ETHICS AND PUBLIC POLICY CENTER

July 18, 2024

EO 12866 Meeting
"National Apprenticeship System Enhancements"
RIN 1205-AC13

Natalie Dodson
HHS Accountability Project
Ethics & Public Policy Center

Thank you for the opportunity[1] to provide comments on OIRA's review of the Department of Labor (DOL) rule, "National Apprenticeship System Enhancements."[2]

My name is Natalie Dodson, and I am a Policy Analyst and scholar at the Ethics and Public Policy Center.

For the reasons I will explain, and as set out in more detail in my March 18, 2024, public comment to the Department of Labor, I support the Department of Labor's goal of "improv[ing] the quality of registered apprenticeship programs," however, the rule would have the opposite effect.[3] In an environment where local and state governments are already dealing with apprenticeship labor shortages, as well as a shortage of registered national apprenticeship program sponsors, the Department's requirements for nondiscrimination, training, and education would deter apprentices and program sponsor applicants rather than encourage participation in the apprenticeship system. The rule also raises serious religious freedom concerns, which the Department fails to address, as well as other legal and cost concerns.

Today, I will provide five points of particular interest for OIRA.

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, I are glad you are willing to hear an EPPC scholar's input on this rule. *See* Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.
[2] 89 Fed. Reg. 3118 (Jan. 17, 2024), https://www.federalregister.gov/documents/2024/01/17/2023-27851/nationalapprenticeship-system-enhancements.
[3] *Id*; *See* Natalie Dodson, EPPC Scholar Submits Comment Opposing DOL's Equity-Focused National Apprenticeship System Proposed Rule, https://eppc.org/publication/eppc-scholar-submits-comment-opposing-dols-equity-focused-national-apprenticeship-system-proposed-rule/.

I. OIRA should ensure that the Department of Labor demonstrates a need for rulemaking.

Purported need. For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. Federal administrative agencies are required to engage in "reasoned decision-making."[4] To justify replacing current regulations, an agency must provide specific evidence as to how the current regulations are causing harm or burdens and how the rules would remedy the alleged defects without causing equal or greater harms and burdens.[5] Here, the Department of Labor has failed to demonstrate any need for its rules.

The Department claimed in its proposed rulemaking that the rule is necessary to "improve the quality of apprenticeship training and the quality of working conditions for apprentices, and to further promote DEIA principles and goals throughout the National Apprenticeship System."[6] However, these changes would impose burdensome standards and training across all apprenticeship program sectors.

The Department states in proposed § 29.1 that the purpose of the proposed changes is to "ensur[e] equitable apprenticeship opportunities for underserved communities."[7] Yet these new standards and procedures may actually discourage access to the programs, undercutting the purported need for rulemaking. DOL states that it would like to "mitigate barriers and facilitate equal access and greater success for underserved communities," but by adding excessive training and education requirements, fewer organizations would partner with the DOL to become registered apprenticeship programs.[8] While the Department emphasizes the importance of access to these apprenticeship programs, the proposed rule failed to identify a single case where an applicant did not have an opportunity to be a part of a program. The rule would be a solution in search of a problem.

II. OIRA should ensure that the rule provides clarity and does not create confusion.

The Department of Labor claimed its rule would "increase clarity established by the universal baseline standards the Department seeks to apply across all registered programs."[9] Yet they do no such thing.

Despite an 182-page triple-columned document with a lengthy preamble describing the requirements across programs in all industry sectors, the proposed rule failed to define key terms and lacked an appreciation of the rule's impact on registered programs. Further, the Department would create a confusing and unclear standard by failing to provide relevant definitions and explanations. Thus, the rule is bound to create more confusion, not "clarity."[10]

---

[4] *Michigan v. EPA*, 576 U.S. 743, 750 (2015).
[5] *Id*. at 779 (regulation is irrational if it disregards the relationship between its costs and benefits); Alltelcorp v. FCC, 838 F.2d 551, 561 (D.C. Cir. 1988) ("a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist").
[6] 89 Fed. Reg. 3122.
[7] *Id*. at 3270.
[8] *Id.* at 3119.
[9] *Id*.
[10] *Id*.

III. OIRA should ensure that the rule adequately protects religious freedom.

The proposed rule defined "underserved communities" as "historically marginalized communities or populations…that have been adversely affected by discrimination."[11] These populations include "lesbian, gay, bisexual, transgender, queer, gender nonconforming, and nonbinary persons."[12]

The rule also would assign the Department the role of "promot[ing] diversity, equity, inclusion, and accessibility."[13] Under the rule, programs would be required to "adhere to all of the applicable non-discrimination and EEOC requirements contained in 29 CFR part 30."[14]

Further, DOL's rule would include an "obligat[ion]" on "program sponsors and participating employers to promote and maintain a safe environment that is free from violence, harassment, intimidation, and retaliation."[15] However, DOL did not define these terms in its proposed rule. It is unclear what constitutes harassment towards individuals that identify as "gay, bisexual, transgender, queer, gender nonconforming, and nonbinary." A recent harassment guidance by the Equal Employment Opportunity Commission stated that "sex-based harassment," which it said covers "sexual orientation or gender identity"[16] could include:

> repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.[17]

If the Department holds a similar view to EEOC that it is unlawful harassment to not use pronouns associated with a person's identity or allow people to use sex-specific facilities aligned with their identity, it would raise serious free speech and religious liberty concerns, especially when one of the goals of the rule is to support "persons adhering to particular religious beliefs or practices."[18]

The Department of Labor, in the proposed rule, failed to cite the First Amendment or consider other federal laws protecting faith-based organizations and religious employers from making employment decisions based on religion, such as Title VII and the Religious Freedom Restoration Act. In cases where faith-based, religious organizations or religious employers seek to sponsor a program, I urge OIRA to consider the impact of all relevant federal laws protecting religious exercise, especially those identified by the Supreme Court in *Bostock*: the First Amendment's ministerial exception, Title VII's religious organization exemption, and the Religious Freedom Restoration Act.

---

[11] *Id*. at 3276.
[12] *Id*.
[13] *Id*.
[14] *Id.* at 3127.
[15] *Id.* at 3160.
[16] Enforcement Guidance on Harassment in the Workplace, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_Toc164807996.
[17] *Id*.
[18] 89 Fed. Reg. 3276.

IV. OIRA should ensure that the rule does not overstate their benefits or fail to consider the costs.

The rule would constrain apprenticeship programs and burden businesses with extra costs. Through the DEIA initiatives, it would eliminate the competency-based model, where apprentices progress by demonstrating skills. This approach is counterproductive to effective skills training. It risks demotivating quick learners and increases expenses for employers. The rule's rigidity may discourage businesses from offering apprenticeships altogether, potentially reducing opportunities for aspiring workers.

The proposed rule included provisions that are tangential to developing effective apprenticeship programs. Notably, the Diversity, Equity, and Inclusion (DEI) mandates add unnecessary administrative complexity and shift focus from apprenticeships' core objectives of addressing workforce needs and creating viable career paths.

These requirements burden employers with providing "equitable" facilities and equipment for all workers, potentially pricing out small and medium-sized businesses from offering Registered Apprenticeship programs.[19] Additionally, states operating or planning their own apprenticeship agencies must develop plans to advance DEI across all state apprenticeship programs. This introduces a new layer of state-level bureaucracy and represents unwarranted government intervention in what should be industry-driven training initiatives.

V. OIRA should take into account other legal concerns

A. The rule would likely violate the spending clause of the U.S. Constitution

Lack of clear congressional intent: Federal funding conditions require Congress to express its intent "unambiguously" and "with [a] clear voice."[20] The rule appears to impose new requirements without identifying a "clear statement" in the authorizing legislation to support such conditions.[21]

Potential Equal Protection violation: If the rule violates the Equal Protection Clause, it would consequently violate the Spending Clause by imposing an unconstitutional funding condition.[22]

Overreach of spending power: The federal government's spending power cannot be used to compel states to engage in activities that would themselves be unconstitutional.

---

[19] *Id*. at 3118.
[20] *West Virginia v. Dep't of Treasury*, 59 F.4th 1124, 1140-41 (11th Cir. 2023) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).
[21] *Adams v. Sch. Bd. of St. Johns Cnty*., 57 F.4th 791, 815-16 (11th Cir. 2022) (en banc).
[22] *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

These issues raise significant concerns about the rule's compliance with established Spending Clause jurisprudence.

B. The rule is likely inconsistent with the Administrative Procedure Act

The Administrative Procedure Act (APA) requires that agency actions be "reasonable and reasonably explained."[23] For the rule to withstand scrutiny under the APA, the final version must thoroughly address the various policy concerns outlined previously. This includes:

Comprehensive consideration: The agency must demonstrate that it has carefully considered each of the identified issues.

Reasoned explanation: The final rule should provide a well-reasoned explanation for its decisions, particularly in light of the concerns raised.

Addressing reliance interests: Special attention must be given to the significant reliance interests of states like Florida that may be affected by the rule.[24]

Failure to adequately address these points could render the final rule vulnerable to challenge under the APA's standards for reasoned decision-making.

C. Proposed Regulatory Action Exceeds DOL's Authority

An agency rule can be invalidated under the Administrative Procedure Act (APA) if it exceeds the agency's statutory authority.[25] The rule appears vulnerable to such a challenge for several reasons:

Overreach of core objectives: The rule seems to extend beyond the fundamental purposes of apprenticeship programs.

Infringement on autonomy: It potentially encroaches upon the decision-making authority of employers and apprenticeship sponsors.

Lack of statutory basis: The Department of Labor (DOL) has not identified a clear statutory grant of authority that would justify such a significant departure from established practices.

Judicial skepticism: Courts tend to view with skepticism agency claims of newly discovered authority in long-standing statutes, especially when such authority represents a dramatic shift in regulatory approach.[26]

---

[23] *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).
[24] *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).
[25] 5 U.S.C. § 706(2)(A), (C).
[26] *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

These factors collectively suggest that the rule may exceed the DOL's delegated authority, potentially rendering it vulnerable to challenge under the APA.

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld and that Labor's rule has sufficient legal and economic analysis that reflects its obligations under the Constitution, the Administrative Procedure Act, and all other relevant legal authorities.