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BERGESON & CAMPBELL, P.C.

1203 Nineteenth Street, NW | Suite 300 | Washington, DC | 20036-2401 | tel 202.557.3800 | fax 202.557.3836 | web www.lawbc.com

MEMORANDUMVia E-Mail

DATE: September 3, 2008

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: Department of Labor Issues Proposal to Modify Occupational Health Risk Assessment Process

On August 29, 2008, the U.S. Department of Labor (DoL), which implements, *inter alia*, the Occupational Safety and Health Act of 1970 (OSH Act) and the Federal Mine Safety and Health Act of 1977 (Mine Act), and which includes, among other agencies, the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA), proposed to modify its occupational health risk assessment process.¹ Written comments on the DoL proposal are due no later than **September 29, 2008**.

According to the preamble, the proposed rule would “compile[] in one easy-to-reference regulation, all of [DoL’s] existing best practices related to risk assessment, and includes two requirements to establish consistent procedures that promote greater public input and awareness of [DoL’s] health rulemakings.”² DoL states that the proposed rule is grounded in the OSH and Mine Acts’ directives that “agency actions should be based on the best scientific information available at the time of the agency action,” as well as in the DoL and federal government-wide guidelines issued pursuant to the Information Quality Act and the joint Office of Management and Budget (OMB)/Office of Science and Technology Policy Memorandum on Updated Principles for Risk Analysis.³

¹ See 73 Fed. Reg. 50909 (Aug. 29, 2008), available at <http://edocket.access.gpo.gov/2008/pdf/E8-20179.pdf>.

² *Id.* at 50910.

³ *Id.*

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After summarizing its existing risk assessment paradigm and its internal Information Quality Guidelines, DoL explains that “any health rulemaking should involve the open and vigorous exchange of information and ideas among technical experts in the relevant disciplines, policy makers, and the public,” and that “it is particularly important that [DoL] seek out and receive all relevant data before proposing a health standard.”⁴ Consequently, DoL:

is proposing that when developing a health standard regulating occupational exposure to a toxic substance or hazardous chemical, [DoL] agencies shall issue an Advance Notice of Proposed Rulemaking (ANPRM) soliciting public input on studies, scientific information, data describing the frequency, intensity and duration of exposure of workers in the affected industries and occupations, key default factors and assumptions, and other relevant information, prior to issuing a Notice of Proposed Rulemaking (NPRM) or other regulatory action in that health rulemaking.⁵

To ensure transparency, DoL also is proposing to post together in a docket on www.regulations.gov the following materials:

all relevant documents related to a rulemaking addressing occupational exposure to toxic substances and hazardous chemicals no later than fourteen days after the conclusion of the relevant rulemaking step that relied upon or utilized those documents. Those rulemaking steps would include but are not limited to: publication of the ANPRM, conclusion of the [Small Business Regulatory Enforcement Fairness Act (SBREFA)] process, publication of the NPRM, conclusion of any public hearing under the OSH Act and Mine Act, and the publication of the Final Rule. The documents to be posted would include but are not limited to: any underlying scientific studies relied upon in the rulemaking, to the extent possible given copyright limitations; all risk assessment analyses underlying the NPRM and Final Rule; the text of the ANPRM; SBREFA process documents; the text of the NPRM; all public hearing transcripts and briefs; all public

⁴ *Id.* at 50913.

⁵ *Id.* at 50913-14.



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comments; the final docket of the rulemaking; and the text of the Final Rule.⁶

DoL specifically invites public comments on these two proposed procedural requirements. Comments are due by **September 29, 2008**.

DoL's proposal, if issued in final, would not impose any requirements or obligations on employers, nor would it effect any changes to what is currently required of employers under the OSH and Mine Acts. Rather, DoL claims that the proposed rule seeks only to make procedural modifications to the occupational health risk assessment process.

Given the lateness of the hour of the Bush Administration, legislators and others have decried the proposed rule. Representative George Miller (D-CA), Chair of the House Education and Labor Committee, stated that the proposal is "a last minute rule that could dramatically weaken future workplace health and safety regulations and slow their enactment," and for this reason he introduced legislation in late July, H.R. 6660, that would prohibit DoL from issuing, administering, or enforcing the rule.⁷ Together with Senator Edward Kennedy (D-MA), Rep. Miller earlier had written to the Secretary of Labor and requested that the proposal be withdrawn. Just prior to DoL's publication of the proposal in the *Federal Register*, Rep. Miller is reported to have stated that while "the most objectionable language put forward was removed [from the version submitted to OMB] as a result of intense public pressure from Congress and the public," the proposal continues to be unacceptable.

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We hope this information is helpful. As always, please call if you have any questions.

⁶ *Id.* at 50914.

⁷ House Education and Labor Committee, "House Democrats Introduce Legislation to Stop Labor Department's 'Secret Rule'" (July 31, 2008), available at http://www.house.gov/apps/list/speech/edlabor_dem/Rel731SecretRule.html.