



Office of Advocacy

January 27, 1999

Honorable Charles N. Jeffress
Assistant Secretary
For Occupational Safety and Health
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Jeffress:

As OSHA prepares to initiate the formal SBREFA panel process for a rule to control the workplace risk associated with ergonomic hazards, I want to respond to your specific request for guidance on data submissions and take time to reflect on lessons learned from the Health and Safety Program panel process.

First, let me say that I agree that the panel process for the Health and Safety rule was a success. All parties to this process focused on the key issues associated with the draft proposal. The panel report points the way toward development of a clearer, more focused proposal which will accomplish both of our goals – ensuring a safer workplace free from ergonomics hazards while not unduly burdening small business. I want to congratulate your staff for their hard work and their commitment to crafting a consensus report.

Second, the Health and Safety panel process served an important collateral purpose, beyond evaluation of the draft rule's effectiveness and impact on small business. Our staffs expended significant effort discussing and fine-tuning the panel process itself. We learned some important lessons because of that effort. As we see the ergonomics rule on the short-term horizon, now is the time to consolidate our lessons and agree on an even more efficient and robust process. Based upon Advocacy's experience with both OSHA and EPA panels to date, we believe that changes in two aspects of early preparatory regulatory activities, prior to convening the panel, will ensure efficient and productive panel deliberations: 1) Pre- 609 Notification Activities and Data Analysis; and 2) Pre-609 Notification – Small Entity Representatives Activities.

1. Pre-§609 Notification Activities and Data Analysis.

OSHA has routinely engaged in considerable outreach with the regulated community before it narrows its focus on draft regulatory alternatives. OSHA has also conducted significant economic and cost analysis before it develops a draft proposal. We commend OSHA for this early regulatory activity and endorse a robust outreach and analytical effort well prior to initiating contact with Advocacy under § 609 of the RFA.

In addition to (and after) these early regulatory steps, our staffs should meet for an in-depth briefing on outreach feedback, regulatory options and economic analysis. Advocacy, OMB and EPA have successfully engaged at the staff level in this early stage, with rewarding results. I believe it is the consensus that such briefings early and prior to the convening of the panel would be extremely productive. At meetings on the ergonomics rule, OSHA should be prepared to distribute and explain the following:

- a. the purpose of the rule, in the context of benefits resulting from regulation;

- b. the regulatory alternatives currently under consideration, and specifying which OSHA would likely propose;
- c. quantitative and qualitative preliminary annual estimates of the benefits, at the establishment and national levels, for each of the major alternatives;
- d. quantitative preliminary regulatory cost estimates at the establishment and national levels, for each of the major alternatives⁽¹⁾; a description of the benefit and cost estimation methodology, including a list of the important assumptions and data sources used in the analysis.
- e. a list of states with ergonomics programs and the impact these programs have had on the reduction of injuries in those states.

It would be most helpful if these materials, especially (c), (d) and (e), took the form of fairly detailed information. The following list exemplifies the level of detail most useful to Advocacy when analyzing a rule at this point in the regulatory process:

- Illustrative Data Elements Needed Prior to §609 Notification

- i. The baseline (pre-regulatory) injury and illness prevalence by injury category, entity size and SIC code.
- ii. Fatality prevalence by entity size and SIC code.
- iii. A complete description of the analytical (cost & benefits) methodology, allowing reproduction of the analysis, to include a flow diagram describing the arithmetic logic.
- iv. The number of entities regulated and workers protected by each proposal, for each SIC code and by entity size.
- v. Identification each assumption used in place of data in the analyses, their sources and for each, the uncertainty therein.
- vi. The sources of data elements used in the analyses and for each, the uncertainty therein.
- vii. The degree of expected preventive effect at full compliance for each regulatory alternative and the level of compliance actually expected upon promulgation and normal enforcement.
- viii. A cross-walk of regulatory elements with existing state programs.
- ix. Information on all governments and illustrative entities which have applied programs similar to the regulatory proposal and the degree to which each reduced specified illnesses and injuries, and deaths, as well as information on why others considered and did not implement such programs and why still others implemented the program and then stopped using the approach.

After review of these materials, OMB and Advocacy would identify data and analysis issues of concern. OSHA, Advocacy and OMB staff would then reconvene to discuss the issues and attempt to reach a consensus on what analysis would be prepared prior to initiation of the § 609 panel process. In the absence of a consensus, we should convene a meeting of principals or exchange letters. I cannot over-emphasize the importance of this pre-§609 data effort.

2. **Pre-§609 Notification Small Entity Representatives Activities.**

An agreement on data analysis and presentations serves several purposes, not the least of which is the need to understand what materials can be prepared for use during the panel process. Before we start the 60-day clock on the panel process, we should already have reached consensus on which materials will go to the Small Entity Representatives (SERs). This will allow the SERs to focus on a small amount of useful data and allow us more time to focus on SER questions and comments. At a minimum, we should reach consensus on versions of the following:

- a. Draft regulatory text: A copy of the draft proposed rule would allow panel members and SERs to

understand the thinking of the program office in terms of the scope, applicability and need for the proposed rule. This is a specific statutory requirement in § 609(b)(4).

- b. Economic impact data: A copy of a draft IRFA that summarizes, at minimum, the items (a) – (e) in the paragraph above, would provide the SERs an understanding of direct impacts on small entities as well as an understanding of the national implications of the proposal and other regulatory alternatives. Section 609(b)(1) requires that similar materials accompany the agency's initial notification that the rule may have a significant economic impact on a substantial number of small entities. The draft IRFA would best serve the Panel and SER process.
- c. Regulatory alternatives: Section 603(c) requires that each initial regulatory analysis contain a description of the regulatory alternatives considered. Discussion of the alternatives have generally constituted a major portion of the Panel's deliberations, including discussions with the SERs. The description of the regulatory alternatives would normally include a discussion of benefits and costs for each alternative at the national and entity levels.
- d. Technical and legal supporting materials: The agency should provide general background information, including legal authority and the reason for regulating under one authority as opposed to other available authorities.

I hope that these important steps will aid you and your staff prepare for both the upcoming Ergonomics Panel and all other panels to follow. I look forward to working with you to create another successful panel experience.

Sincerely,

Jere W. Glover
Chief Counsel of Advocacy

cc: John Morrall, OMB

ENDNOTE

1. OSHA should offer costs at the establishment level in terms appropriate for use by Small Entity Representatives. Typically, annualized costs would only be used when most firms would amortize the regulatory expenses. First-year, start-up and non-amortized one-time costs should be presented in real dollars, indicating approximately when entities would have to pay them. Amortized costs should be clearly marked as such and when provided should reference the total cost amortized.