusetts, Pennsylvania and New York. Private pension funds have increased investment in ETIs, although they have taken a modest profile in the ETIs discussion. The labor movement has also made significant investment in ETIs. For example, the AFL-CIO established its Housing Investment Trust to facilitate investment by labor pension funds in ETIs. Other key supporters include the National Women's Business Council, the National Senior Citizens Council, the Pension Rights Center and the Government Finance Officers Association.

Hill Positions:

Congressman Saxton has indicated that he is considering whether to re-introduce his bill in the next session of Congress. His position may be muted, however, because of the narrower Republican majority in the House. In addition, the bill's concern over ETIs may be undercut by the position of Jack Kemp, during his tenure as HUD secretary, who made a formal inquiry to Labor Secretary Elizabeth Dole to persuade the Department to approve below-market pension fund investments for housing projects; Secretary Dole rejected the proposal.

Pros/Cons:

The Department is not currently pursuing any additional initiatives regarding ETIs at this time. The interpretive bulletin codifies and confirms the same standard of scrutiny for pension fund investments that has been held for the past twenty years under both Democratic and Republican administrations, i.e., ETIs are permissible under federal pension law as long as their goal is to achieve competitive rates of return for their plan sponsors.

Employer Stock and Employer Real Property Contributions to 401(k) Plans

Background:

The issue relates to whether ERISA should be amended to establish limits on the investment of employee and employer contributions to 401(k) plans in employer securities and real property (i.e., real property owned by the plan and leased to the employer). Unlike traditional defined benefit pension plans, generally, there are no specific limits on the amount of employer securities and real property that a 401(k) plan may invest in. Typically, employers match a certain percentage of employee elective contributions to 401(k) plans. These employer contributions are often made in company stock. There have been instances where employees' retirement savings have been adversely affected by their employer's decision to invest substantial portions of the 401(k) plan in employer securities or real property. For example, Color Tile Corporation's 401(k) plan invested over 80% of its assets in Color Tile stores before the company went into Chapter 11 bankruptcy. The Department has an ongoing investigation into Color Tile's plan to ensure that the employees' interests are protected and to determine if there were any violations of ERISA. In another example, Carter, Hawley, Hale's 401(k) plan was nearly 100% invested in company stock, which was rendered worthless when the company went into bankruptcy.

The Color Tile and Carter, Hawley, Hale situations have been the subject of several press articles and Senator Boxer has introduced legislation to establish limits on the investment of 401(k) plan assets in employer securities and real property. On September 12, 1996, Secretary Reich sent a letter to Senator Boxer expressing the Administration's support for legislation that would impose the same ten percent limit on plan investments in employer securities and real property currently applicable to traditional defined benefit pension plans to employee elective contributions to 401(k) plans over which the employees do not exercise control. The General Accounting Office has initiated a study of the issue in response to a request from Congressman Archer. In response to requests from the Hill, Department staff have provided technical assistance and guidance to Congressional staff in developing a framework for the ten percent limit. This framework has been incorporated into an omnibus pension bill that will be introduced by Senator Daschle on behalf of the Senate Democratic leadership as one of the first ten Senate bills in the 105th Congress.

Current Status:

Senator Daschle will introduce legislation shortly after Congress reconvenes in January. (See issue paper No. 8.)

Key Constituents:

401(k) plan sponsors and their representatives may object to having any limit on the investment of employer contributions in employer related investments. There may be less opposition, however, to a limit on such investments of employee contributions. 401(k) plan participants are likely to be generally supportive of this legislation.

Hill Positions:

Senator Boxer has been the primary sponsor of this legislation. It is likely that those legislators who are sympathetic to the business community may be concerned about imposing the additional burdens on 401(k) plan sponsors.

Pros/Cons:

The major rationale for the legislation is to help avoid recurrences of situations like Color Tile and Carter, Hawley, Hale. With the growth of 401(k) plans, this is viewed by many as desirable. The major argument against will come from plan sponsors who will claim the proposal will diminish the attractiveness to formation of 401(k) plans to employers and/or lessen their willingness to contribute to these plans. This criticism is being addressed in the proposal by establishing limits already accepted in the defined benefits pension plan world.

ERISA Disclosure and Protection Act for Employees and Retirees (Audit Bill)

Background:

ERISA generally requires health and pension plans with 100 or more participants to have an annual audit by an independent accountant. However, plan assets held by banks or insurance companies can escape audit by outside plan auditors if the plan administrator elects a so-called "limited scope audit", a loophole in the 1974 ERISA law that permits a business to satisfy the "legal" requirement to do an audit without examining all of the plan's assets and without the auditor expressing an opinion regarding the soundness of the plan management. Currently, there are \$950 billion in pension plan assets receiving no meaningful audit because of the limited scope audit provision. This bill would correct these problems.

Both the Department's Inspector General and the General Accounting Office (GAO) have warned of accounting weaknesses in employee benefit plans which, they warn, could lead to a situation similar to the S&L crisis. Senator Simon and Senator Jeffords introduced in the 104th Congress the ERISA Enforcement Improvement Act and the President's Retirement Savings and Security Act (S.1818/H.R.3520), which contained repeal of the limited scope audit. They were not enacted in the 104th Congress.

Action on this proposal is needed to achieve the Administration's stated goal of protecting employee benefits for American working families.

Current Status:

To help ensure chances for enactment, the proposal should be resubmitted to the Congress by the Administration soon after the new Congress convenes.

Senator Daschle is expected to address these issues as part of his comprehensive Senate Democratic pension bill, which he has announced he will introduce early on in the 105th Congress. Senator Rockefeller is expressing interest in assuming Senator Simon's past role as chief legislative advocate of the bill.

Key Constituents:

This legislation is supported by federal law enforcement agencies including the Pension and Welfare Benefits Administration, the Department's Inspector General and the GAO, as well as the American Institute of Certified Public Accountants. Many business groups have opposed this legislation, including the ERISA Industry Committee (generally representing large companies offering pension and other welfare benefit plans) and the Investment Company Institute (representing the mutual fund industry).

Hill Positions:

While some business opposition remains, bipartisan support was developing for repeal of the limited scope audit for pension plans only at the end of the 104th Congress.

Pros/Cons:

The major argument for this legislation is that it is needed to help protect plan assets in pension and welfare benefit plans. The business community will argue that doing a full audit in many instances is unnecessary and in other instances duplicative and costly. They will also assert there is no convincing evidence of accounting weakness when limited scope audits are utilized. We believe PWBA experience is to the contrary.

Advisory Commission on Consumer Protection and Quality in the Health Care Industry

- Background:* President Clinton established the Advisory Commission on Consumer Protection and Quality in the Health Care Industry on September 5, 1996, through Executive Order 13017. The Advisory Commission is co-chaired by the Secretaries of Labor and Health and Human Services, and the Department of Health and Human Services has been designated the lead agency pursuant to the Federal Advisory Committee Act. Members of the Advisory Commission are to address issues concerning consumer protection and quality related to health care and make recommendations to the President as may be necessary for improvements in these areas.
- Current status:* No formal announcement has been made concerning the appointment of Advisory Commission members, and staff has yet to be hired.
- Key constituents:* The Department's interests in the Advisory Commission largely stem from the Employee Retirement Income Security Act (ERISA), which is administered by DOL's Pension and Welfare Benefits Administration. Health benefit plans sponsored by private sector employers and unions fall under the scope of ERISA. Employers and unions that sponsor health benefits do so voluntarily; no federal law requires employers or unions to provide health benefits to workers. In 1993, 74% of private sector workers were in firms that sponsored a health benefit plan. Many employers and unions are large purchasers of health care coverage and can exert leverage to influence the cost and quality of health care through their purchasing power in the voluntary health care marketplace. Consequently, key constituents include the employer and union communities as sponsors of health benefit plans as well as workers and their families as consumers of health care under these plans.
- Hill positions:* Many members of Congress have proposed legislative initiatives that address consumer protection and quality in health care, and legislative proposals in the 105th Congress are likely to extend to the private sector in addition to Medicare and Medicaid. For example, members who have expressed an interest in consumer protection proposals include Senators Kennedy, Graham, and Wellstone and Representatives Dingell, Cardin, Stark and DeLauro. Legislation may range from omnibus consumer protection bills to proposals aimed at specific issues. Many members of Congress have also recommended individuals for appointment to the Advisory Commission.
- Pros/Cons:* The rationale for the Commission is that the health care market is undergoing rapid changes, and the Advisory Commission provides an opportunity to bring together some of the best minds in the field to analyze and make recommendations on how to ensure that people get the best quality care possible. Instead of waiting for the work of the Commission, Congress may choose to move forward to develop their own proposals on health care quality, particularly to forestall pressure to enact incremental reforms and to address a growing popular public concern.

Health Coverage for the Unemployed

Issue: Providing health care coverage for unemployed individuals and their families.

Background: The Administration has developed a Worker Transition Insurance Proposal (WTIP) that would provide unemployed individuals and their family members income-based subsidies for the purchase of up to six months of health care coverage. Individuals would be eligible if they: are collecting unemployment insurance; had health insurance through their employer for at least the last six months of their most recent job; have family income below 240 percent of the poverty line; and are not eligible for health insurance coverage through an employed spouse, Medicare, or Medicaid. WTIP would establish a four-year demonstration project that would provide annual grants to states which choose to participate. HHS would operate a program in states that choose not to participate. WTIP would serve approximately 3 million unemployed workers and their family members in its first calendar year.

WTIP is targeted to middle and lower-income individuals and their families who could lose their health care coverage when they are between jobs. It complements the recently passed Health Insurance Portability and Accountability Act (HIPAA, otherwise known as Kassebaum-Kennedy), which helps individuals get and keep insurance coverage when they change jobs. WTIP was included in President Clinton's FY97 budget and will be included in FY98, and the President emphasized this issue throughout his campaign.

Current Status: WTIP was developed through an interagency group coordinated through the White House by Chris Jennings. Most design issues have been settled, and the Department of Health and Human Services is drafting language to be submitted to Congress. \$9 billion dollars to fund the program for 4 years would be included in the FY98 budget proposal the President will send to Congress in February.

Key Constituents: The strongest constituents are middle and lower-income workers. Recent polling data indicate that losing their health care coverage if they lose their jobs through downsizing or lay-offs is among the top concerns of women. The states will find the program appealing because it provides them with full funding while affording significant flexibility in its implementation. Unions will also be very supportive, although employers may perceive the proposal as potentially raising their health benefit costs if states choose to help unemployed workers maintain coverage under their previous employer's health plan.

Hill Positions: Senators Kennedy and Kerry have proposed a bill that is very similar to WTIP, although it clearly encourages workers to maintain coverage through a previous employer's health plan, while the Administration seeks to give states maximum flexibility to administer the subsidies. Senators Kennedy and Kerry are familiar with a successful program that Massachusetts operates through which unemployed workers receive assistance to buy coverage through their previous employer. The Massachusetts program builds on COBRA, a federal law that

provides workers and their families the opportunity to purchase group health coverage through their employer's health plan for a limited period of time if they lose coverage due to specified events, including termination of employment, divorce, or death. Workers in companies of 20 or more employees generally qualify for COBRA. DOL continues to work closely with Senator Kennedy's staff to discuss proposals.

The Kennedy-Kerry proposal is known as a "COBRA-first" proposal, which means that coverage for COBRA-eligible individuals must be in the form of subsidizing COBRA payments. Only those not eligible for COBRA could receive coverage through other methods, such as through a state's high risk pool, Medicaid buy-in, or purchasing individual insurance policies. Employers are opposed to a "COBRA-first" approach because they do not think that they should shoulder the costs of unemployed workers' health coverage, and they believe that a "COBRA-first" approach could raise their COBRA-related costs. Because COBRA premiums are limited to 102 percent of the combined employer and employee premiums and COBRA enrollees tend to have considerably higher health care costs than the average worker in the health plan, the 102 percent limit effectively forces employers to pick up part of the cost of COBRA coverage, even though there is no explicit employer premium contribution.

Pros/Cons:

DOL strongly supports efforts to provide health care coverage for temporarily unemployed individuals and their families, particularly the concept of providing an appropriate interim benefit without encouraging longer periods of unemployment. The Majority may oppose this as a costly new program and criticize the design of the program, claiming it provides incentive to stay on unemployment insurance longer to retain health care benefits and these individuals will substitute this program for another option of retaining health care insurance during this period of unemployment. There is also likely to be confusion over the provisions of the new Kennedy-Kassebaum bill because many people are under the mistaken impression that the new law accomplishes this end.

Kennedy-Kassebaum: Implementation of the Health Insurance Portability and Accountability Act of 1996

- Issue:** Implementation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) through the promulgation of regulations by April 1, 1997.
- Background:** HIPAA, signed into law on August 21, 1996, amended Title I of the Employee Retirement Income Security Act of 1974 (ERISA) as well as the Internal Revenue Code and the Public Health Service Act and charged the three Agencies with jurisdiction with respect to the relevant laws to work together on the regulations implementing the new provisions. The regulations due April 1, 1997, include the portability provisions which decrease preexisting condition exclusions through crediting previous coverage identified in certifications required to be provided to individuals by their employers. Other provisions to be addressed in regulations include nondiscrimination based on health status, guaranteed renewability, newborn and mothers' coverage, and mental health parity. A regulation regarding notification of material reductions in benefits is due in late February 1997.
- We have already issued a model notice to assist employers and plan administrators in notifying participants of the changes made by HIPAA to the continuation health coverage rules (COBRA). In addition, we have issued a question and answer pamphlet designed to help the average participant better understand the changes under the new health legislation. Finally, we have published a request for comments from the public and regulated entities for their views on the HIPAA portability provisions to assist the Agencies in their deliberations on the regulations.
- Current Status:** The Agencies have been meeting since HIPAA was signed into law in August 1996 and are actively drafting all of the regulatory sections. We have had discussions with both the Office of Management and Budget and various staff members in Congress regarding the status of the regulations.
- Key Constituents:** Group health plan sponsors and participants. Plan sponsors generally are concerned with the ease of administration of the plan. Plan participants are generally concerned with the ease of understanding the plan provisions.
- Hill Positions:** The key committees, Labor in the Senate and the Education and Economic Opportunities and Ways and Means in the House, have expressed an interest in the timely development of the regulations. Department officials recently met with Senator Jeffords committee health care staff to discuss implementation.
- Pros/Cons:** We agree with plan sponsors that the regulations should not complicate plan administration because we would like to encourage employers to sponsor plans and not make plan administration a major plan expense. We also want to make the provisions under HIPAA effective with regard to the intent and make

the regulations, such as the coverage certification, easy for participants to understand so they may get the most coverage under their plan. Finally, we agree with the Hill that the regulations should be timely to help carry out these provisions while we also want to assure that they are a thorough and precise interpretation of HIPAA and its intent.

Multiple Employer Welfare Arrangements (MEWAs)

Background:

A multiple employer welfare arrangement (MEWA) provides health benefits to the employees of two or more employers. Under ERISA, the Department shares regulatory responsibilities for MEWAs with the States. The States have primary responsibility over the financial soundness of MEWAs and the licensing of MEWA operators, reflecting the fact that MEWAs essentially act as insurance carriers, and the Department enforces fiduciary duties. In part by creating economies of scale, MEWAs can increase health coverage, especially in the small group market, by offering affordable health benefits. In practice, however, MEWAs have a long history of abuse, and hundreds of thousands of workers and their families have been left with tens of millions of dollars in unpaid claims. While it is difficult to quantify how many MEWAs exist, a 1992 General Accounting Office report estimated over 2.5 million participants and beneficiaries in 46 states were enrolled in MEWAs.

Current status:

Legislation was introduced by Rep. Harris Fawell (R-IL) in the 104th Congress that would have federalized most existing MEWAs and encouraged their expansion by exempting them from state regulation unless the Department rejected a MEWA's application for exemption. DOL would have to implement an exemption program - ruling on solvency and adequacy of reserves for thousands of applications.

The Administration opposed Rep. Fawell's proposal to federalize MEWA regulation and has argued that statutory changes to ensure that financially sound MEWAs continue as a viable alternative for small employers should build on the current federal/State framework. The Administration viewed this legislation as a barrier to the States' ability to regulate group health insurance by encouraging self-funded, federal-level MEWAs at the expense of the insured group health insurance market, which presently is regulated at the State level. The Administration supported a proposal by Senators Kennedy and Kassebaum to encourage the creation of purchasing cooperatives, authorizing States to certify as "purchasing cooperatives" entities that met certain conditions designed to protect consumers and employers as well as the viability of state insurance markets.

Key constituents:

Many organizations representing small businesses, including the National Federation of Independent Businesses and the National Association of Manufacturers, supported legislative proposals to federalize MEWA regulation. Opponents to the proposal includes state legislators and insurance commissioners.

Hill positions:

The Department anticipates the introduction of bills in the 105th Congress that would federalize MEWA regulation. Congressman Fawell has stated that it will be one of his priorities in the 105th Congress. Other members of Congress that may support such a proposal include Senators Lott and Jeffords and Reps. Goodling, Archer, and Thomas.

Pros/Cons:

Advocates of federal MEWAs argue they will expand health insurance coverage to individuals, particularly in the small business sector. Opponents argue, federalizing MEWAs could diminish states' ability to pool risk in the small group market, allowing entities to "cherry-pick," potentially raising health insurance costs for people left in state-regulated insurance markets and driving health insurers out of the small group market. Moreover, in an era of shrinking federal resources, the Department simply does not have the resources to carry out such substantial new federal responsibilities as envisioned by Rep. Fawell's bill.

Pension Abuse Project: The Failure of Employers to Promptly Remit Employee Contributions to 401(k) Retirement Plans.

- Background:* This enforcement initiative addresses the diversion or misappropriation of employee contributions by employers that sponsor benefit plans. Increasingly, employees are funding their own retirement through 401(k) plans. By regulation, the Department has required that employers forward such contributions as soon as the employer reasonably can segregate the money from company assets. A final regulation, effective February 3, 1997, will shorten the holding period for employee contributions to retirement plans to 15 business days after the month in which the employer receives or withholds the employee contributions. Under ERISA employers must apply employee contributions toward benefits or administrative expenses. Any other use, such as the payment of business expenses, is unlawful.
- Current Status:* This project formally began in 1995 with the Secretary's announcement of ten warning signs of employer abuse of workers' contributions. The Department also publicized the number of its investigations, and the amount of diverted employee funds that PWBA recovered. From March to September 7, 1996 the Department in coordination with the Department of Justice and the Internal Revenue Service offered an opportunity for employers to correct prior violations without civil or criminal penalties. Approximately 170 employers participated in the program depositing \$ 4.8 million into the contributory retirement plans. Currently, PWBA has recovered \$12 million and opened over 1,300 cases.
- Key Constituents:* Single employers are the primary sponsors of this type of retirement plans. Thus, union-sponsored plans are not a focus.
- Hill Positions:* Congress has been generally supportive of our initiative.
- Pros/Cons:* The Department has emphasized that most contributory plans are responsibly managed. Nonetheless, critics alleged that the Department exaggerated the scope of the pension abuse problem because most employers appropriately and timely forward withheld contributions. Critics have charged that employees might contribute less and that employers might curtail contributory plans.
- However, an employer's processing of employee contributions creates a tempting pool of cash. The number of 401(k) plans has grown to over 140,000, with over \$553 billion in assets controlled by these plans. A shorter holding period may minimize, but cannot eliminate, the potential for abuse. A heightened enforcement profile will help instill confidence in the private retirement system, and deter unscrupulous employers.

Retiree Health

Background:

Rising costs of health care and changes in accounting rules have resulted in corporations cutting back on retiree health benefits, and retirees have faced impediments to enforcing an employer's promise of lifetime health benefits when they have received one. Early retirement agreements between the employer and retirees containing specific promises of lifetime benefits may be overridden by the courts if the plan document also contains boilerplate reservations of a right to amend. Additionally, employers may terminate coverage without any advance notice to retirees.

Current status:

The Department has filed *amicus curiae* briefs in several high profile cases involving the reduction of retiree health benefits and has observed a recent trend in the courts that tends to favor employers who seek to avoid honoring apparent promises of lifetime health benefits rather than retirees who have reasonably relied on these representations. The Department's current position is to work with Congress on their proposals and to continue to monitor court cases involving retiree health benefit promises. Additionally, the Department recently released an advisory aimed at helping workers and retirees protect their health care in retirement.

Key constituents:

Employers are not required to provide health benefits to retirees or current employees. Their willingness to provide such benefits depends, to some extent, on the ability to adjust or terminate the benefits as dictated by business needs and would likely oppose any proposals to make more enforceable their apparent promises for benefits. Retirees have an interest in enforcing promises for health benefits made to them by their employers.

Hill positions:

The Department anticipates Reps. Kleczka and Barrett to reintroduce proposals addressing these issues, including requiring employers to provide advance notice of benefit cuts, allowing early retirees to buy into their employer's group health plan through COBRA until they are eligible for Medicare, and providing a presumption in favor of retirees when evidence exists that employers have made a lifetime promise of health benefits. In addition, Senator Daschle has indicated that he will reintroduce a proposal allowing early retirees to buy into their employer's health plan through COBRA.

Pros/Cons:

Advocates of change argue that the sudden termination of retiree health care benefits should not be permitted and that the rights of former employees and commitments of employers to retirees need to be clear. Opponents of change argue the system is clear and needs to be flexible to encourage maximum participation of employers in financing retiree health benefits.

The Retirement Security Act: Senator Daschle's Pension Bill

- Background:** Senator Daschle, on behalf of the Democratic Caucus, is developing a significant pension bill for introduction early in the 105th Congress. The legislation includes many provisions from the President's Retirement Savings and Security Act proposal of April 1996 that were not enacted as part of The Small Business Job Protection Act of 1996. The bill has over 30 provisions, including the provisions of the ERISA Disclosure and Protection Act for Employees and Retirees (Audit Bill). Other provisions would expand IRAs, provide for a 1% mandatory contribution for all employees in the SIMPLE small business plan, provide for increased spousal rights, limit 401(k) plan investments in employer stock and real property, increase multiemployer PBGC guarantees, and provide for a toll free number for women's pension issues.
- The Senate Minority Leader is attempting to solidify Democratic positions and support on pension issues by these proposals to increase leverage in the Senate. Many parts of the legislation may be targeted for eventual passage, either on their own or as amendments to other legislation.
- Current Status:** We expect that Senator Daschle will introduce this legislation in the first few weeks of the new 105th Congress. The National Economic Council pension working group has provided technical assistance support on this legislation, but the Administration does not yet have a formal position on the legislation.
- The Secretary may be called upon to lend support to Senator Daschle or to assist in the passage of components of this legislation. Strategic questions may arise in connection with the handling of the ERISA Disclosure and Protection Act for Employees and Retirees and other DOL initiatives included in this legislation.
- Key Constituents:** Lower paid workers; unions; and federal, state, and local governments should generally support this legislation because it has many provisions that would benefit them. The business community is likely to oppose many provisions of this bill, like the audit bill and Senator Boxer's proposal to limit the investment of employee contributions to 401(k) plans in employer securities and real property.
- Hill Positions:** It is expected that there again be significant opposition to this legislation.
- Pros/Cons:** The legislation includes many provisions from the President's Retirement Savings and Security Act proposal of April 1996 that were not included in The Small Business Job Protection Act of 1996 so there are many provisions in the bill that the Administration would like to see enacted. Advocates will argue that continuing pension reform and security is a policy priority. Opponents are likely to argue that a large step forward was taken through enactment of the Small Business Job Protection Act of 1996 and additional legislation at this

time is premature.

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Divider Title: **Safety and Health**

SAFETY AND HEALTH

Cooperative Compliance Programs

Ergonomics

Indoor Air Quality Rulemaking

Methylene Chloride Rulemaking

The New OSHA

OSHA Reform/Reg Reform Legislation

OSHA's Role in Protecting Workers at DOE "GOCO" Facilities

Prop 65 California Hazard Communication/Proposition Standard

Safety and Health Program Standard

Tuberculosis Standard

Workplace Violence Guidelines

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

MISSION STATEMENT

The Occupational Safety and Health Administration (OSHA) helps save lives, prevents injuries and illnesses and protects the health of America's workers through cooperative compliance, common sense enforcement, strategic partnerships, and leveraging resources to protect more workers with fewer dollars all with a focus on measurable program outcomes.

OSHA will continue to stress the strategic theme of a common sense approach to occupational safety and health. The multiplier effects of leveraging resources, and the value of strategic partnerships, which also demonstrate effectiveness, will be emphasized. Overall, OSHA will continue to develop a sharpened focus on measurable program outcomes and tighter alignment and integration of multiple program and management initiatives.

BUDGET

(dollars in thousands)

FISCAL YEAR	DISCRETIONARY \$	MANDATORY \$	FTE
1997	\$327,734	0	2,241
1998	\$388,983	0	2,657

COOPERATIVE COMPLIANCE PROGRAMS

- Issue:* Cooperative Compliance Programs (CCPs), based on OSHA's awarding winning pilot program, Maine 200, offer responsible employers a chance to work in partnership with OSHA as an alternative to traditional enforcement. They also allow OSHA to leverage its limited resources to protect workers at more facilities than the agency would be able to reach through inspections alone.
- Background:* CCPs are enforcement-based, data-driven programs being developed in each Federal enforcement state. By the end of March 1997, CCPs are expected in all twenty-nine of these states. State plan states are encouraged to follow suit. CCPs are a National Performance Review (NPR) *New OSHA* initiative. President Clinton promised that OSHA would apply this program throughout the country. CCPs identify within each state those employers with the highest number/rate of compensable injuries or illnesses. OSHA offers those employers a choice of partnering with OSHA to improve their worksite safety and health conditions, or of facing traditional OSHA enforcement action.
- Current Status:* In the twenty-nine federal enforcement states and territories: 11 states have operating programs; 13 programs are nearing implementation; and 5 states have programs in the clearance process. In the 23 State Plan states: 6 states have programs operating which comprise concepts of CCPs; 5 have programs in the developmental stage; and 12 states have neither programs nor plans to develop them.
- Key Constituents:* The AFL-CIO at the national level is lukewarm at best on the effort to implement CCPs nationwide. Local unions at companies involved in CCPs are generally favorable, since employee participation is a primary requirement for employers who choose to partner with us. Considerable outreach with the AFL-CIO at the national and state levels has been accomplished and will continue. Employer groups such as ORC and the National Association of Manufacturers, as well as the Chambers of Commerce at the state and local level are generally supportive of the various state programs.
- Hill Positions:* Departing Assistant Secretary for OSHA Joe Dear recently provided a briefing to the Joint Appropriations Staff. There appears to be considerable support for CCPs from this group. Members of Congress, specifically from Missouri and Colorado, have raised issues brought to them by particular companies. We believe these issues have been

successfully addressed. Because of these concerns and those raised by key constituents, OSHA has put all new CCP programs on hold until we expand and complete outreach efforts.

Pros/Cons:

Pros: OSHA has only limited quantifiable results due to the novelty of the majority of these programs, but what OSHA has found out so far is very encouraging:

Maine Top Two Hundred Program

- Winner of \$100,000 Innovations in Government Award from the Ford Foundation
- Approximately 65 percent of employers experienced reductions in injury and illness incidence rates, including the - New Balance Co. which reduced injury and illness losses from \$551,226 in 1991 to \$89,154 in 1994

Wisconsin Two Hundred Program

- 160 employers had a reduction in rate of claims
- The average rate of claims for these employers dropped 29.5%

Dakota First Program (preliminary results after nine months)

- Forty-six percent of partner employers realized a reduction in lost workday incidence (LWDI) rates
- Twenty-seven had a fifty percent or greater reduction, and eight dropped their LWDI to 0.0%
- DuraTech Industries reduced its workers compensation premium for 1995-96 by \$128,000

Cons: The AFL-CIO continues to have conceptual problems with CCPs. For example, they would like to be more involved in the design of these programs, which they think are too big to be properly administered, and would like to see a larger role for enforcement. OSHA will meet again with the AFL-CIO's Safety and Health Director, Peg Seminario, in early January to resolve some or all of these issues. This is the primary stumbling block to OSHA meeting the Presidential mandate. The Paperwork Reduction Act and the Small Business Regulation Enforcement and Fairness Act have and will continue to cause data collection problems for program implementation and major problems in OSHA's attempts to develop an evaluation process which allows employers and employees to participate (the latter is an important item for the AFL-CIO).

ERGONOMICS

Issue:

Repetitive stress injuries (RSIs) comprise more than 100 different types of job-induced injuries and illnesses that result from wear and tear on the body. RSIs are one of the fastest growing workplace injuries, and can result any time there is a mismatch between the physical requirements of the job and the physical capacity of the human body. Specific risk factors that can cause RSI include repetitive motion, force, awkward posture, heavy lifting, or a combination of these factors.

Background:

OSHA has been working on a standard for several years. After the agency released a draft proposal in 1995, Congress (through an appropriations rider) prohibited OSHA from issuing the standard. The rider was finally lifted in the FY 97 bill. As a general matter, RSIs account for one in four lost-time injuries reported to the Bureau of Labor Statistics -- 615,000 in 1993. RSIs account for \$20 billion annually in workers' compensation costs. Indirect costs associated with RSIs (lost work days, lost productivity, etc.) account for more than \$100 billion annually. Although RSIs are not fatal, they can be extremely debilitating. Carpal tunnel syndrome, for example, can leave its victims unable to perform simple functions like brushing their teeth or holding a drinking glass.

California recently issued a state OSHA ergonomics standard, the first of its kind in the United States. Both labor and business oppose it for different reasons.

Current Status:

In December 1996, OSHA announced its intention to move forward in developing an ergonomic standard to address RSIs. OSHA has a four point plan to address this workplace issue:

- (1) Education -- OSHA and the National Institute for Occupational Safety and Health (NIOSH) of HHS are cosponsoring a conference on January 8 and 9 in Chicago for more than 1,000 stakeholders. The conference will provide success stories and case histories for implementing ergonomics programs in many different kinds of workplaces;
- (2) Research -- updating and expanding OSHA's database to better track the implementation of ergonomic programs in corporate settings, reviewing the scientific literature on RSIs and providing targeted training grants to prevent RSIs and assess the effectiveness of various programs;

(3) Enforcement activities -- identifying ergonomic infractions, under the direction of an OSHA field committee, through traditional inspection activity and pursuing ergonomic cases through the legal process; and

(4) Developing a Standard -- the actual development of a proposed standard.

Key Constituents: Business organizations, such as the National Association of Manufacturers, generally oppose OSHA's efforts to protect workers from RSIs, despite the fact that many companies which have adopted ergonomics programs have had significant drops in workers' compensation costs and lost work days due to injuries. There are pockets of business support for action on ergonomics, as well as support from the medical and health community. In addition, many unions are pushing OSHA for strong action, including UFCW, UNITE, and the Steelworkers.

Hill Positions: OSHA came under significant fire from Republicans in the 104th Congress for its work on this issue. During consideration of the FY 95 rescissions bill, the House adopted an amendment to strip from OSHA's budget an amount equal to the cost of developing the proposal. Although the money was ultimately restored, a rider was adopted which precluded the agency from issuing the rule. During debate over the FY97 budget Rep. Henry Bonilla (R-TX) attached a rider that would have extended the ban and prohibited the agency from even doing research on ergonomic issues. Ultimately, Rep. Nancy Pelosi's (D-CA) amendment voiding the Bonilla rider carried. At the present time, OSHA has no restrictions from Congress on this issue.

Pros/Cons: Pros: RSIs are the single largest cause of preventable injuries in the American workplace. Millions of lives can be improved if OSHA requires employers to make changes in the workplace that sometimes bring concomitant gains in productivity. OSHA can target its regulation to the employees with the worst problems and the greatest likelihood of improvement.

Cons: The business community is generally opposed to OSHA regulation of ergonomics. The cost OSHA's original draft proposal was estimated to be several billion dollars. Millions of employers, including many of whom have never had a compensable injury, would have had to incur costs of analyzing and changing jobs, with no

guarantee that employees would be appreciably safer.

INDOOR AIR QUALITY STANDARD

Issue: One of OSHA's top regulatory priorities is to issue a final standard on Indoor Air Quality, addressing adverse health effects attributable to indoor air pollution, including environmental tobacco smoke (ETS).

Background: The agency published a proposed rule in 1994. In general, the proposal focused on the maintenance and operation of heating, ventilation, and air conditioning (HVAC) systems to reduce health effects related to indoor air pollution. The proposal also had provisions for the control of specific contaminant sources, mainly secondhand tobacco smoke, bacteria, molds, and volatile organic chemicals. This rulemaking produced the largest record and the longest hearing in OSHA's history.

Current Status: OSHA staff are reviewing the comments made in response to the proposed rule. This effort is expected to be completed in June 1997. Due to the complexity of the issues involved in the rulemaking, we do not anticipate that a final standard will be ready for issuance for another 18-24 months.

A coalition supporting the IAQ standard -- Action on Smoking and Health (ASH) -- filed their sixth lawsuit against OSHA to compel action by OSHA on IAQ and ETS. In response, the court recently ruled that it will not force OSHA to speed up this regulatory activity.

Key Constituents: In addition to the ASH coalition, the American Medical Association also supports the rulemaking. The tobacco industry opposes the rule.

Hill Positions: Senators Helms, Hollings and Warner have challenged OSHA's scientific assumptions concerning ETS, citing a 1995 report of the Congressional Research Service (CRS). Senator Wendell Ford is a fierce opponent of regulating ETS. Congressman Henry Waxman, Congressman Joseph Kennedy and Senator Dick Durbin are strong supporters of OSHA's activity in this area.

Pros and Cons: Pros: There are large potential health benefits from regulating indoor air quality, especially with respect to ETS.

Cons: The rule is extremely controversial. OSHA estimates that the cost of the rule to be \$ 4-5 billion a year. The tobacco industry, some unions (e.g., Bakery and Confectionery, and Tobacco workers) and small businesses will oppose finalization of an IAQ/ETS standard. One particularly difficult issue is that a final standard may preempt already enacted state and local workplace regulations governing IAQ and/or ETS.

METHYLENE CHLORIDE RULEMAKING

- Issue:* OSHA is lowering the permissible exposure limits (PEL) for methylene chloride (MC), a multi-use solvent that causes cancer.
- Background:* Nearly 92,000 establishments employing almost 5.6 million workers use MC, with about 237,500 of these workers directly exposed. Industries with many small businesses and significant employee exposures include furniture stripping, polyurethane foam manufacturing, and paint stripping in construction.
- The new PEL is intended to reduce the risk of developing cancer over a working lifetime by 97 percent, saving an average of 31 lives per year. In addition, there are requirements for employee training, medical surveillance, recordkeeping, hazard communication and exposure monitoring.
- Notably, this will be one of the first rules reviewed by Congress under the Small Business Regulatory Enforcement Fairness Act (SBREFA). This new law includes a number of new regulatory procedures designed to reflect small business concerns in new rules. It also provides an expedited Congressional review process.
- Current Status:* OMB has approved the standard. It will be published in the Federal Register on January 9, 1997.
- Key Constituents:* The Halogenated Solvents Industry Alliance (HSIA) has opposed any PEL below 50 parts per million and intends to sue to block enforcement of the standard. Kodak and some pharmaceutical manufacturers are unlikely to oppose the PEL, but would prefer that the rule permit the use of filter respirators and may sue.
- Hill Positions:* The FY 1997 appropriation conference report required OMB to ensure OSHA would coordinate its MC risk assessment with EPA and comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) requirements. Although OMB and OSHA have complied, numerous Senators and Representatives continue to raise compliance concerns and are likely to seek congressional nullification of the rule through a new congressional review process. Should this occur, the rule will receive heightened scrutiny as perhaps the first rule to be subjected to such review.

Pros/Cons:

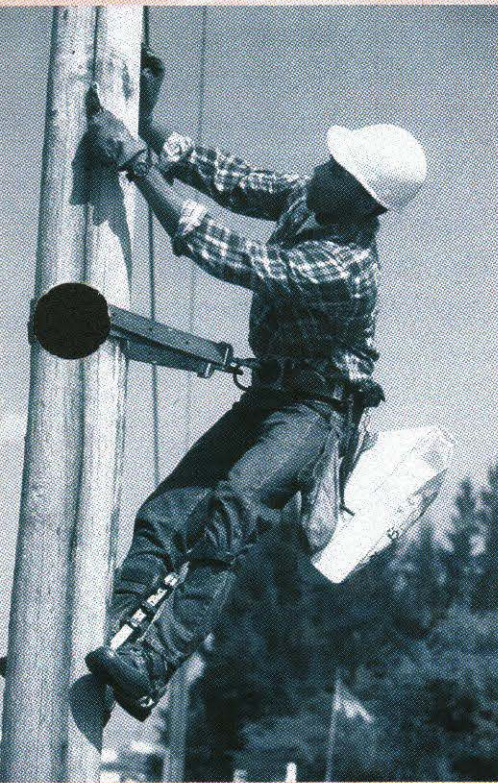
Pros: The proposed lower standard will save 31 lives a year from cancer deaths. OSHA has worked to help many small businesses comply with this standard in response to concerns.

Cons: OSHA's critics, both on the Hill and in the business community, are likely to mount strong opposition to the rule based on small business and paperwork concerns.

THE NEW OSHA

- Issue:* President Clinton announced the New OSHA initiative in May 1995.
- Background:* The attached brochure outlines the major themes and early results of this effort.
- Key Constituents:* The labor movement has been skeptical at best, and extremely critical at times, of the New OSHA programs. Their principal concern is that these programs focus on providing employers relief from enforcement (through partnership programs, for example) and consume resources that would otherwise be spent on inspections. The business community has been generally positive about the changes.
- Notably, the New OSHA is at the forefront of the NPR reinvention effort; the Vice-President has been a strong supporter.
- Hill Positions:* Joe Dear earned very high marks from Congress for his efforts to change the agency, even from OSHA's staunchest critics. The New OSHA effort played a significant role in defeating Republican OSHA reform efforts as well as proposed budget cuts. With Joe's departure, the Hill will be watching with even greater scrutiny to determine whether the New OSHA programs will move forward.
- Pros/Cons:* Although the labor movement has serious concerns about these efforts, they generally represent the right thing to do. In the past OSHA has earned a reputation as overzealous, too unaware of the real world, and uninterested in stakeholder views. The New OSHA programs have helped to motivate, recognize, and reward employer good faith, and instill common sense in both regulatory and enforcement practices. At the same time, they have also produced very positive results in terms of worker protections.

THE NEW OSHA



In May 1995, President Clinton announced "the New OSHA," emphasizing cooperative partnerships with employers and workers; common sense, plain language protective standards; and a new agency culture focusing on the reduction of injury and illness rates rather than the numbers of inspections, citations and penalties. This initiative has improved OSHA's ability to protect America's working men and women, won numerous awards, and been widely praised by employers, workers and Congress.



ENFORCEMENT

The Old OSHA

Complaint: OSHA has been too confrontational with employers, often failing to distinguish between responsible employers and neglectful ones.

The New OSHA

The agency now treats responsible employers differently from neglectful ones. That means new, cooperative programs, penalty reductions and other incentives for employers who make good faith efforts to protect their workers, and serious consequences for serious violators.

Cooperative Compliance Programs: Saving Lives

OSHA's new, cooperative programs are designed to leverage the agency's limited resources to protect more workers for fewer dollars. Under the "Maine 200" program, for example, OSHA identified the 200 employers with the highest number of injuries, and offered these employers a chance to work in partnership with the agency to develop a comprehensive safety and health program. Participating employers eliminated hazards at these sites at a rate 14 times greater than was possible under the old OSHA. One paper mill worker described the program's impact: "We worked together to find out what the violations were, tagged them, and started trying to fix things." Over half of the participating employers have already achieved measurable reductions in workplace injuries and illnesses. The Maine 200 program recently won a Ford Foundation Award for Innovations in American Government. Comparable programs have been set up in

Wisconsin, New Hampshire and Mississippi, and are being developed in other states. Other cooperative efforts are also keeping American workers safe and healthy:

- The agency's Atlanta office worked closely with a steel manufacturer, Horizon Steel, to protect its workers; so far, the effort has saved three lives and reduced the company's workers compensation costs from \$4.25 per employee per day to just 18 cents.
- OSHA's Parsippany, New Jersey, office worked with state health and transportation officials, and state contractors, to achieve dramatic reductions in lead exposures resulting from bridge repair work; over four years, the number of over-exposed workers dropped from 1 in 4 to 1 in 50.
- OSHA's St. Luis office worked with builders and workers to reduce fall-related injuries by 74% in six months.

Focused Inspections: Limited-Scope Inspections for Responsible Employers

Under the agency's "focused inspection" program, when OSHA inspects a construction worksite that has an effective safety and health program, the agency checks only for the hazards responsible for the four leading causes of death in construction (trenching, falls, electrocutions, and being struck by objects). The Associated Builders and Contractors, the industry's largest trade association, observed that this program "demonstrates [OSHA's] commitment to truly improving jobsite safety, rather than merely pursuing increased citation and inspection numbers. [T]he agency will increasingly be viewed as an ally...rather than [as] a thorn in the side of companies with good safety and health programs."

Other Initiatives: Additional Incentives for Responsible Employers

- The revised penalty system will substantially increase penalty discounts for small employers and for employers who make good faith efforts to comply.
- OSHA's cooperative Voluntary Protection Programs (VPP) accept only those employers who demonstrate the highest commitment to safety and health: VPP participants experience injury incidence rates 40% to 60% below industry averages. OSHA has nearly doubled the number of VPP participants over the last three years.
- In addition, over the past five years, OSHA has provided free assistance to over 100,000 small and medium sized employers through its state-run consultation programs, resulting in the identification and elimination of over half a million workplace hazards.

Serious Consequences for Serious Violators

The cooperative partnership and incentive programs described above can be effective only if OSHA maintains a strong enforcement presence. Thus, the agency has taken steps to identify the most dangerous workplaces and enforce the law against employers who fail to address serious hazards. Between FY 1994 and FY 1995, the number of egregious cases doubled, from 8 to 17. During the same period, the number of significant cases—typically involving fines of \$100,000 or more—nearly doubled, from 60 to 110.

PROTECTIVE STANDARDS

The Old OSHA

Complaint: OSHA has not listened closely enough to employers, workers and safety and health professionals in the standard-setting process, and as a result, its regulations are too complicated and hard to understand.

The New OSHA

The agency has consulted with stakeholders both early and often in the development of protective standards to ensure that new rules make sense.

- The agency's proposed recordkeeping revisions incorporated many ideas developed in an intensive stakeholder process; the proposal will expand the small business exemption, simplify recordkeeping requirements, and save employers millions of dollars, while also improving the quality of the data collected.
- OSHA has pursued consensus rulemaking where feasible; OSHA's Steel Erection Negotiated Rulemaking Advisory Committee recently reached consensus on a proposal to improve protection for workers engaged in steel erection work.
- OSHA is developing a protective standard on 1,3-Butadiene that is based on an agreement between workers and employers in the synthetic rubber industry.
- OSHA resolved controversial regulatory issues regarding asbestos exposures through stakeholder discussions; the President of the National Roofing Contractors Association commented that "with the cooperation of OSHA we were able to negotiate a reasonable and workable solution."

Other Regulatory Improvements

OSHA has expanded its use of non-regulatory approaches. For example, the agency recently published guidelines to assist employers in addressing the growing problem of workplace violence. In addition, the agency has begun to write new standards (and rewrite old ones) in plain language, and eliminate outdated, duplicative or conflicting regulations. The agency is also in the process of improving the hazard communication standard, which protects workers' right to know about exposure to hazardous chemicals in their workplaces.

PAPERWORK

The Old OSHA

Complaint: OSHA citations are mostly for paperwork violations unrelated to safety and health.

The New OSHA

In the past, OSHA issued thousands of citations with penalties for failure to put up an OSHA poster. Now the inspector simply gives the employer a poster. Similarly, citations for the most common paperwork violations have declined by 71% over the past six years. In addition, OSHA recently issued a new compliance directive to its inspectors, eliminating citations and/or penalties in certain circumstances such as minor injury log inaccuracies and failing to keep a log if no injuries occurred. Finally, the agency's efforts to simplify its recordkeeping requirements have met with widespread approval: the AFL-CIO was "pleased" to see the effort move forward; the Business Roundtable Human Resources Coordinating Committee wrote to "applaud" this initiative.

AGENCY CULTURE

The Old OSHA

Complaint: At times, OSHA has seemed more interested in fines and citations than in reducing injuries and illnesses. In part, this resulted from agency performance measurements—adopted during previous administrations—which were based on the numbers of inspections, citations and penalties.

The New OSHA

Under the Clinton Administration, the agency has eliminated these performance measures, and is developing a new performance system tied to real improvements in safety and health. The agency is also redesigning each of its 67 field offices to expand the use of proactive, cooperative approaches as an alternative enforcement tool, and to improve efficiency and customer service. A new complaint-handling process, for example, has dramatically reduced the time from complaint to abatement of hazards: from 32.5 days to just 8.5 in Atlanta; from 35 days to just 11 in Columbus, and from 39 to just 9 in Wichita.

In the future, OSHA plans to continue implementation of President Clinton's May 1995 "New OSHA" Initiative. New and existing reinvention programs will be developed and expanded through a careful process of stakeholder involvement and pilot projects. These programs will promote cooperative relationships with responsible employers, emphasize common sense regulations, and foster a greater focus on reducing work-related injuries and illnesses. Ultimately, President Clinton's "New OSHA" Initiative will help the agency improve its mission of ensuring a safe and healthful workplace for all working Americans.

OSHA REFORM LEGISLATION

Issue: The House Economic and Educational Opportunities Committee and the Senate Labor & Human Resources Committee are likely to consider legislation to change OSHA's regulatory and enforcement authority.

Background: During the 104th Congress, 3 measures were considered. The first, offered by Rep. Cass Ballenger, was the most drastic. It would have stripped away the core of the agency's enforcement authority and imposed layers of new, costly, time-consuming processes on the agency's regulatory processes, delaying protective standards for years. It would also have eliminated NIOSH and merged MSHA into OSHA. The bill was strongly opposed by labor and the some segments of the business community. Mr. Ballenger withdrew it after the Vice-President threatened a veto.

Senators Kassebaum and Gregg introduced their own measure claiming that it codified the Administration's New OSHA initiative (a reinvention effort designed to create an opportunity for partnerships rather than traditional enforcement). In reality, the bill would have substantially narrowed the agency's enforcement authority and undermined its protective standards. The bill was favorably reported by the Labor and Human Resources Committee on a party line vote, but drew a veto threat from Secretary Reich, and lacked sufficient support to be considered by the full Senate.

Rep. Ballenger introduced a third measure --- a significantly stripped down version of his earlier bill --- and reported it from his subcommittee. He also claimed it simply codified the Administration's New OSHA programs. While some of the bill's provisions would have been acceptable with a few changes, the bill would have overturned a core principle of the original Occupational Safety and Health Act-- that worker health should be given priority over other considerations (rather than being considered as just another cost of doing business). This provision would have greatly hindered the agency's ability to protect workers in the future. Departing Assistant Secretary Joe Dear predicted that it would fall within the earlier veto threats, and the bill was not acted on by the full committee.

Current Status: Rep. Ballenger has been meeting with business community representatives to draft a new bill. It will likely contain some of the provisions of the earlier bills.

Key Constituents: Organized labor strongly opposes Republican-led reform efforts. The business community supports such efforts but is divided on how far to go. This division was fatal to Republican-led reform efforts in the last Congress.

Hill Positions: We anticipate a typical party line split on the issue. By the end of the 104th Congress, key "Blue Dogs" were telling us that they would oppose to any Republican OSHA reform bill that the Administration had not agreed to.

Pros/Cons: Pro: Despite the reinvention success of the New OSHA, the agency continues to suffer the stigma of being viewed as an over-zealous regulator and picayune enforcer.

Con: Despite the above mentioned criticism of OSHA, the agency has successfully fought reform bills by demonstrating through the President's New OSHA initiative that legislation is not needed to change the way OSHA does business. The Administration should retain its existing policy on any such legislation-- and state that the President will veto any reform bill that reduces worker protections.

OSHA'S ROLE IN PROTECTING WORKERS AT DOE "GOCO" FACILITIES

Issue:

The Department of Energy plans to transfer to OSHA the responsibility of regulating worker health and safety at DOE's contractor-operated, government-owned (GOCO) facilities, the laboratories and factories that have made up the nuclear weapons complex.

Background:

OSHA commissioned and DOE paid for a report by the National Academy of Public Administration (NAPA) which presents a transition plan and recommendations to OSHA, DOE, and Congress on how the transition and transfer should proceed. The NAPA report is almost ready for publication. The report includes OSHA's estimate that the agency would need 172 new FTEs and an increase of roughly \$16 million per year to do the work. Legislation will be needed to give OSHA jurisdiction over public employees in states where OSHA enforces safety and health protections, and to allow states that enforce their own safety and health protections to have jurisdiction over these facilities.

OSHA does not currently assert regulatory authority at the sites because DOE has actively enforced its own orders under a complicated system of self-regulation and oversight. However, in 1993 Secretary of Energy Hazel O'Leary announced her intention to change this system.

The NAPA panel's recommendations will include the following excerpts:

- The federal government has a responsibility to manage the DOE complexes with an exceptionally high degree of care and accountability because the sites employ more than 135,000 workers, and because the general public will not tolerate accidents at facilities it regards with deep concern. Radiation continues to be a problem at the facilities, particularly for those workers engaged in decontaminating and dismantling old buildings and storage areas. The most frequent causes of worker injuries across the complex appear to be related to construction and security, however, and OSHA is familiar with most of the hazards it would encounter at the sites.
- With appropriate support from Congress, DOE should formally transfer regulatory authority for occupational safety and health across its complexes to OSHA. DOE should transfer regulatory authority to OSHA only if Congress makes a clear commitment to finance OSHA's work at the complex.

- OSHA should assert its authority over virtually all worker safety and health issues at the DOE complexes, including risks from radiation at nuclear facilities.
- OSHA's function at the DOE complexes should be entirely consistent with its function at workplaces around the country and with the mission established in the OSH Act. OSHA should step in to enforce the law if a contractor's management systems and/or DOE's own corporate management system fails.
- Congress and OSHA should clearly earmark funds for OSHA's regulation of the DOE complexes and Congress should clearly state its expectations for OSHA and DOE. OSHA should ensure that its involvement with the DOE sites is transparent and distinct from other actions.
- OSHA and DOE should agree on a target date for transferring regulatory authority and on the outlines of an implementation schedule, and seek Congressional approval of that schedule.

Current Status:

On December 20, 1996, Under Secretary Tom Grumbly announced DOE's plan to put the Nuclear Regulatory Commission in charge of regulating the nuclear safety aspects of the complex. At OSHA's request, DOE deferred comment concerning OSHA's assumption of responsibility for worker safety and health. NAPA intends to release its report on January 10, 1996. OSHA has not taken a public position on the recommendations in the study.

Key Constituents:

Many of DOE's GOCOs have more than one labor union representing their employees. NAPA made an effort to build the union's views into their recommendations. Unions generally support an OSHA role, although they are wary of the potential drain on OSHA's resources and oppose some of the partnership approaches DOE would favor.

Hill Positions:

Sen. John Glenn was one of the early supporters of DOE transferring its safety and health role. Current feeling among other members of Congress is probably mixed, although OSHA has not surveyed its key committees.

Pros/Cons:

Pros: OSHA is more likely to receive the money and staff it needs to take on the DOE role if it assumes the responsibility all at once in a coordinated transition with DOE rather than have responsibility trickle down through a protracted series of privatization of individual facilities. OSHA can use DOE and its best contractors as a laboratory for testing new regulatory approaches. The NAPA report makes this case and could be a useful tool for working with OMB, OSHA employees, unions, and the Hill.

Cons: Assuming any additional responsibility at this time threatens OSHA's ability to do its core job. Congress is not insisting on the transfer and may even resist it. For both OSHA and the workers at the sites, the worst case would be if OSHA asks for (or receives) the responsibility without obtaining the staff and appropriation needed to do the job.

PROP 65 - CALIFORNIA HAZARD COMMUNICATION/PROPOSITION STANDARD

Issue:

The Occupational Safety and Health Administration is reviewing a California State standard addressing hazard communication which incorporates Proposition 65, the Safe Drinking Water and Toxic Enforcement Act.

Background:

The federal Occupational Safety and Health Act allows states to administer their own safety and health programs if they are approved by federal OSHA. California is one of twenty-three States that administer their own programs. Regulations require that each state's standards (i.e., specific regulations under their safety and health programs) be submitted to OSHA for review and approval (they must be at least as worker protective as federal standards).

Proposition 65, which was passed by the voters of California, is primarily an environmental and consumer initiative, but includes requirements for employers to warn workers of their exposure to carcinogens or teratogens (causing birth defects). Provisions of the law were incorporated into the Cal/OSHA hazard communication standard following a court order. These provisions include a private right of action allowing citizens to bring suit against employers for failure to provide warnings in the manner prescribed and to collect 25% of any penalty imposed. Private actions have been filed against out-of-state manufacturers to compel them to use California's specific label warning language.

Following contacts from chemical manufacturers, Congress in the Statement of Managers in the 1997 Omnibus Spending Bill directed OSHA to expedite review and report to the Appropriations Committee by January 1, 1997, on the status of its review. OSHA has received an informal extension of the due date, and the report is in the clearance process. Chemical manufacturers want OSHA to reject the standard as an undue burden on interstate commerce, and, in any case, to decide quickly so they can challenge the standard in court. Labor and environmental groups support the standard.

Current Status:

OSHA published a notice in the Federal Register on September 13, 1996, seeking public comment on whether the State standard: (1) is at least as effective as the Federal standard; (2) is applicable to products which are distributed or used in interstate commerce, and, if so, (3) whether the standard unduly burdens interstate commerce; and (4) is required by compelling local conditions. OSHA received 205

comments totaling over 3,000 pages in response to the notice. The comments are currently being reviewed by program, legal and technical staff. The State of California will submit its comments by January 21, 1997.

OSHA must decide whether to hold a hearing. After review and analysis of all the comments, the state's response and any hearing record, the Assistant Secretary will need to address a myriad of issues raised by the commenters and decide whether to approve or reject the standard. Negotiation with the state to reach a compromise position is also an option. A Federal Register notice announcing the decision would then be published. While approval of the standard would constitute final agency action, a decision to reject the standard would initiate a second formal rulemaking process.

Key Constituents: The Congressional interest was initiated by employer groups (in particular the National Paint and Coatings Association and the Shell Oil Company) whose members have been subject to civil enforcement action by citizen groups and in many cases have agreed to settlements to avoid costly litigation. Among those supporting the standard are the AFL-CIO and the Environmental Defense Fund.

Hill Positions: After contact by manufacturers in Pennsylvania, Senator Arlen Specter was involved in the inclusion of the provisions involving the standard in the Fiscal Year 1997 Statement of Managers. In addition, the following Senators expressed their concern about the state's standard in a September letter to Secretary Reich: Mitch McConnell; Mike DeWine; John Glenn; Kit Bond; Jon Kyl; J. Bennett Johnston; Spencer Abraham; John Breaux; and Carl Levin.

Pros/Cons: Any decision must be based on the record (i.e., the comments submitted to OSHA). If OSHA rejects the standard, California workers would lose a valuable protection that is now provided under state law. The AFL-CIO and the Environmental Defense Fund, among others, would be extremely dissatisfied. If OSHA approves the standard, the Department can anticipate that it will be sued by various employer groups.

SAFETY AND HEALTH PROGRAM STANDARD

Issue: OSHA's most important regulatory project involves the development of a standard that would require employers to establish safety and health programs in their workplaces.

Background: Safety and health programs (S&HPs) allow employers and workers to address safety and health problems through an ongoing, systematic, worksite-specific approach. S&HPs are highly effective at reducing injuries and illnesses. S&HPs are also cost-effective. For every dollar invested, employers can save between \$4 and \$6 in lower workers' compensation costs and related expenses.

Many states require some or all employees to establish Safety and Health Programs. Nonetheless, this could be a controversial proposal because of its dramatic scope. Even employers with no history of health and safety hazards will be required to spend money to establish safety and health programs.

The key elements of an effective S&HP include management commitment, employee involvement, hazard analysis and control, training, and periodic program evaluation. Given OSHA's limited resources, employers and workers must play a bigger role to continue our progress in protecting working families.

Current Status: The week of November 18, 1996, OSHA released a working draft of proposed regulatory text for a safety and health programs standard. OSHA convened stakeholder meetings December 10-12 to discuss the draft. Several hundred employer representatives, worker representatives and safety and health professionals participated. OSHA intends to issue a proposed standard before the end of FY 1997.

Key Constituents: This is a very high priority for organized labor and for safety and health professional organizations. In addition, many large employers support the standard (though most would hesitate to say so publicly). The Chamber, NFIB, and other small business representatives are opposed.

Hill Positions:

We anticipate a typical party line split on the issue. Notably, Safety and Health Program requirements were included in several Democratic OSHA reform bills in the 102nd and 103rd Congresses. These bills were favorably reported by the labor committees but were not considered by either body. Some opponents of the S&HP standard might argue that OSHA is trying to accomplish OSHA reform regulatorily when it could not accomplish it legislatively.

Pros/Cons:

Pros: The working draft will help to advance the President's 1995 New OSHA initiative. It has been praised by stakeholders for being written in plain language and reflecting substantial stakeholder input. Moreover, the rule will help shift OSHA's focus away from individual, technical violations, toward an employer's ongoing, systematic approach to worker protection. In addition, the anticipated enforcement scheme will treat responsible employers differently from neglectful ones.

Cons: According to their representatives, there will be fierce opposition to the rule by business groups, especially the United States Chamber of Commerce and the National Federation of Independent Businesses. They will argue that the costs, especially for employers that have no safety and health problems, will be enormous and that the benefits are speculative. It will be hard to persuade a small business that has no record of injuries for several years that it should institute a Safety and Health program.

TUBERCULOSIS STANDARD

- Issue:* OSHA is proposing a rule to govern occupational exposure to tuberculosis.
- Background:* The number of TB cases transmitted to nursing home, hospital, and other workers has increased in recent years. A total of 5 million workers (primarily women in lower paying jobs) are occupationally exposed, causing over 20,000 TB infections every year through contact with patients and clients. OSHA estimates that approximately 70 of these workers will eventually die of this disease (TB often has a long latency period).
- OSHA's proposal requires measures which have been very effective in reducing the number of TB cases among workers in hospitals, nursing homes, and other facilities.
- Current Status:* The proposed rule is currently undergoing Executive Order review at OMB. This rule is one of OSHA's and labor's top regulatory priorities.
- Key Constituents:* Labor, especially the Service Employees International Union, strongly supports promulgation of a strong rule. Some professional societies in the health care field, such as the Association of Infection Control Practitioners, oppose it because they see it as OSHA interference in their area.
- Hill Positions:* Because the rule has not yet been proposed, the Hill has not expressed much interest to date. However, many of the constituencies potentially affected by this rule, e.g., the healthcare industry and nursing homes, have strong Hill advocates.
- Pros/Cons:*
- Pro: This rule would address a significant occupational health problem.
- Con: This rule will affect several industries that are not routinely regulated, such as homeless shelters, hospices, and substance abuse treatment shelters, because it raises important policy issues. Since these institutions already operate on very slim budgets, some have expressed concern that the rule's costs might impede the charitable functions that these institutions perform.

WORKPLACE VIOLENCE GUIDELINES

Issue: Workplace violence is a growing issue in many sectors of the workforce. Accordingly, OSHA released guidelines for workers in the health care industry in the spring of 1996. Currently in development are guidelines for workers in the night retail industry and the fast food industry which are set to be released shortly.

Background: Homicide is the second-leading cause of job-related death for all workers and the leading cause of job-related death for women. Each week, an average of 20 workers are murdered on the job. The majority of these murders are robbery-related.

The guidelines OSHA developed represent the "best practices" of representative companies in those industries and provide recommendations on how to minimize the risk of violence against workers. In spring 1996, Secretary Reich released voluntary guidelines for health care workers. These guidelines were favorably received and have been in use since then without controversy.

The night retail guidelines, which are based on the State of Florida's popular and effective guidelines, focus on such risk factors as: exchange of money with the public; working alone or in small numbers; working late night or early morning hours; working in high crime areas; guarding valuable property or possessions; and working in community settings.

Current Status: The release of the guidelines for the night retail industry has been delayed for several months. OSHA extended the stakeholder comment period several times in response to industry and congressional requests. The guidelines have been revised and now deal only with the convenience store industry. The fast food industry felt that the guidelines did not address their needs, so a restaurant-specific set of guidelines is in development and will be ready for release in 1997.

Key Constituents: Victims rights groups and organized labor are supportive. The National Association of Convenience Stores opposes OSHA's effort, as does the National Council of Chain Restaurants. They are concerned that OSHA would enforce the guidelines. In response, OSHA has made clear that the guidelines are recommendations only, and not enforceable. They are also concerned that plaintiffs would use the guidelines to support tort litigation.

Hill Positions:

This past fall OSHA received a letter from 104 Members of Congress outlining their opposition, mainly on the grounds that the guidelines impose new burdens on small businesses. Outgoing Assistant Secretary Joe Dear testified before Congress that OSHA will not utilize the guidelines when doing inspections, but should release them as an example of "best practices" for the industry..

Pros/Cons:

Pros: Workplace violence is a growing concern and OSHA's guidelines are strictly voluntary and represent what we know works to reduce violence in the workplace.

Cons: Members of Congress may use the guidelines as an example of OSHA overstepping its bounds. Some elements of the business community are strongly opposed because they fear these guidelines will be enforced or used to support tort litigation.

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