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April 8, 2011

Submitted Via http://dolregs.ideascale.com/
The Honorable Hilda Solis
Secretary of Labor
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210-0001

Re: The U.S. Department of Labor's Plan for Analysis of Significant Regulations Pursuant to Executive Order 13563

Dear Secretary Solis:

On behalf of the American Civil Liberties Union (ACLU), over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to respond to the U.S. Department of Labor's (the Department) request for public comment regarding the review of significant regulations. We appreciate the opportunity to comment on this important process.

Executive Order 13563, issued by President Obama on January 18, 2011, calls on agencies to improve their regulatory processes and to develop protocols for periodic review and improvement of significant regulations. 76 Fed Reg. 3821 (Jan. 21, 2011). This process will aid the Department in eliminating ineffective regulations and developing new ones that better serve the Department's mission.

In the review process, the ACLU encourages the Department to ensure that all regulations provide clarity and support vigorous enforcement of employment laws. Along these lines, we ask that the Department issue new or updated regulations in several areas:

1. The Office of Federal Contract Compliance Programs (OFCCP) should issue regulations clarifying that federal contractors are prohibited from retaliating against employees for discussions of pay under Executive Order 11246.

OFCCP is charged with enforcing Executive Order 11246, which prohibits federal contractors and subcontractors from discriminating in compensation based on protected classes. OFCCP plays a critical role in preventing compensation discrimination by federal contractors by preventing employers from using taxpayer money to subsidize discrimination in the workplace.

When employers retaliate against employees for discussing their pay with coworkers, this practice creates an atmosphere of fear and secrecy that perpetuates discrimination. OFCCP should make clear through issuance of new regulations that EO 11246 prevents federal contractors from retaliating against employees for inquiring about, discussing, or disclosing their pay to their coworkers.

2. OFCCP should issue regulations implementing a tool for data collection.

Pursuant to the goals of non-discrimination in EO 11246, the agency must be equipped with the tools it needs to carry out its important mission. OFCCP's ability to enforce EO 11246 would be vastly improved by access to information identifying where employment discrimination is occurring. A revised data collection tool for collecting such information about federal contractors and subcontractors would enable OFCCP to streamline its enforcement efforts and strengthen efforts to combat the persistent problems of employment discrimination.

3. OFCCP should finalize its proposed rule revising affirmative action requirements for construction contractors.

Women and racial minorities have continued to be underrepresented in construction occupations under the current regulations at 41 C.F.R. Part 60-4, which were last revised in 1980. To address the disparate representation of these groups and strengthen affirmative action requirements in the area of recruitment and job training, OFFCP should finalize its proposed rule. RIN 1250-AA01 at 75 Fed. Reg. 79463 (Dec. 20, 2010). This will finally provide a much-needed increase in opportunities for women and racial minorities in the construction field.

4. OFCCP should increase employment opportunities for people with disabilities by revising regulations at 41 C.F.R. Part 60-71.

Current regulations at 41 C.F.R. Part 60-71 have not adequately addressed the needs of people with disabilities in affirmative action requirements for federal contractors. OFCCP should correct this problem by revising these regulations to require federal contractors to set goals and timetables for the hiring, retention, and advancement of people with disabilities. These requirements should be modeled on affirmative action programs already in place on the basis of gender, race, and ethnicity. Such regulations would strengthen Section 503 of the Rehabilitation Act and provide new opportunities for people with disabilities in federal employment.

5. The Wage and Hour Division should revise regulations under 29 C.F.R. 825 to strengthen employee rights under the Family and Medical Leave Act.

Regulations issued by the previous administration in 29 C.F.R. 825 made it more difficult for employees to use family and medical leave. At the same time, it gave employers greater ability to deny this leave to employees. The Department should review these regulations and revise them to restore the rights provided in the Family and Medical Leave Act and to streamline the process of qualifying for leave.

6. The Wage and Hour Division should revise its companionship exemption regulations under the Fair Labor Standards Act (FLSA).

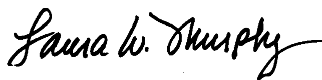
The FLSA exempts from its minimum wage and maximum hours rules certain persons employed in companionship service to those unable to care for themselves. 29 U.S.C. § 213(a)(15). The Department's regulations at 29 C.F.R. Part 552 interpret this exemption to include companionship workers who are employed by an outside agency or employer. In a 2007 decision, the Supreme Court upheld the Department's interpretation. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158. The Court noted that the Department has considered changing this rule on several occasions to bring workers who work for agencies and other third parties within the scope of the FLSA's wage and hour protections. We urge the Department to revise its regulations to limit the companionship exemption to workers directly employed by the relevant family, who provide fellowship and protection services. Other workers, who are employed by a third party employer, such as a home care agency, should be deemed to be covered by FLSA's protections.

7. The Wage and Hour Division should issue regulations regarding the Affordable Care Act's amendment to the FLSA requiring employers to provide reasonable break time for nursing mothers covered under the Act.

The Patient Protection and Affordable Care Act (ACA) amends the FLSA to require employers to provide nursing mothers covered by section 7 of the FLSA with reasonable break time. ACA § 4207 (amending 29 U.S.C. § 207). On February 22, 2011, the ACLU submitted recommendations in response to the Department's request for comments on this issue. 75 Fed. Reg. 80073 (Dec. 21, 2010). We hope the Department will consider these recommendations in determining next steps.

The ACLU appreciates this opportunity to submit comments on these important issues. Please contact Deborah J. Vagins, Senior Legislative Counsel at dvagins@dcaclu.org or (202)715-0816 with any questions.

Sincerely,



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