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The Department of Labor's New Rules for Working Children and Youth: February 2005

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Summary

The Fair Labor Standards Act (FLSA) is the primary federal statute dealing with minimum wages, overtime pay, and child labor issues. As with other aspects of the Act, jurisdiction over the work of children and youth is somewhat mixed: in part, the direct responsibility of the Congress; but, with the approval of Congress, a specific responsibility has been reserved for the Department of Labor (DOL).

In fashioning the FLSA, Congress set certain standards for children and youth who work, depending upon the type of work to be performed and the age of the child. For example, where a youth is under 16 years of age, his or her work must not interfere with either his or her education — nor with the worker's health and well-being. Where it does, it is, by definition, *oppressive* child labor and precluded under statute. However, the Secretary of Labor — except in areas in which the Congress has chosen to address such issues through specific legislation — has the authority to determine when work by a child is *oppressive* and when, with certain caveats, it can be permitted. In conformity with this authority, the Secretary has instituted a series of *Hazardous Occupations Orders* that apply to child and youth workers in various work environments. For children and youth engaged in agricultural work, a separate set of Hazardous Occupations Orders have been established.

Here, we are dealing with children and youth in the nonagricultural economy. In mid-December 2004, the Department issued new rules governing portions of the workforce. *First*. Congress, in carrying out its legislative responsibilities, has adopted new laws governing aspects of work by adolescents, each of which has been regarded as hazardous. These include: (a) industrial “paper balers” and “paper box compactors,” and (b) teens who make “incidental and occasional” use of a car while on the job. *Second*. The Secretary of Labor, in keeping with her congressionally mandated authority, has reviewed the Hazardous Occupations Orders for nonagricultural workers and has determined that certain nuances of policy were deficient. In this latter case, three groups of workers have been singled out for attention: (a) 14- and 15-year-olds who cook and the conditions under which such cooking is done; (b) persons under 18 years of age who work with explosives; and (c) persons under 18 years of age who are engaged in various facets of roofing-related activities.

With respect both to “paper balers” and “box compactors” and to teen drivers, the Secretary has proposed implementing regulations in response to action already taken by the Congress. In the second case, in keeping with the administrative functions of the FLSA, she has expanded upon conditions, already extant, that govern the activities of the three groups of workers.

This report reviews the issues involved in the several cases. Since it deals with specific rulemaking, it is unlikely that it will be updated further — absent either a change of policy at DOL or direct intervention on the part of the Congress.

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The Fair Labor Standards Act (FLSA) is the primary federal statute that deals with minimum wages, overtime pay, and child labor constraints — among its various functions. In jurisdictional terms, the Act has something of a dual structure. On the one hand, the Congress can (and has) legislated directly on behalf of children and youth who work. Conversely, where a field has not been preempted by Congress, the Secretary has the authority (and responsibility) to review areas of work by youth or children and to assess whether they are appropriate for youngsters and, if so, under what conditions such children and youth might be employed.

This report reviews both functions. *First*. It reviews the implementation of two acts of the Congress: (a) youth workers who are engaged, as part of their more general work, as waste “paper balers” and “paper box compactors” (P.L. 104-174), and (b) persons, under 18 years of age, who engage in “incidental and occasional” use of an automobile as part of their work (P.L. 105-334). In each case, Congress has already acted. However, the implementation of these statutes has been left up to the Secretary of Labor — within certain guidelines. *Second*. Although the FLSA lays down certain general standards for youth/child labor, its general implementation and enforcement has been delegated to the Secretary of Labor. In this broader area of her responsibility, the Secretary is able to assess the types of work in which youth/child workers may be engaged, setting standards that will protect them from injury and will insure that the work does not interfere with the youth’s educational responsibilities.

Introduction

Normally, with the exception of persons engaged in mining and manufacturing (and in agriculture, treated somewhat differently under the FLSA), a person can work at 16 years of age. The Secretary can also permit 14- and 15-year-olds to work in areas that are not deemed unduly hazardous for such persons. However, what constitutes *unduly hazardous* conditions for young persons or what may be *detrimental to the health and well-being* of such workers may well be contentious.¹ Further, such standards may clash with interests of industry and of labor — and with the views of child labor advocates.

¹ Several states have enacted standards of their own: the times of the day during which child and youth workers may be employed, coordination between work and school activities, and general circumstantial matters. Where they are in conflict with the federal rule, the state standards will normally be applicable *if* they are more protective of those who work.

In each of the current cases (“paper balers,” paper “box compactors,” and youth who make “incidental and occasional” use of a car while on the job), most of the issues were controversial and complex. But, some were not. Similarly, those current issues that did not flow directly from legislative enactments — for 14- and 15-year-olds who cook, for persons under 18 who work with explosives, and for persons less than 18 years of age engaged in roofing — sparked variously both protest and more generalized agreement.

On December 16, 2004, there appeared in the *Federal Register* new regulations in each of these areas. The new rules, in final form, took effect 60 days later: on February 15, 2005. There appears, below, a summary of the new regulations and, where they were of controversy, some discussion of related arguments pro and con.²

Scrap Paper Balers and Paper Box Compactors

Hazardous Occupations Order No. 12 (HO 12), generally, prohibits “operation or assisting to operate” a variety of paper balers and related equipment by persons under 18 years of age.³ At issue, here, are industrial-strength paper balers and compactors: the sort that one finds in supermarkets and malls and that compress waste materials into bales for transport to recycling centers or to waste disposal facilities. For younger persons, it was alleged, use and operation of such balers could expose them to industrial accidents — especially when loading boxes into the balers. Industry spokespersons argued the opposite: that, with training, the hazards, if they were such, could easily be overcome.⁴

General Introduction

Originally written in 1954, HO 12 came gradually to focus on paper balers and paper box compactors.⁵ With time, a new generation of baler and compactor equipment came onto the market. Some argued, with new safety features and a

² The new rules are printed in the *Federal Register*, Dec. 16, 2004, pp. 75382 ff. For an evaluation of Department of Labor’s efforts with respect to child labor, see U.S. General Accounting Office, *Child Labor: Labor Can Strengthen Its Efforts to Protect Children Who Work*, GAO-02-880, Sept. 2002, 86 pp. The Department of Labor’s response is included, pp. 66-79. See also U.S. Department of Health and Human Services, National Institute for Occupational Safety and Health, *National Institute for Occupational Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders*, May 3, 2002, 176 pp.

³ 29 C.F.R. § 570.63 (July 1, 2004 edition).

⁴ For description of such equipment, see U.S. Department of Health and Human Services, National Institute for Occupational Safety and Health (NIOSH), *Preventing Deaths and Injuries While Compacting or Baling Refuse Material*, NIOSH Publication no. 2003-124, July 2003. (Hereafter cited as NIOSH, *Preventing Deaths and Injuries*.)

⁵ For background purposes, see *Occupational Hazards to Youth Workers: Report No. 12: The Operation of Paper-Products Machines*, Bulletin no. 181, U.S. Department of Labor, by Secretary James P. Mitchell and Paul E. Gurske, Director, Bureau of Labor Standards.

reasonable program of instruction, that these were safe for young persons to operate. Others, including the Department of Labor (DOL), saw a danger in such equipment and, in December 1991, the Department clarified the rule to apply “to all power-driven machinery used to convert paper into waste paper.”⁶ Thus, modern paper balers and compactors were brought under the act and the industry was alerted to the potential risks that could arise from the employment of minors.⁷

The Department, according to industry, began “retroactively enforcing this rule.”⁸ In a letter of August 6, 1992, to Karen Keesling, Wage and Hour Administrator, corporate counsel Ronald Block of the National Grocers Association (NGA) pointed out that “[t]eenage unemployment is at an all-time high” and urged a reassessment of the Department’s policy on paper balers in order to safeguard “the health and safety of minors without necessarily restricting their employment opportunities.” He further suggested that the Department’s use of “strike forces and [the] targeting of grocers” suggests that there is “more at stake here than health and safety” — though he did not suggest what it might have been.⁹ Later, Block wrote to Labor Secretary Lynn Martin to protest “unnecessarily increasing grocers’ costs” from the HO 12 regulation, without “increasing the health or safety of minors.” He asserted, “grocers from coast to coast are being fined thousands of dollars for conduct that cannot reasonably be expected to result in any harm or injury.” Stating that the operation of HO 12 “in its present form is irrational,” he concluded that, unless the Department agreed to modify HO 12, “grocers will continue to eliminate jobs for teenagers” and they will “pass along their increased operating costs to consumers in the form of higher food prices.”¹⁰ Keesling responded by affirming the need for “a

⁶ U.S. Congress, House, *Authority for 16 and 17 Year Olds To Load Materials into Balers and Compactors*, H.Rept. 104-278, Oct. 17, 1995, pp. 2-3. (Hereafter cited as H.Rept. 104-278.) The concept of retroactivity is not entirely clear, though it may have been that the clarified rule was enforced before employers were made generally aware of its existence. While under consideration, eight comments were received on the regulation: *in favor*, the National PTA Health and Welfare Commission; the National Consumers League; the Child Labor Coalition; the Food and Allied Services Trades Department, AFL-CIO; the Economic Research Department, ALF-CIO; and the National Education Association; and, *those opposed*: the National Grocers Association; and the Food Marketing Institute. See *Federal Register*, Nov. 20, 1991, pp. 58629-58630 and 58632. Under the concept of “assisting to operate,” the Department affirmed: “‘assisting to operate’ would not include the stacking of cardboard boxes or paper by an employee in adjacent areas in close proximity to a machine subject to this order where the employee does not place the materials into the machine....” See *Federal Register*, Nov. 20, 1991, p. 58630.

⁷ Testimony of Thomas F. Wenning, National Grocers Association, in U.S. Congress, House Economic and Educational Opportunities Committee, July 11, 1995. (Hereafter cited as Testimony of Thomas F. Wenning.)

⁸ *Ibid.* See also H.Rept. 104-287, p. 6.

⁹ Letter from Ronald A. Block, Corporate Counsel for the National Grocers Association, to Wage and Hour Administrator, Karen Keesling, Aug. 6, 1992. Wenning, in *The Washington Post*, July 28, 1995, p. C2, again referred to DOL’s “strike force enforcement” mentality.

¹⁰ Letter from Ronald Block to Secretary Lynn Martin, Sept. 8, 1992. During a June 22, 1992, conference with NGA members, Martin cautioned that at “a certain age we just don’t
(continued...)

balance that adequately protects our young workers while assuring the continued availability of job opportunities so important to their future.”¹¹

The dispute continued. On October 7, 1994, Thomas Wenning of NGA, responding to a proposed rulemaking, observed: “... N.G.A. recognizes the critical need to create and preserve job opportunities for young people.” While NGA “strongly supports the intent of the child labor laws,” he observed that many such laws “were written in the context of the 1930s when children were frequently employed for long hours in sweatshop conditions or occupations such as manufacturing and coal mining.” He stated that hazardous occupation orders were “clearly outdated” and that their enforcement by DOL was “overly broad and excessive.” According to Wenning, the result would be “to severely reduce employment opportunities for teenagers under age 18 in the grocery industry.” He called for a ““common sense”” balance that would permit persons of 16 and 17 years of age, “with proper training and education ... to operate paper baling machines.”¹²

Gradually, over a series of years, the primary arguments opposing HO 12 standards were established. *First*. Enforcement of HO 12 would leave 16- and 17-year-olds without work. *Second*. The cost to employers, with penalties for any infringement of the regulations, would be passed on, where possible, to consumers.

Debate in Congress (1995-1996)

On March 10, 1995, Representatives Thomas W. Ewing (R-IL) and Larry Combest (R-TX) advised their colleagues that, during the week of March 13, “grocers from your district may visit your office to discuss a Labor Department regulation, H.O. 12, which is causing many of them to avoid hiring teenagers.” They noted that HO 12 was “a 40-year-old regulation which prohibits teenagers from loading paper balers ... even when the machine is turned off.” Under a bill introduced by Representatives Ewing and Combest (H.R. 1114 of the 104th Congress), “employees who are under 18 years of age would be permitted to load materials into the machines” — so long as the machines met American National Standards Institute (ANSI) standards.¹³

¹⁰ (...continued)

want to have children around certain machinery” and warned “Congress is not going to reduce the [working] age.” See Bureau of National Affairs, *Daily Labor Report*, June 23, 1992. (Hereafter cited as *DLR*.)

¹¹ Letter from Karen Keesling to Ronald Block, Oct. 16, 1992.

¹² Letter from Thomas Wenning to Administrator, Wage and Hour Division, U.S. Department of Labor, Oct. 7, 1994. DOL’s proposed rulemaking was overtaken by events in the Congress.

¹³ Dear Colleague Letter, Thomas W. Ewing and Larry Combest, Mar. 10, 1995. The American National Standards Institute (ANSI) is a private sector entity that promotes voluntary compliance with safety and related standards. In an Issue Brief, “Cardboard Balers and Compactors,” Food Marketing Institute (FMI), endorsing the Ewing/Combest bill, it is pointed out: “HO 12 simply does not reflect the realities of today’s workplace or workforce. It has a chilling affect on teen employment opportunities at a time of high youth unemployment.”

A campaign was now underway to modify HO 12 by legislation. Linda Rosenstock, Director of the National Institute for Occupational Safety and Health (NIOSH), reviewed the issue of paper balers and, under date of May 5, 1995, wrote to Maria Echeveste, Wage and Hour Administrator, recommending that the rule “should be maintained.”¹⁴ Conversely, Thomas Zaucha, President and CEO of NGA, wrote to Representative Bernard Sanders in support of H.R. 1114:

This legislation will end the overzealous enforcement of an unnecessary Wage and Hour law that resulted in inequitable citations for innocent retailers and decreased employment opportunities in grocery stores for teenagers.... The current rules and enforcement policy are unreasonable and result in excessive and unnecessary penalties for grocers and discourage them from employing teenage workers.¹⁵

The lines seem, clearly, to have been drawn; but, during subsequent hearings, they were the subject of dispute.

On July 11, 1995, the House Subcommittee on Workforce Protections and the House Subcommittee on Employer-Employee Relations, jointly, took up the issue. “Teenagers who are looking for summer jobs today are being turned away from grocery stores, which have traditionally hired a lot of teens to bag groceries and stock shelves,” Representative Ewing stated. The Ewing/Combest bill would “make it practical for grocery store owners to hire teenagers to stock shelves and then throw the empty boxes into the store baler.” Of course, some of the older machines might still be in use and, so, he went on to stress that “... under our bill teenagers would still be prohibited from even loading these [older] machines.”¹⁶

Representative Combest argued that fines under HO 12 would seem “to contradict common-sense even for Washington, D.C. standards.” The bill, he stated, “strengthens the current standard in many ways, including improvements in design, training, maintenance and inspection of balers to meet the tougher American National Standards Institute (ANSI) guidelines.” It provides business an “incentive to retro-fit their older balers to meet these more stringent requirements....” Pointing to the age of the regulation, he stated: “Maybe we should rename this regulation the ‘Rip Van Winkle’ rule.” He added: “... this sleepy old baler regulation was promulgated with the best of intentions, but it simply is outdated for today’s more advanced technology.” He appealed to Congress to do something to reduce the currently high youth unemployment rate which, for youth aged 16 to 19, “was more than 16 percent in 1994.”¹⁷

¹⁴ Linda Rosenstock to Maria Echeveste, May 5, 1995.

¹⁵ Thomas K. Zaucha to Rep. Bernard Sanders, May 19, 1995.

¹⁶ Statement of Rep. Ewing, July 11, 1995.

¹⁷ Statement of Rep. Combest, July 11, 1995. See also statements of the Food Marketing Institute and the National Grocers Association, aligned in support of H.R. 1114.

Speaking for regulation was Linda F. Golodner, president of the National Consumers League.¹⁸ She noted that young persons had a “very limited understanding of the range of potential hazards in the workplace.” Golodner proceeded through a series of questions concerning the paper baler. For the most part, she said, balers are located in isolated areas: in a basement or an out-building. On the one hand, this may render them less likely to be utilized by a casual baler. But, their isolation may also provide an incentive to *just go ahead* and get the work done. If a problem occurs, their isolation might render the baler/compactor too far away from authority for a quick response. Further, where a worker loads a baler/compactor, he may find it necessary “to rearrange the boxes or materials in the machine” — to reach into the machine, to readjust the load, or to clear a jam. Such a worker “likely feels an obligation to ensure that materials actually make it into the machine.” She reminded the Members that a paper baler “is a large, dangerous machine” — and one from which persons under 18 should remain clear.¹⁹

As the Committee moved for mark-up, Labor Secretary Robert Reich wrote to Chairman William F. Goodling (R-PA). Reich explained once more the nature of the problem: that H.R. 1114 would undercut essential protections now afforded youth as workers. He urged the Committee “not give favorable consideration” to the bill. He stated a commitment to “promoting employment opportunities” for youth but not those that “present a risk to their health and safety.” Although “representatives of the grocery industry” allege that modern balers are safe for minors to load, the risks “will be greatly compounded because employers, minors, parents, and enforcement officials will experience confusion over which balers the minors may legally load.” This bill would place “working youth at substantial risk of injury and/or death.” Given this risk, “I would again urge that your Committee not report this bill.”²⁰

The Statute is Modified (1996)

On July 20, 1995, the House Committee on Economic and Educational Opportunities reported the bill (largely on a party-line vote) and, on October 24, 1995, the full House took up its consideration. It was, Representative Ewing affirmed, “a common sense approach” to regulation.²¹ After a discussion, the bill was passed by the House.²²

¹⁸ Golodner had chaired the U.S. Department of Labor Child Labor Advisory Committee during the late 1980s and, subsequently, was co-chair of the Child Labor Coalition.

¹⁹ Statement of Linda Golodner, July 11, 1995.

²⁰ Letter from Robert Reich to William F. Goodling, July 19, 1995.

²¹ *Congressional Record*, Oct. 24, 1995, p. H10663.

²² *Ibid.*, pp. H10661-H10667. Compliance with this standard, observed the Child Labor Coalition, “will require vigilance by employers who put youth in contact with these machines — both in terms of differentiating between prohibited and acceptable machines and curtailing activity to just loading the machines. The Labor Department,” the Coalition pointed out, “requires no specific training for young workers under these new regulations.” See Coalition press release, Feb. 15, 2005.

On July 16, 1996, a new bill, a substitute proposed by Senators Tom Harkin (D-IA) and Larry Craig (R-ID), was called up for Senate consideration and adopted: as in the House, without a rollcall.²³ Referred to the House, Representative Cass Ballenger (R-NC) explained the nature of the substitute. The first change had to do with constitutionality.

While it is clear that Congress may, by reference, incorporate the current ANSI standard, there was concern about incorporating by reference future standards by a nongovernmental entity. Under the Senate amendment, future ANSI standards would apply only if the Secretary of Labor certifies that the standard is at least as protective of the safety of minors as the current ANSI standard.

A second change concerned a reporting requirement: that the Secretary, *for two years following enactment*, shall report any injuries or fatalities to the Congress. “The purpose of this legislation is to collect information[,] not to have another reason to fine employers.” Thereafter, the measure was adopted by the House and signed by the President on August 6, 1996 (P.L. 104-174).²⁴

A New Rule Becomes Effective

The reporting requirement, under the 1996 amendments, continued in effect until August 6, 1998. Only one report of a serious injury to a minor emerged; and, thus, no changes were recommended in the recently passed legislation.

Under the current rule (2005), youth workers (aged 16 to 17) “may load materials into, but not operate or unload, those scrap paper balers and paper box compactors *that are safe for 16- and 17-year-old employees.*” (Emphasis added.) To be regarded as *safe*, the baler or compactor had to meet a series of standards.

- (i) The scrap paper baler or paper box compactor meets the applicable ANSI standard ...;
- (ii) The scrap paper baler or paper box compactor includes an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;
- (iii) The on-off switch of the scrap paper baler or paper box compactor is maintained in an off position when the machine is not in operation; and
- (iv) The employer posts a notice on the scrap paper baler or paper box compactor (in a prominent position and easily visible to any person loading, operating, or unloading the machine) that includes and conveys all of the following information:....²⁵

²³ *Congressional Record*, July 16, 1996, pp. 17214-17217.

²⁴ *Congressional Record*, July 25, 1996, pp. 19165-19166.

²⁵ *Federal Register*, Dec. 16, 2004, pp. 75403-75404.

Driving as a Form of Teen Employment

Hazardous Occupations Order No. 2 generally prohibits persons under 18 years of age from employment involving motor vehicles on public roads or highways, together with certain other venues: i.e., “in or about any mine,” a locality “where logging or sawmill operations are in progress” — or in a place of particular hazard for persons between 16 and 18 years of age. In short, such driving should be only “occasional and incidental” to the minor’s employment. But, what constitutes *occasional* and *incidental*? And, why would more frequent driving place at risk persons between 16 and 18 years of age?²⁶

In 1968, Labor Secretary Wirtz called for a review of efforts “to increase youth employment opportunities wherever this is possible without endangering their health and safety.”²⁷ Among issues explored was driving a car as part of one’s occupation. Most persons of 16 and 17 years of age are newly-licensed drivers, lacking experience on the road. With that in mind, DOL determined that work-related operation of motor vehicles by 16- and 17-year-olds was “particularly hazardous” and that young persons ought not to be employed in such activity.

However, HO 2 did proscribe an exemption in response to “[i]ncidental and occasional” driving by the targeted group. As stated, the ban read:

... shall not apply to the operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if such driving is restricted to daylight hours; *Provided*, Such operation is only occasional and incidental to the child’s employment; that the child holds a State license valid for the type of driving involved in the job which he performs and has completed a State approved driver education course; And, provided further, that the vehicle is equipped with a seat belt or similar device for the driver and for each helper, and the employer has instructed each child that such belts or other devices must be used.

Excluded, for persons under 18 years of age was driving that involved the towing of vehicles.²⁸ With certain refinements of language (for example, “child” would become “minor”) and definitional adjustments, the provision remains in effect.²⁹

²⁶ 29 C.F.R. § 570.52 (July 1, 2004 edition). The final rule also contained a provision concerning school bus drivers, clearing up a regulation that had posed a problem a decade or more ago. That rule did not produce comments and, as a result, the rule was removed as unnecessary. See *Federal Register*, Oct. 23, 1990, pp. 42812-42813; and *Federal Register*, Nov. 20, 1991, pp. 58626-58627.

²⁷ U.S. Department of Labor, *Fifty-Sixth Annual Report, Fiscal Year 1968* (Washington: GPO, 1969), p. 17. (Hereafter cited as *Report of the Secretary of Labor*, with the year under review.)

²⁸ *Federal Register*, Mar. 28, 1968, pp. 5100-5102.

²⁹ 29 C.F.R. § 570.52(b)(1).

Preliminary Adjustments

After remaining a relatively quiet issue through much of the 1970s, federal regulation of child labor reemerged as a high-visibility issue early in the Reagan Administration. On July 16, 1982, the Department proposed major changes in the structure of child labor regulation. In response, the House Subcommittee on Labor Standards, chaired by Representative George Miller (D-CA), commenced two days of hearings on the issues raised. As the second day was about to commence, the Department decided to extend the comment period in order to receive and to consider additional evidence.³⁰ Eventually, the rule was withdrawn.³¹

In July 1987, Labor Secretary William Brock tried a new approach, announcing creation of a Child Labor Advisory Committee “to advise the Secretary” on administration of the child labor provisions under the FLSA.³² Linda Golodner of the National Consumers League was named chair. When the Committee met for the first time, they were advised by Wage and Hour Administrator Paula Smith that federal child labor regulations were “outdated, outmoded, and obsolete.”³³ But, the Committee proceeded through the various regulations and, in the fall of 1988, a final report was filed which, *inter alia*, urged modification (strengthening) of HO 2 including the *incidental* and *occasional* standard.³⁴ Still, very little happened.

In early 1989, Elizabeth Dole became the new Secretary of Labor. In testimony before the House Subcommittee on Labor Standards, June 1990, she had praise for employers “who legally employ young people within the bounds of the child labor laws...” But, she continued, there has been “a disturbing 128 percent increase in violations in the past four years.” In response, she created a series of “strike forces” which moved in on targeted industries in which children were most likely to be employed. The purpose of these initiatives (collectively, “Operation Childwatch”) was to promote understanding of child labor and to redress abuses.³⁵ Rather than

³⁰ U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor Standards, *Oversight Hearings, Proposed Changes in Child Labor Regulations*, hearings, 97th Cong., 2nd sess., July 28 and Aug. 3, 1982, 144 p. See also *Federal Register*, July 16, 1982, pp. 31010-31011, and 31254-31259; and *Federal Register*, Aug. 6, 1982, pp. 34166-34167.

³¹ See *Nation's Restaurant News*, Feb. 1983, pp. 2, 77; and *DLR*, Aug. 11, 1986, p. D3.

³² *Federal Register*, July 21, 1987, p. 27476.

³³ *Federal Register*, Feb. 17, 1988, p. 4788. See also *DLR*, Mar. 10, 1988, pp. A11-A12.

³⁴ *Federal Register*, Nov. 20, 1991, p. 58627. In May 1989, the National Consumers League launched its own year-long study of child labor, an effort that gradually emerged as the National Child Labor Coalition.

³⁵ U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor Standards, *Hearings on the Child Labor Provisions of the Fair Labor Standards Act*, hearings, 101st Cong., 2nd sess., June 28, July 19, and Aug. 1, 1990, pp. 16-17.

provide new regulations, Secretary Dole chose to enforce standards long in place but, frequently, it appears, violated with impunity.³⁶

In May 1994, with Robert Reich as the new Secretary of Labor, the Department again proposed a general review of federal child labor regulation.³⁷

A Response from the Congress

The *strike force* proceedings that had been utilized under some Secretaries of Labor had proved to be controversial.

The Initial Debates. In April 1994, Representative Mike Kreidler (D-WA) introduced a bill to modify the hazardous occupations treatment of “minors between 16 and 18 years of age engaged in the operation of automobiles.”³⁸ Representative Kreidler protested that violation of what he termed an “outdated” child labor provision had resulted in fines of \$197,000 against 59 Washington State auto dealers. After reviewing the statute and the regulations, he charged that auto dealers were unable to find a definition of “incidental and occasional” and expressed amazement that the Department had, “with unexpected zeal ... pursued cases against auto dealers.” He concluded that “the word is out” that “it’s safer to fire teenager lot attendants than to risk violating a law even the Department of Labor can’t define.”³⁹

Hearings by the Congress. In 1995, proposals were introduced by Representative Randy Tate (R-WA) and by Senator Slade Gorton (R-WA).⁴⁰ Senator Gorton charged that the federal government “is denying young people the opportunity to work.” What we are talking about, he stated, “is not exploitation, but perfectly reasonable actions” — “to drive cars for short distances, say, from one lot to another across the street, or to a nearby gas station.”⁴¹ During hearings before the House Subcommittee on Workforce Protections, September 12, 1996, Tate chided the “unfair” manner in which the Department has enforced federal child labor law and which “has prevented employers from hiring hundreds of teenagers in my district.” The Department, he suggested, has shifted its interpretation of the statute from “occasional and incidental” to “rare and emergency” which he regarded as an “unworkable standard.” The Department, he stated, should have been pursuing

³⁶ *Annual Report of the Secretary*, 1900, pp. 66-67.

³⁷ *Federal Register*, May 13, 1994, pp. 25167-25173.

³⁸ The Child Labor Advisory Committee had previously made recommendations “including defining and delimiting the terms ‘occasional and incidental’ driving and ‘outside helper,’” but they were not included in the various rulemakings. See *Federal Register*, May 13, 1994, p. 25171.

³⁹ *Congressional Record*, Apr. 26, 1994, pp. E779-E780. Ultimately seven other members from the Washington delegation signed on as cosponsors of the Kreidler bill (H.R. 4304). Here, as with the arguments of the National Grocers Association and the Food Marketing Institute (discussed above in connection with *balers* and *paper box compactors*), an appeal was made in behalf of *teen employment*.

⁴⁰ See H.R. 2089 (Tate) and S. 1099 (Gorton), both of the 104th Congress.

⁴¹ *Congressional Record*, Aug. 1, 1995, p. S11107.

“other priorities” rather than “punishing businesses that provide part-time jobs and summer jobs to teenagers.”⁴²

Golodner presented a different perspective. “Teenagers are at risk every time they get behind the wheel,” she stated. The Insurance Institute for Highway Safety “reports that the risk of crash involvement per mile driven among drivers 16 to 19 years old is four times the risk among older drivers. That risk is highest at age 16 and 17,” she pointed out. “Teenagers are inexperienced drivers,” she said, and they “should not be driving on the job.” The National Consumers League, she affirmed, was “strongly opposed” to the Tate bill.⁴³

During hearings before the Subcommittee on Workforce Protections, Representative Cass Ballenger (R-NC) noted that action by the Department had been both unexpected and retroactive. Janet Ramble, speaking for the Washington State Auto Dealers Association, explained that the Department had created “something called a strike force” and had targeted auto dealers. The Department, she stated, has “changed their policy” but “they didn’t notify anyone that they had reinterpreted incidental and occasional to mean emergency only.”⁴⁴ Both the National Automobile Dealers Association and the Washington State Auto Dealers Association reiterated their strong support for the Tate/Gorton legislation.⁴⁵ The bills died at the close of the 104th Congress.

Debate Continues. Auto dealers in Washington State, the *New York Times* reported during the spring of 1998, “say it never occurred to them that they could be breaking the law by giving part-time jobs to 16- and 17-year-olds.” And so, the *Times* added, the auto “dealers came to congress ... for a law that would supersede the [DOL] regulation.” Darlene Adkins of the National Consumers League viewed the situation differently. “What we’re seeing is this trend of employers, industries and associations getting penalized for child labor violations ... and instead of saying we need to fix this problem and comply with the law, they’re putting pressure on legislators to change the law.”⁴⁶

On July 31, 1997, Representative Larry Combest (R-TX) introduced H.R. 2327, a bill titled the “Drive for Teen Employment Act.” It was marked-up and reported to the full Committee on Education and the Workforce.

⁴² U.S. Congress, House Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections, *Oversight Hearing on the Fair Labor Standards Act*, hearings, 104th Cong., 2nd sess., Sept. 12, 1996, pp. 2-8. (Hereafter cited as House Subcommittee on Workforce Protections, *Oversight Hearing on the Fair Labor Standards Act*.) Tate was followed, pp. 16-18, by Edward Fitzpatrick, the Washington State Auto Dealers Association.

⁴³ House Subcommittee on Workforce Protections, *Oversight Hearing on the Fair Labor Standards Act*, p. 26-29.

⁴⁴ *Ibid.*, p. 124.

⁴⁵ National Automobile Dealers Association, *NADA News*, Sept. 12, 1996, 2 p.

⁴⁶ *New York Times*, Apr. 12, 1998, p. 17.

During full Committee mark-up, Representative Harris Fawell (R-IL, a co-sponsor of the legislation) argued that the departmental requirement “significantly restricts the ability of teenagers to gain valuable experience in the workplace” and has “created confusion for many businesses.” As a result, he stated, “there have been a number of employers, primarily automobile dealerships, which have been fined thousands of dollars for allowing teens to drive cars from one lot to another or to a nearby gas station for refueling.” He expressed his “strong support” for the measure.⁴⁷

Labor Secretary Alexis Herman opposed the bill. In a letter to Committee Chairman Goodling, she expressed concern that the result would be “an increase in the number of automobile-related injuries and deaths caused by very young and inexperienced drivers.” Many persons in the targeted group (16 to 17 years of age) “will have just been licensed to drive and, were the legislation adopted, would be spending “as much as one-fifth of their workweek behind the wheel on public roads and highways.” She pointed out that the measure, as written, could also cover pizza delivery persons in what some have identified as “fast-paced” and a “highly competitive” field. She concluded that “public policy dictates that any modifications to weaken child labor protections be carefully weighed against the potential harm to the health and safety of these young people.”⁴⁸

The Congress Acts. On September 28, 1998, Representative Fawell moved to suspend the rules and to bring H.R. 2327 to the floor. As called up, the bill in amended form evidenced some concession to Departmental views. *First.* It provided that persons under 17 years of age “may not drive automobiles or trucks on public roadways” as part of their employment. *Second.* Occupational driving by 17 year olds was permitted only if certain conditions were met — mainly, safety factors.⁴⁹

Representative William Ford (D-MI) termed the measure “bipartisan” and commended the various advocates of protection for their insights and persistence which had resulted in legislation “addressing many of the legitimate concerns” that had been raised.⁵⁰ Representative Robert Andrews (D-NJ) viewed the bill as “a youth employment bill.” He noted: “Frankly, if the young person is not permitted to drive on occasion, his or her value to the auto dealer as an employee is rather diminished.”⁵¹

No Members appeared in opposition to the legislation — which was adopted on a voice vote.⁵² The Senate took up the bill on October 12, 1998, and passed the

⁴⁷ Statement of Rep. Harris Fawell at mark-up of H.R. 2327, Apr. 1, 1998.

⁴⁸ Labor Secretary Alexis N. Herman to Rep. William F. Goodling, Mar. 31, 1998.

⁴⁹ *Congressional Record*, Sept. 28, 1998, pp. H9124-H9125.

⁵⁰ *Ibid.*, pp. H9125-H9126.

⁵¹ *Ibid.*, p. H9126.

⁵² *Ibid.*, p. H9127.

measure with a technical amendment — returning the bill to the House.⁵³ The House again adopted the measure with a voice vote.⁵⁴ On October 31, 1998, the legislation was signed by the President.

The New Rule. The new rule, having gone into effect on February 15, 2005, provides regulations under which the “Drive for Teen Employment Act” will be implemented. Aside from the restriction of age (no one under 17 years of age may drive as part of their occupational duties), the rule provides for the following:

- (1) The automobile or truck does not exceed 6,000 pounds gross vehicle weight, and the vehicle is equipped with a seat belt or similar restraining device for the driver and for any passengers ...;
- (2) The driving is restricted to daylight hours;
- (3) The minor holds a State license valid for the type of driving involved in the job performed and has no records of any moving violations at the time of hire;
- (4) The minor has successfully completed a State-approved driver education course;
- (5) The driving does not involve: the towing of vehicles; route deliveries or route sales; the transportation for hire of property, goods, or passengers; urgent, time-sensitive deliveries; or the transporting at any one time of more than three passengers, including the employees of the employer;
- (6) The driving ... does not involve more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the minor’s employer ...;
- (7) The driving performed by the minor does not involve more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than the employees of the employer);
- (8) The driving takes place within a thirty (30) mile radius of the minor’s place of employment; and
- (9) The driving is only occasional and incidental to the employee’s employment.

Drivers who carried food (pizzas, etc.) or who were engaged in time-sensitive trips (to a bank with deposits or to a rail station) were viewed as singularly subject to risk. Thus, “urgent, time-sensitive” deliveries were forbidden under the rule. Finally, the terms “*occasional and incidental*” were defined to mean “no more than one-third of an employee’s worktime in any workday and no more than 20 percent of an employee’s worktime in any workweek.”⁵⁵

Updating of Child Labor Standards

Some child labor standards are updated in response to congressional enactments. However, in major part, updates of non-legislative proposals have their origins in the technology of the workplace. Some old industries *may* have evolved new practices

⁵³ *Congressional Record*, Oct. 12, 1998, pp. S12397-12398.

⁵⁴ *Congressional Record*, Oct. 13, 1998, pp. H10796-10798.

⁵⁵ See *Federal Register*, Dec. 16, 2004, p. 75403, for a complete version of the regulation.

which could make the use of children and youth viable as workers. Some newer industries *may* have arisen that provide a safer environment for youth who work. But, what constitutes a *safe environment* for younger persons — of 14 and 15 and on up to 18 years of age?

In its revision of occupations considered hazardous for younger workers that took effect in mid-February 2005, DOL has limited itself to a series of very particular fields: (a) *cooking*, (b) work with *explosives*, and (c) employment involving *roofing* in its various aspects. With those particular industries in mind, some critics may ask whether the working environment has changed sufficiently to allow new standards to be implemented — and, whether the new standards are appropriate.

Cooking

In 1962, with extension of the FLSA to certain retail concerns, new regulatory standards were set forth for children and youth who worked in dining establishments.⁵⁶ Section 570.34(a)(7) of Title 29 C.F.R. provides *as permitted work* for persons aged 14 and 15 the following:

Kitchen work and other work involved preparing and serving food and beverages, including the operation of machines and devices used in the performance of such work, such as but not limited to, dish-washers, toasters, dumbwaiters, popcorn poppers, milk shade blenders, and coffee grinders; ...

At the same time, Section 570.34(b)(5) of Title 29 C.F.R. provides, by way of caveat, the following areas that *shall not be permitted* for persons 14 and 15 years of age.

Cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking; ...⁵⁷

These regulatory standards remain in effect, although the industry would seem to have changed in certain respects.

Initial Proposals by the Department of Labor. While recognizing that certain aspects of cooking (“Lifting large containers of hot materials, working over a hot stove for long periods of time, cooking over an open flame, and operating pressure cookers were all considered too dangerous for young workers.”) were not appropriate for persons under 16 years of age, the Department stated that “preparing an occasional hamburger or grilled cheese sandwich ... did not seem to place young workers at risk.” Such activity might be performed “in plain view” of the customer.

⁵⁶ Under the original FLSA, the child labor provisions were separated from the main statute and administered by the Children’s Bureau within the Department of Labor. See *Federal Register*, Oct. 22, 1938, pp. 2531-2533.

⁵⁷ *Federal Register*, May 2, 1962, p. 4165. A special regulation governs the operation of power-driven meat-processing machines: Hazardous Work Order 10. However, that particular Order was not a part of the current proposal. See *Federal Register*, Oct. 23, 1990, p. 42813, and *Federal Register*, Nov. 20, 1991, pp. 58627-58629.

“The work was not strenuous, did not require continuous cooking at a grill or stove, and did not require the minor to use complicated or dangerous equipment.”⁵⁸

Gradually, *snack bars* and *soda fountains* gave way to fast food restaurants. In some establishments, food is still prepared in plain view of the customers. In others, it may not be. Further, in some full-service restaurants, some food is prepared *in plain view* as a form of entertainment — while, in others, it is prepared in separate facilities. From the perspective of a child/youth worker (or of his employer), this could pose a dilemma; and, given this evolution, some argued that the “place of performance” (*in plain view*) added to the regulatory confusion. In some cases, youth workers may perform most cooking jobs because, in the nature of the work, “all cooking is performed in the plain view of the customers.” In another environment, those minors “would not be able to perform the identical functions because all cooking is done in a closed kitchen away from the customer’s view.” A further complication has been the advent of equipment such as “microwaves, automatic cooking machines and systems, and computerized equipment and systems.”⁵⁹

The Reagan Proposals: 1982. In mid-July 1982, the Reagan Administration proposed revision of employment options for minors of 14 and 15 years of age.⁶⁰ The proposed rule would have permitted employment “in occupations involving cooking and baking except those involving the handling of hot grease” at or above 140 degrees Fahrenheit. Such cooking, it was explained, should not be “over an open flame” or involve “cooking with containers under pressure which have no safety valves.” Further, there would have been an extended pattern of work: from 3 hours to 4 hours a day while school was in session, and from 7 p.m. to 9 p.m. for closing time.⁶¹

The preface discussed the working patterns of 14- and 15-year-olds and noted: “While the industry distribution of these establishments is unknown, they are most likely concentrated in the retail and service trades.” It added: “The interest shown by the fast food and amusement part industries in revision of the hours provision of the child labor regulations supports this view.”⁶²

In the Subcommittee on Labor Standards, Representative George Miller observed that “the Reagan administration [had] unveiled its first concrete plan for expanding job opportunities,” he branded the “proposals as profoundly unwise.” The Department has proposed “an unconscionable proposal to increase substantially the number of hours that 14- and 15-year-olds may work,” he stated, that is “profoundly insensitive to the needs of 14 million Americans who are without work and to whom

⁵⁸ *Federal Register*, Nov. 30, 1999, p. 67133.

⁵⁹ *Federal Register*, Dec. 16, 2004, p. 75385.

⁶⁰ The 1982 proposals dealt with a number of other, separate, provisions in addition to cooking. See *Federal Register*, July 16, 1982, pp. 31254-31259.

⁶¹ *Federal Register*, July 16, 1982, p. 31256. Use of 140 degrees Fahrenheit was used because it is the level at which “a first degree burn can occur.”

⁶² *Federal Register*, July 16, 1982, p. 31256.

this administration offers very little in the way of hope.”⁶³ The rule was later withdrawn.

The Clinton Proposals. During the Clinton Administration, contention over child labor continued to surface. The Child Labor Advisory Committee (and now, the independent Child Labor Coalition), with others, continued to affirm the need for protections for working children and youth.

Initial Proposals in 1994. In early 1994, the new Wage and Hour Administrator, Maria Echaveste, issued an advance notice of proposed rulemaking and a request for comment. “Because of changes in the workplace and the introduction of new processes and technologies since the adoption of current regulatory standards,” it began, “... the Department is undertaking a comprehensive review of the criteria for child labor employment....”⁶⁴

Various entities have sought to review these standards: some to strengthen them, others to relax them. Echaveste sought comment on the time that children/youth workers might be employed and the special situations with which they might be involved. School systems “have begun converting to non-traditional attendance schedules and remain open year-round,” the Department noted. Further, home education programs have become common. Or, some schools may operate on a “platoon system” of differing schedules. The Department asked: “... how do employers and student-employees determine when different hours restrictions are applicable and what records would have to be maintained to ensure compliance?”⁶⁵

Further, the proposal took up the *in plain view* regulation, a ruling that applied, *inter alia*, “to full service restaurants and certain fast food restaurants where the cooking configuration does not permit customers to plainly view the cooking activity.” Should cooking, the Department inquired, be permitted in retail and food establishments and, if so, with what restrictions? It questioned 29 C.F.R. § 570.34(a)(7) concerning the operation of toasters, dumbwaiters, popcorn poppers and related equipment. Should any of these machines, it asked, *be reconsidered?*⁶⁶ The questions were raised for general review.

A Second Assessment: 1999. In late November 1999, DOL proposed yet another rulemaking and request for comments — and, in the process, summarized comments already received. NIOSH noted the risk of burns which, for adolescents, were “frequently severe.” It indicated that teenagers comprise nearly one-quarter of total employment in eating and drinking places and stated that “the ‘in plain view’ policy provides no additional safety factors for teens.” It recommended that cooking

⁶³ U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor Standards, *Oversight Hearings: Proposed Changes in Child Labor Regulations*, July 28 and Aug. 3, 1982, p. 1.

⁶⁴ *Federal Register*, May 13, 1994, p. 25168.

⁶⁵ *Ibid.*, p. 25170.

⁶⁶ *Ibid.*, pp. 25170-25171. The proposal dealt with other child labor matters, as well; but, since they reach beyond the issue of *cooking*, they will not be discussed here.

be prohibited regardless of where performed.⁶⁷ The Child Labor Coalition “opposed 14- and 15-year-olds performing any cooking, grilling, or frying.”⁶⁸ The Massachusetts Department of Health, Occupational Health Surveillance Program, and the National Consumers League took similar stands against anyone under 16 cooking — while the Washington State Department of Labor and Industries recommended against “cooking and baking by workers under 16 years of age.”⁶⁹

The National Restaurant Association (NRA) supported allowing 14- and 15-year-olds “to perform cooking, including immersing foods in grease or tending cooked foods.” It also suggested that a standard of 140 degrees Fahrenheit serve as the cut-off point for handling hot grease “before or after cooking” where such workers were concerned. It urged that children and youth workers, 14 and 15 years of age, be protected against an open flame and that they not be involved with pressure cookers that have no safety valve. “The NRA cited the current regulations as ‘a product of a bygone era’ and stated that cooking and baking should be permitted regardless of where they are performed.”⁷⁰ The National Council of Chain Restaurants “also supported allowing 14- and 15-year-old minors to cook and bake. It labeled the current regulations as outdated and stated that the ‘in plain view’ interpretation does not lend itself to practical and consistent application in the restaurant industry.”⁷¹

Diverse comments had been made, pro and con, regarding equipment, deep fat or oil fryers, and the carrying of hot grease to and from various receptacles. DOL, however, seemed to focus on determinations tending toward the industry position. “The Department has preliminarily concluded that the current regulations should be revised so that 14- and 15-year-olds may perform a limited number of cooking activities (i.e., only those that are safe and appropriate) for their age group. The Department,” it noted, “believes that this regulatory revision can be done without negatively impacting employment opportunities for young workers.” It proposed (still tentatively) that 14 and 15 year olds could:

... (1) Cook with electric or gas grilles which do not involve cooking over an open flame, (2) use deep fat fryers which are equipped with devices which automatically raise and lower the “baskets,” but not pressurized fryers; (3) clean, maintain (including the changing, cleaning, and disposing of oil or grease and oil or grease filters) and repair cooking devices (other than power-driven equipment) when the surfaces of the equipment or liquids do not exceed a temperature of 140 [degrees] F.

The ban on all baking activities for those under 16 years would continue — but the Department was seeking to review the process. The proposed rule would ban the use

⁶⁷ *Federal Register*, Nov. 30, 1999, p. 67133. Comments are summarized by DOL and, again, by the author unless otherwise indicated.

⁶⁸ *Federal Register*, Nov. 30, 1999, pp. 67133-67134.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 67134.

⁷¹ *Ibid.*

of rotisseries, pressurized equipment and cooking devices that operate at extremely high temperatures.

When the Clinton Administration left office, new child labor regulations were still pending.⁷²

The Bush Proposals

In mid-December 2004, the new Bush Administration published final regulations governing child labor.

DOL proposed elimination of the “*in plain view*” provision. Comment was “unanimous in supporting the elimination of the ‘in plain view’ standard” — but there was disagreement as to what should replace it.⁷³ The Department came to the conclusion that yet another system might be useful: namely, one based on exposure to temperature. As a practical matter, however, some “expressed doubt that the minors, their employers, and enforcement officials would be able to determine when and if the equipment, oil, or grease had cooled to the permissible temperature” of 140 degrees Fahrenheit.⁷⁴ However, the maximum allowable temperature would be 100 degrees Fahrenheit for cleaning up and disposing of grease.

The Department recognizes that compliance with this standard will require vigilance by employers, whose managers and supervisors must assure that equipment and materials have cooled to 100 [degrees] F or less, before young workers are allowed to undertake any clean-up tasks such as washing the machines or removing or filtering the oil or grease.

But, the “ban on cleaning grilles that exceed a temperature of 100 [degrees] F would not prohibit 14- and 15-year-olds from performing the normal grill ‘maintenance’” that involves “the use of water and a spatula to scrape away and remove food particles and grease from the surface of the grill.”⁷⁵

The final rule permits children and youth (14- and 15-year-olds) to cook only on electric or gas grills “which do not have open flames.” Further, they are allowed

⁷² Ibid., pp. 67134-67135.

⁷³ *Federal Register*, Dec. 16, 2004, p. 75386.

⁷⁴ Ibid., p. 75387.

⁷⁵ Ibid., p. 75388. “Of all burn injuries,” states a press release from the Child Labor Coalition, Feb. 15, 2005, “nearly 50 percent are caused by hot grease. The Labor Department readily admits that compliance with this standard will require vigilance by employers to ensure that equipment and materials have cooled to 100 degrees Fahrenheit.” Darlene Adkins, for the Coalition, observed: “‘Issuing regulations that sometimes allow exposure to certain machines, equipment, and hot surfaces — but not to others — is confusing both to workers and employers,’ said Adkins. ‘It’s bound to result in young workers being exposed to greater danger.’”

to use “deep fryers which are equipped with and utilize devices that automatically lower and raise the baskets” in which fries and other foods are held.⁷⁶

With respect to baking, a restriction imposed upon young persons of 14 and 15 years of age, it was determined that “no regulatory modification” would be undertaken “at the present time.”⁷⁷ Testimony had been, the Department suggested, largely statements pro and con. But, DOL indicated that it would welcome any further information on the question.

Finally, the Department acknowledged that the rule “did not contain provisions dealing with the training of young workers.” It recognized “the important roles that occupational safety education and training — in the home, in the classroom, and on-the-job — play in helping teens experience positive work experiences and in reducing injuries to all workers.” It encouraged such persons “to expand their efforts in this important area of safety instruction.”⁷⁸

Section 570.34: The New Rule on Cooking

(a) * * *

(7) Kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work. Examples of permitted machines and devices include, but are not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, coffee grinders, automatic coffee machines, devices used to maintain the temperature of prepared foods (such as warmers, steam tables, and heat lamps), and microwave ovens that are used only to warm prepared food and do not have the capacity to warm above 140 F. Minors are permitted to clean kitchen equipment (not otherwise prohibited), remove oil or grease filters, pour oil or grease through filters, and move receptacles containing hot grease or hot oil, but only when the equipment, surfaces, containers and liquids do not exceed a temperature of 100 F. (* * * * *)

(b) * * *

(5) Baking and cooking are prohibited except:

(I) Cooking is permitted with electric or gas grilles which does not involve cooking over an open flame (**Note:** this provision does not authorize cooking with equipment such as rotisseries, broilers, pressurized equipment including fryolators, and cooking devices that operate at extremely high temperatures such as “Neico broilers”); and

⁷⁶ *Ibid.*, p. 75387.

⁷⁷ *Ibid.*, pp. 75386-75388. Speaking generally, Robert Green, Vice President for Federal Relations of the National Restaurant Association (NRA), observed that the update “better reflects the realities of today’s workplace.” Again, the NRA stated that the revised rules “should make it easier for restaurateurs to offer teens more job opportunities.” See *Nation’s Restaurant News*, Jan. 3, 2005, p. 18.

⁷⁸ *Federal Register*, Dec. 16, 2004, p. 75389.

(ii) Cooking is permitted with deep fryers that are equipped with and utilize a device which automatically lowers the baskets into the hot oil or grease and automatically raises the baskets from the hot oil or grease;...”⁷⁹

Other Changes to the Child Labor Requirements

Through the years, certain child labor regulations have become dated, either because the procedures to which they were anchored have changed or because the technology governing their implementation has changed. Two examples of this shift are explained below.

Explosives and Articles Containing Explosive Materials

On May 19, 1939, Katherine Lenroot, chief of the Children’s Bureau within the Department of Labor, proposed what would become Hazardous Occupations Order No. 1: restricting employment of youth workers in plants or establishments that involve explosives or explosive components. Ms. Lenroot explained that:

... an investigation having been conducted with respect to the hazards for minors between 16 and 18 years of age in occupations in or about plants manufacturing explosives or articles containing explosives;...

... the manufacture of explosives and articles containing explosive components is hazardous in nature...

... employment in plants manufacturing explosives or articles containing explosive components is especially hazardous for young workers who are characteristically lacking in the exercise of caution....

Therefore, Ms. Lenroot declared “that all occupations in or about any plant manufacturing explosives or articles containing explosive components” are particularly hazardous for employment of persons aged 16 to 18. She further defined, in a second paragraph, the concept of “plant manufacturing explosives,” as “the land with all buildings and other structures thereon, used in connection with the manufacturing or processing of explosives or articles containing explosive components.” And, finally, she referred to a listing of such components prepared by the Interstate Commerce Commission (ICC).⁸⁰

The Lenroot rule was subsequently modified in spring 1952 when Labor Secretary Maurice Tobin made certain amendments to it in order “to broaden the scope of the order.”⁸¹ In 1999, the Clinton Administration proposed an amendment to remove the reference to the ICC (that agency having been abolished in 1995) and

⁷⁹ *Ibid.*, pp. 75402-75403.

⁸⁰ *Federal Register*, May 20, 1993, pp. 2079 and 2080.

⁸¹ *Federal Register*, Mar. 20, 1952, pp. 2397-2398; and *Federal Register*, May 13, 1952, pp. 4323-4324.

listing the various explosives covered by the rule.⁸² The Clinton rule was not adopted, leading to the Bush Administration's rule of 2004.

As published in December 2004 (taking effect on mid-February 2005), the new rule eliminates the reference to the ICC and, in its place, substitutes a listing of explosives and articles containing explosives prepared by the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the Department of Justice (ATF) and published “at least annually in the *Federal Register*” — together with a reference to the ATF website where a more complete listing can be found.⁸³

Work in the Roofing Occupations

Hazardous Occupations Order No. 16 deals with the employment of young workers in various classifications of roofing. The final rule of December 16, 2004 (effective in mid-February 2005), provides an updating of the regulation.

Early during the Kennedy Administration, the Department of Labor reviewed the work practices of young persons involved in roofing operations. According to a report of the Bureau of Labor Standards, it was noted that “all occupations in roofing ... are dangerous, more dangerous than construction generally, and the incidence of injuries is four times as great as manufacturing....” On that basis, Labor Secretary Arthur Goldberg proposed that “all occupations in roofing...” be regarded as “particularly hazardous for the employment of children between 16 and 18 years of age....” The term “roofing operations” shall include weatherproofing and “(1) the installation of roofs, including related metal work and alterations, [and] (2) additions, maintenance and repair including painting and coating of existing roofs.” However, the terms *shall not include* “work performed in construction of the sheathing or base on roofs or the installation of television antennas, air conditioners, exhaust and ventilating equipment on roofs.” A hearing on the proposal was scheduled.⁸⁴

On January 5, 1962, the *Federal Register* carried an affirmation by Acting Secretary Willard Wirtz setting forth the new rule (to become Order 16). In addition to the general provisions stated earlier by Secretary Goldberg, it provided that the following *would not be covered*: “... gutter and downspout work; the construction of the sheathing or base of roofs; or the installation of television antennas, air conditioners, exhaust and ventilating equipment, or similar appliances attached to roof.” Further, the work of an apprentice or student-learner was spelled out in considerable detail.⁸⁵

With minor modification, the rule continued in effect through the years. Then, in mid-May 1994, the Clinton Administration called for public comment on a variety of hazardous work orders — including HO 16. Noting the exceptions of HO 16, the

⁸² *Federal Register*, Nov. 30, 1999, pp. 67135-67138, and 67142-67143.

⁸³ *Federal Register*, Dec. 16, 2004, pp. 75389-75390 and 75403.

⁸⁴ *Federal Register*, Oct. 31, 1961, p. 10180. A special exemption was made in behalf of apprentices and student-learners.

⁸⁵ *Federal Register*, Jan. 5, 1962, pp. 102-103.

Department observed that several states currently are more restrictive of roof-related work than the federal government. “Should all occupations involving work on roofs be prohibited? If so,” he questioned, “why?”⁸⁶

In response, the Department was asked why any youngster “under 18 years of age may perform any work on a roof.”⁸⁷ The majority view “supported the prohibition of roofing work and all work on a roof.” Some recommended expansion of the ban to include “any phase of roofing work, including the construction or repair of roof sheathing, installation of gutters and downspouts or any other related roofing work.” The single commenter not in support of a further ban was the Associated Builders and Contractors (ABC) which “commented that a ban would jeopardize valuable career-advancing opportunities” and would “prevent the brightest and best of non-college-bound adolescents from being recruited into careers in the construction industry.”⁸⁸ Thus, the Department has “preliminarily concluded” that an expansion of the existing ban be instituted to include all work on or about the roof of a building.⁸⁹ But, nothing was immediately accomplished.

In mid-December 2005, the Bush Administration issued a final rule on the roofing trades. After considering comments received through the years, the Bush Administration decided to reverse the early Kennedy exemptions and issue an all-inclusive ban. After considering “comments and available experience,” the Department had concluded that the dangers, originally cited, “still persist for youth working not only in roofing occupations but also *on or about roofs*.” (Emphasis added.) The latter term, “on or about roofs,” might be misconstrued.

To avoid the possibility of confusion as to the scope of this prohibition, the proposed definition of the term on or about a roof has been modified in the Final Rule, to clarify that the term includes work ‘upon or in close proximity to a roof’ and to clarify that the installation of trusses or joists is included in the ‘construction of the base of roofs’ within the meaning of this definition.⁹⁰

In addition, the ban would extend to “the installation and servicing of television and communication equipment such as cable and satellite dishes; the installation and servicing of heating, ventilation and air conditioning equipment...; or any similar work that is required to be performed on or about roofs.” In addition, the ban includes: “... all jobs on the ground related to roofing operations such as roofing laborer, roofing helper, materials handler and tending a tar-heater.”⁹¹

Thus, almost all enterprise involving roofing would seem to be off-limits for youth workers.

⁸⁶ *Federal Register*, May 13, 1994, pp. 25172-25173.

⁸⁷ *Federal Register*, Nov. 30, 1999, p. 67139.

⁸⁸ *Ibid.*, p. 67140. Comments are summarized by the Department of Labor.

⁸⁹ *Federal Register*, Nov. 30, 1999, p. 67140.

⁹⁰ *Federal Register*, Dec. 16, 2004, pp. 75397-75398.

⁹¹ *Ibid.*, pp. 75404-75405. The objection of the ABC seems to have been met by inclusion of special consideration for apprentices and student-learners.

Concluding Observations

Under the FLSA, there are a number of generic exceptions, pro and con, to the Act's child labor standards. In addition, there are 17 Hazardous Occupations Orders for children and youth engaged in non-agricultural work and an additional 11 Hazardous Occupations Orders for children and youth engaged in agricultural work. The regulations are different, depending upon the age of the worker, the type of work performed, and conditions under which employment is offered. Some of these regulations have been in place for many years — which might, to some, suggest a need for updating.

During the past several Congresses, a number of proposals that would have amended the child labor provisions of the Act have been offered. Some have focused upon work by children and youth in non-agricultural enterprise; others, in agricultural employment. While these have generally not been acted upon (aside from those discussed above), the continuing concern with employment of children and youth remains an item of interest for some Members of Congress and could emerge again as a public policy issue