April 8, 2011

Comments Submitted via Department of Labor's Regulations Portal at http://dolregs.ideascale.com

Response by Society of Human Resource Management to Request for Public Comment on how the Department of Labor can Improve Its Significant Regulations in Response to Executive Order 13563

These comments are submitted by the Society for Human Resource Management (SHRM) in response to the Notice published in the Federal Register by the U.S. Department of Labor (DOL) on March 21, 2011, inviting public comment on “how the Department can improve any of its significant regulations by modifying, streamlining, expanding, or repealing them,” in response to President Obama’s Executive Order 13563 (Executive Order).

The Society for Human Resource Management (SHRM) is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

The Executive Order is intended to increase the effectiveness of governmental regulation, while reducing the burden imposed by compliance with overlapping and many times obsolete requirements. As President Obama emphasized in announcing its implementation,

This order requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth.
And it orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive.


DOL, like all Executive Branch departments and agencies, is required under the Executive Order to submit a preliminary plan for periodic review of existing significant regulations to the Office of Information and Regulatory Affairs (OIRA) on or before May 18, 2011 (120 days from the January 18 issuance date) “under which the agency will . . . determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.” Exec. Order No. 13,563, Sec. 6(b), 76 Fed. Reg. 3821, at 3822. In a Guidance Memorandum issued February 2, 2011, the Office of Management and Budget (OMB) emphasized that the aim of
the plan requirement is “to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive.” Memorandum re Executive Order 13563, “Improving Regulation and Regulatory Review,” Office of Management and Budget (OMB) M-11-10 (Feb. 2, 2011).

On March 29, 2011, we submitted our request that DOL extend the deadline for submission of public comments. On March 31, DOL extended the deadline for all commenters to April 8, 2011. SHRM is very appreciative of the additional time to allow members of the public to provide more meaningful input into the review process.

SHRM offers the following suggestions to DOL in its review of existing regulations:

**Method for Prioritizing DOL's Periodic Review of Existing Regulations**

Section 6 of the Executive Order requires the agencies to submit a preliminary plan under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

To further this goal, SHRM suggests that DOL agencies identify for review those regulations that meet any of the following criteria:

1. The regulation is contrary to DOL’s goal of effecting compliance with the laws it is charged with enforcing in that it discourages the regulated community from seeking compliance assistance from DOL. To identify such regulations, DOL should issue a Request for Information;

2. The regulation has proven, over time, to impose such a significant burden on the regulated community as to create a disincentive to job creation, to discourage businesses from becoming federal contractors, or to adversely affect the competitiveness of businesses in the international marketplace. To identify these regulations, DOL should issue a Request for Information to obtain data to enable DOL to quantify the costs of compliance with the regulation, as compared to the public benefit achieved as a result of complying with the regulation;

3. While the regulation may have been effective at the time of promulgation, intervening events or technologies have rendered the regulation less relevant or efficacious. To identify these regulations, DOL should issue a Request for Information to obtain information about how the need for the regulation has changed since its promulgation; or
4. The regulation or multiple regulations impose overlapping obligations that are either duplicative or inconsistent, such that the costs of compliance far exceed the public benefit achieved. To identify these regulations, DOL should issue a Request for Information to obtain data to enable DOL to quantify the costs of compliance with the regulation, as compared to the benefit achieved as a result of complying with the regulation.

**Specific Regulations and Non-Regulatory Enactments that DOL Should Review**

SHRM members have a vital interest in many of DOL's regulations, including those promulgated by the Wage and Hour Division, the Occupational Safety and Health Administration, the Office of Federal Contract Compliance Programs, the Employee Benefits Security Administration, the Employment and Training Administration, the Office of Labor-Management Standards, and other DOL agencies. We believe that the process outlined above would provide DOL with valuable information that would enable the DOL component agencies to proceed with their review of existing regulations in an objective manner.

Should DOL instead decide to conduct its review of specific regulations without requesting the information SHRM has suggested above, SHRM submits for consideration the following priorities for review:

1. **Uniform Guidelines on Employee Selection Procedures (UGESP).** DOL should examine whether UGESP, adopted in 1978, needs to be revised or updated to reflect current views on the measurement of adverse impact and validation of employment selection procedures. OFCCP, which has codified UGESP at 41 C.F.R. § 60-3, employs UGESP in assessing potential discrimination under Executive Order 11246. The agency should evaluate its use of UGESP. It should also determine whether its application of UGESP is in line with interpretations enunciated by the Equal Employment Opportunity Commission.

2. **DOL** should not limit its review to existing significant regulations. It should also apply the principles set forth in the Executive Order to review actions that have a significant impact on employers but that were established through mechanisms outside of the Administrative Procedure Act (APA). The following are illustrative of the problem; there are numerous other programs and actions that should be the subject of APA notice-and-comment rulemaking.

   a. **Bridge to Justice Program:** The Wage and Hour Division recently created its Bridge to Justice Program, without the benefit of input from the regulated public. Under that program, when Wage and Hour cannot resolve a complaint, it will connect the complainant to a local attorney referral service which will, in turn, provide the complainant with access to an attorney. Wage and Hour will also provide information to the complainant about the agency's investigation, including the violations found by the agency and the amount of back-wages owed. That information is not given to the employer. Although the impact on the regulated community may be enormous, Wage and Hour has instituted this program without the benefit of any public input.
b. **OFCCP Directive No. 293**: On December 16, 2010, OFCCP issued Directive No. 293, concerning jurisdiction of OFCCP over health care providers and insurers by virtue of the status of such providers and insurers as government contractors or subcontractors. The Directive discusses coverage issues with regard to Medicare, TRICARE, and the Federal Employees Health Benefit Plan, and provides guidance to the agency in making determinations of coverage. In so doing, the Directive explicitly disavows earlier directives. The potential impact of the Directive is enormous: for the first time, participating in Medicare Part C or Part D may bring a participant under the agency's jurisdiction. Yet, this sea change was effected without any input from the public.

Thank you for the opportunity to provide input into DOL’s plan to implement Executive Order 13563. If you would like any additional information, please contact Nancy Hammer at (703) 535-6030.

Yours truly,

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Director, Government Affairs