

United States Senate

WASHINGTON, DC 20510

December 13, 2010

The Honorable Hilda L. Solis
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Solis,

As Co-Chairs of the Senate Task Force on Manufacturing, we write to you today to call your attention to several questions we have regarding the Occupational Safety and Health Administration's (OSHA) proposed interpretation, published in the Federal Register on Tuesday, October 19, 2010, which would alter the Agency's policy regarding workplace noise exposure. There is significant alarm, in the manufacturing community in particular, that this new proposal would force businesses to make drastic and costly changes, often at the expense of job creation.

As we understand this change, OSHA would be overturning established and, to our understanding, effective policy that presently allows businesses to provide their employees with "personal protective equipment" – such as ear plugs and ear muffs that are fitted to the individual employees – if those items are more cost-effective than far broader administrative or engineering controls, to protect employees from elevated noise levels. These controls could include limiting the amount of time an employee can work in an area with high noise, or installing expensive and disruptive noise-dampening equipment at the employer's facility, or purchasing new equipment.

Under the new policy, the Agency would "...consider administrative or engineering controls economically feasible when the cost of implementing such controls will not threaten the employer's ability to remain in business, or if such a threat to viability results from the employer's failure to meet industry safety and health standards."¹ Thus, the paradigm will have shifted from whether or not the "personal protective equipment" is more cost-effective than administrative or engineering controls, to whether or not those controls would force a company to shut its doors.

OSHA does not appear to support this change with data or any suggestion that employees require this new level of protection. Indeed, the most recent Bureau of Labor Statistics (BLS) data on hearing loss injuries shows that from 2004-2009, incidences of hearing loss injuries have decreased from just under 29,000 per year to 19,500 per year, and the rate of injuries has gone from 3.2 per 10,000 employees down to 2.2.

As members of the Senate Small Business Committee, we would note that this new policy puts small and medium-sized manufacturers in a uniquely difficult position, as they will likely have to

¹ "Interpretation of OSHA's Provision for Feasible Administrative or Engineering Controls of Occupational Noise," 75 Federal Register 201 (19 October 2010), pp. 64216-64221.

spend thousands of dollars attempting to prove to the Federal government that their firm would go out of business as a result of making such changes. What we should be doing, particularly during these difficult economic times, is working to mitigate the regulatory burden on small businesses, not increase it.

Additionally, as BLS reported last week, 15.1 million Americans are unemployed (9.8%), and our economy has yet to witness the full-fledged growth we require to break free of this economic downturn. It is incumbent upon Washington, then, to implement policies that do not hinder job creation, but rather provide an environment for it to flourish.

As such, we have a number of questions we wish you to answer in writing prior to the deadline for submission of comments, which was recently extended to March 21, 2011, related to the proposed interpretation. Specifically, we would like you to address the following:

- Did OSHA consider alternative interpretations prior to deciding to publish the proposed interpretation in the Federal Register? If so, what were these alternatives?
- Did OSHA consider any unintended consequences the proposed interpretation could have on small businesses? How did the agency address these concerns during formulation of the proposed interpretation?
- Does OSHA have any quantitative data affirming the necessity to change this policy, given that numerous organizations have noted that the current policy is effective?
- What type and level of stakeholder outreach did OSHA do before publishing this proposal? Did OSHA consult with any businesses that would be affected?
- Did OSHA consider doing this as notice and comment rulemaking that would have included various protections such as analyses of the impact this would have on small businesses through a small business advocacy review (SBREFA) panel? If OSHA did consider doing this through a rulemaking, why did it choose to do this as merely a proposed interpretation not subject to any of the protections of a rulemaking, such as a SBREFA panel?

Thank you for your consideration to this matter. If you have any questions, please contact Chris Averill on Senator Snowe's staff at (202) 224-7884, or Greg Zagorski on Senator Lieberman's staff at (202) 224-4041.

Sincerely,



Olympia J. Snowe
United States Senator



Joseph I. Lieberman
United States Senator