July 25, 2019

Submitted to:
http://www.regulations.gov

Adele Gagliardi, Administrator
Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5641
Washington, DC 20210

Comments on Regulatory Information Number – RIN #1205—AB85

Comments of the Mechanical Contractors Association of America (MCAA) on: 84 Federal Register 29970 et seq. June 25, 2019, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations (29 CFR Part 29)

Dear Ms. Gagliardi:

Please accept these comments on behalf of the Mechanical Contractors Association of America (MCAA), a national specialty construction employer trade association comprised of some 2,600 mechanical construction firms organized in some 82 chapters engaged in multiemployer collective bargaining with construction trade unions across the country, primarily local unions associated with the Plumbers and Pipefitters Union (UA). Together, MCAA members and UA locals jointly sponsor and contribute to pipe trades Registered Apprenticeship programs nationwide. The MCAA and UA employment base nationwide is well over 320,000 workers, all of whom comprise the high-skill workforce base of the high-tech mechanical construction, plumbing, sprinkler installation, and building and facility service industry sectors, trained in 243 jointly administered state-of-the-art Registered Apprenticeship training programs across the country.

Categorical support for permanent exemption of construction industry Registered Apprenticeship programs from SRE/IRAP Conflicts

Comment 1**. **MCAA categorically supports the construction industry exemption in the regulatory notice allowing that construction industry traditional Registered Apprenticeship programs under current 29 CFR Part 29 (now Part A) should be exempt from Industry-Recognized Apprenticeship Program (IRAP) conflicts.

DoL should not recognize Standards Recognition Entities (SREs) or IRAPs in the construction industry. And, the construction industry/sector should be broadly defined to include both building and construction jobsite occupations and traditional construction industry building, plant, and industrial facility maintenance and service occupations frequently incorporated into building trades Registered Apprenticeship programs.

MCAA also urges DoL to grant that exemption on a permanent basis, as per the Apprenticeship Task Force recommendations. The regulatory record and Task Force recommendations do not support a more tenuous exemption permitting a periodic construction industry deconfliction review on the basis of incomplete and questionable evaluation criteria and nebulous regulatory procedures.

Inconsistencies Between the Task Force on Apprenticeship Expansion Recommendations and the Proposed Regulations

The Task Force on Apprenticeship Expansion Final Report to the President of the United States (May 10, 2018) (hereinafter Task Force Report), says in Recommendation 14, Pilot Project: "The Industry-Recognized Apprenticeship program should begin implementation with a ***pilot project in an industry without well-established Registered Apprenticeship programs. This would test the process for reviewing certifiers and would help the Federal government better understand how to support industry groups working to develop standards and materials for Industry-Apprenticeship programs."*** [Emphasis added] (Task Force Report, page 34).

In contradicting this key Task Force recommendation, the regulatory record is insufficient at best, as demonstrated below.

The Training and Employment Notice No. 3-18 (July 27, 2018) on IRAPs, says only: "The Department has reviewed this Recommendation [test pilot program Recommendation 14], and agrees in part and disagrees in part. ... ***The large skills gap requires a more immediate response. Yet there is value to a program that tests how to proceed without undermining pre-existing successful efforts***." [Emphasis added] (TEN, p. 9)

The Regulatory Background on p. 29980, on this point says: "The Department has carefully considered the Task Force's recommendation that it begin with a pilot project, and its premise that there are contexts where registered apprenticeship opportunities are already well established. ***On the one hand the Department believes that the large skills gap requires a more immediate response than a pilot project would permit.*** Workers and employers in many sectors of the economy would benefit from greater use of apprenticeship programs where registered apprenticeship opportunities are not

currently significant. Accordingly, the Department does not propose limiting this new program to one or even a handful of industries." [Emphasis added]

These regulatory passages contradicting the Task Force recommendation fail to directly address the rationale for the pilot program that is stated directly in the recommendation for initial pilot program implementation – to test the process narrowly at first to ensure proper implementation as the scale of the SRE/IRAP deployment increases later.

Instead, the regulatory/bureaucratic contradiction is based on the asserted need for hasty wide-scale implementation only, and ignores the point in the recommendation about careful implementation to ensure better implementation as the IRAP scale increases.

Both the Training and Employment Notice and Regulatory Background statements fail to address the good-government rationale for measured pilot project initial deployment of the new SRE/IRAP system called for in Recommendation 14.

***Comment 2**. MCAA respectfully requests that DoL reconsider this fundamental misjudgment overruling the Task Force's Pilot Project recommendation and re-implement a test pilot program in the Final Regulations.*

If the Task Force expert panel process is to have merit, then its carefully considered recommendations arrived at over a year or more of deliberations should not be subject to summary bureaucratic reversal on incomplete analysis and conclusory grounds.

Surely the Task Force made its test pilot program recommendation in complete awareness of the context of the pressing need for greater workforce development measures to meet current economic conditions – the very reason for convening the Task Force in the first instance.

Other aspects of the possible conflict between IRAPs and Registered Apprenticeship programs and "deconfliction" procedures –

Proposed 29.31 Scope and Deconfliction between Apprenticeship Programs under Subpart A of This Part and This Subpart B

This section of the proposal announces the policy judgment to exempt, ***initially***, the construction industry from having to deal with parallel IRAP programs under proposed new Subpart B. That exemption stems from the Executive Order 13801 Apprenticeship Task Force's recommendation to focus on industries/sectors and contexts where registered apprenticeship is not well established, and to exempt SRE/IRAP approvals in

industries/sectors in contexts where, registered apprenticeships opportunities are already significant. The "***at least initially***" hedge appears first and only clearly in the proposed regulations. The proposed section 29.31 sets what appears to be an annual adjustment evaluation for this ongoing exemption based on industry/sector 5-year average enrollment in ***federal*** Registered Apprenticeships that warrant a continuing exemption if the annual 5-year average amounts to 25% or more compared with all ***federal*** registered apprentices and/or more than 100,000 total ***federal*** registered apprentices.

Comment 3. Construction industry exemption should be made permanent; the exemption should not sunset; annual deconfliction assessment for construction should be removed as the exemption is made permanent; and, the criteria and procedures for deconfliction review should be reconsidered altogether.

Again, in response to the specific "sunset" question in the proposal, MCAA endorses the construction industry exemption broadly defined and requests that it be made permanent. The exemption for the construction industry should not sunset. The exemption should be made permanent (removing the need for the annual deconfliction assessment), to protect the significant gains, achievements, and long-standing and large-scale ongoing investments in the construction industry Registered Apprenticeship programs.

Moreover, given the arbitrary and questionable nature of deconfliction criteria (why 25% or 100,000 in absolute numbers – judged relative to all industry apprentices?) from only a subset of all national programs – with 27 states' enrollment data omitted from the analysis, the sunset of IRAP exemption for construction is wholly unwarranted.

Instead, the national policy should focus on industries and occupations of much greater need to better conserve agency resources and make the most economic impact for the economy as a whole. In fact, this needs-based assessment, rather than an annual review of construction, where Registered Apprenticeship is widely deployed, is fully in line with Task Force Recommendation No. 8 – ***A Robust Need Analysis to Narrow Down the Areas of Most Acute Skills Shortages.*** Consistent with this recommendation, DoL should be proposing assessing and prioritizing needs, not deconfliction with established programs each year – ***after the initial pilot program evaluation***.

Does the Section 29.31 proposal contemplate an annual deconfliction assessment for the construction industry and military? If so, would any or all other industries be evaluated each year?

Would there be a formal Labor Department regulatory notice and comment procedure followed for this process?

Why does an evaluation of a particular industry's participation relative to all other industries support a sound national workforce development policy judgment?

Would DoL have the resources to do that analysis annually with fair notice and comment procedures allowed to all affected industries and programs?

Why wouldn't an industry triage assessment be used for the future SRE/IRAP industry deployment procedures, as in Task Force Recommendation Number 8 above?

Would DoL identify some industries periodically where the workforce development need is greatest (judged by employment projections) and the skill/training deficit the most significant for SRE/IRAP development on a need-based assessment?

How can sound policy judgments be made with evaluating apprentice enrollment in only Federal DoL Registered Apprenticeship states – omitting all the SAC states, where apprenticeship enrollment may be higher? (Footnote 17 on Page 29980 indicates that only Federal enrollment data will be used – not SAC state enrollment.)

Are IRAPs that either have or have not converted to Registered Apprenticeship status to be counted in the assessment?

If an IRAP that has converted to Registered Program status under proposed 29.25 operates in a SAC state, will that converted IRAP be counted in the deconfliction comparison as a Federal registrant – even if they operate in an SAC state without SAC registration but operate only under Federal Registration?

Is the current lack of SAC-state enrollment data a sufficient policy rationale for incomplete policy analysis?

The current rules would omit apprentice enrollment data analysis in: AZ, CN, DE, DC, FL, Guam, HI, KS, LA, KY, ME, MD, MA, MN, MT, NV, NM, NY, NC, OH, OR, PA, RI, VT, VA, WA, and WI; fully 27 of 53 states and territories. (Source DoL, ETA website.)

Why wouldn't fixing the data reporting problems in those SAC states be a better solution?

Why isn't this SAC-state data analysis insufficiency alone a compelling reason to engage in a test pilot program first, while the data analysis problem can be addressed?

In various places discussing the potential conflicts between RA and IRAPs, the notice uses the terms “industry” and “sector” interchangeably; is that intentional?

If it is intentional, should the distinction between the two terms be spelled out in the final regulations?

The regulatory proposal deconfliction assessment adopts the definition of “building and construction industry” from the 1988 8th Circuit Appeals Court’s ***Union Asphalts*** ERISA opinion.

Why isn’t this definition too narrow as applied to the actual building and construction industry registered programs on record, which may include not only construction occupations in line with that opinion, but also many building and construction industry building and facility maintenance and service and industrial plant and facility maintenance occupations long considered part of construction industry training and employment programs also worthy of the deconfliction exemption?

Unexamined assumptions that traditional Federal and State Registration procedures are rigid and inflexible; potential IRAP erosion of SAC standards

Comment/Questions 3 pertaining to proposed Section 29. 25
Much of the underlying discussion in the Task Force report seems grounded in oft repeated anecdotal observations that the current DoL/SAC-state registration model is ***rigid and inflexible*** – and seemingly the sole reason that the apprenticeship model has not been relied on to a much greater degree in the U.S. economy and workforce development system.

Did the Department do any survey or state-by-state analysis of the assumption underlying the rationale for the new industry-lead SRE/IRAP program showing that the traditional Registration system is rigid and inflexible? What is the specific definition and objective criteria that comprise “rigid and inflexible”?, other than time-based progression and “seat-time” requirements?

On the contrary, there are State Apprenticeship Council comments on record denying the premise for the proposal – that the lack of large-scale use of apprenticeship across industries is due to the alleged rigid and inflexible nature of the traditional Registered Apprenticeship model.

The Washington State Apprenticeship and Training Council recently filed a Resolution Opposing the Proposed Federal Rules on IRAPs, and it convincingly asserts, from a

SAC-state view, that the current SRE/IRAP proposal would potentially seriously undercut existing successful SAC-state programs.

There is no explanation in the preamble to the regulatory proposal as to why the allowance of SRE/IRAPs to bypass SAC state approval and seek DoL expedited Federal Registered Apprenticeship 29/29 Part A registration (under proposed Section 29.25) for an IRAP operating in a SAC state is not actually very conflictual with existing SAC state programs.

How does DoL address that conflict, or rationalize the procedure allowing an IRAP to bypass established state SAC procedures and safeguards and allow a Federally Registered IRAP to operate in competition with SAC-state registered programs?

In the consideration of regulatory alternatives, did the Department consider testing a pilot program first in an industry or sector of greatest need, and then consider less disruptive alternatives than creating a parallel IRAP program with the risk of ongoing conflictual patterns with the long- and well-established DoL/State Apprenticeship registration model?

For example, could DoL and SAC state administrators find ways to encourage greater multiemployer collective bargaining or multiple employer adoption and expansion of the current model (in the same way DoL has recently encouraged development of multiple employer health plans and 401(k) retirement savings plans)?

Can regulators help encourage private industry to develop joint employer funding mechanisms and shared apprenticeship workforce and jobsite employment and mentoring systems that would replicate the success of the current construction industry collective bargaining jointly administered workforce development system?

Is the difficulty of separate employers sharing and rotating apprentices among separate employers in the employment/job training aspect of the apprenticeship process more of a problem and impediment than any supposed “rigidity” or “inflexibility” in the current Registered Apprenticeship system? If so, are there regulatory alternatives to promote broad scale adoption of apprenticeship that are less potentially disruptive than creating an entirely new parallel SRE/IRAP program?

Is the apparent lack of means to develop a shared multiple employer funding mechanism more of a problem than the purported inflexibility of the traditional registration process? If so, are there regulatory alternatives that would address that more narrowly than creating a parallel IRAP system?

If an IRAP converts to Federal Registered Apprenticeship status in either a SAC or DoL state, will it then be entitled to be considered a Registered program for purposes of the Federal Davis-Bacon or state prevailing wage laws?

The regulatory analysis also declares (p. 29981) that: " [I]n the interest of maintaining the distinction between Industry Programs and registered apprenticeship programs, the Department wishes to clarify that recognition as an Industry Program does not confer categorical eligibility for government programs which provide special status to programs registered under the National Apprenticeship Act."

The final regulation should specify in detail what those specific programs and bases for eligibility are, and what the qualification "categorical" eligibility means in very specific detail.

Comment 4. ***The final regulations should explicitly and clearly specify the ineligibility of IRAP participants from Davis-Bacon and state prevailing wage law coverage. The Final Regulations should clearly enact Task Force Recommendation 17 – Inapplicability of the Davis-Bacon Act – "Industry-recognized apprenticeship program participants cannot be considered as apprentices for purposes of meeting the Davis-Bacon Act wage requirements."***

This should also be clarified to extend the bar to IRAPs that are subsequently converted to Registered Apprenticeship status under Section 29.25, and to state prevailing wage law ineligibility. Moreover, the list of programs for which IRAPs are not categorically eligible under the National Apprenticeship Act referenced on page 29981 should be expressly set out in the Final Regulations.

Lack of important and explicit apprentice welfare safeguards in various aspects of SRE program development requirements
Proposed Section 29.22 Responsibilities and Requirements of Standards Recognition Entities

Proposed Subsection 22(a) (4) seems to say the SRE must recognize only IRAPs that present training in "apprenticeable" occupations. It is not clear if the SRE is governed by DoL or SAC-state procedures for determining apprenticeability. Does the SRE have independence of any DoL or SAC state governance with respect to what is considered an "apprenticeable" occupation?

If the SRE/IRAP has ungoverned discretion on the “apprenticeability” determination, what checks and safeguards will there be against lax or exploitative apprenticeability determinations?

Subsection 22(b) says the SRE must “validate” the IRAP’s compliance with the criteria for training in an apprenticeable occupation set out in the Section. It is not clear if this requirement is meant to encompass “validation” in the technical sense of the term – that is, Title VII of the 1964 Civil Rights Act validation of job-related requirements under the Uniform Guidelines on Employee Selection Procedures (UGESP) – a complex and expensive procedure mandated for written tests and certifications that become employment eligibility criteria.

Does the SRE have Title VII UGESP responsibility for written test job requirements? If so, why isn’t that process considered in the cost analysis portion of the regulatory notice?

In a related requirement, the proposed section says the IRAP must affirm its compliance with Federal and state non-discrimination requirements – called Equal Employment Opportunity (EEO) requirements.

Yet, the Section-by-Section discussion of the proposal indicates that the current 29 CFR 29 and 29/30 non-discrimination and affirmative action requirements that apply to Part A Registered programs do not apply fully to Part B SRE/IRAP programs. In fact, p.29975 says the EEO requirements in proposed Subsection 29.22 (a) (4) (viii): “[T]his requirement is distinct from the requirements that apply only to registered apprenticeships under 29 CFR 30.”

Is that non-discrimination/affirmative action differential between Part A and Part B programs the intention of the proposal? That is, is the recent expansion of the non-discrimination requirements under Part A 29 CFR 29 in the current regulations likewise not extended to Part B programs?

If so, what bases of the current Part A non-discrimination requirements would be omitted from Part B registrants?

What is the specific rationale for that differential, and what is the social policy justification for having disparate standards?

Would that differential then make it possible for an IRAP to gain expedited Federal approval under 29 CFR 29 Part A without having complied with Part A non-discrimination and written affirmative action plans as required of initial Part A Registered Programs?

If so, what is the rationale for that, and what is the social policy justification for having disparate standards?

Are the apprentice “mentors” contemplated for the employment/work aspect of the IRAP training and others dealing with IRAP apprentices required to have anti-harassment training to the same degree that that training is required under 29/29 and 29/30 requirements for Registered Programs under Part A? If not, why not?

Do the employment “mentors” contemplated under the new SRE/IRAP programs have to have any direct experience or training in education and training and/or adult education? If not, why not?

The proposal says the SRE shall only recognize IRAPs that provide a safe working environment for apprentices. That is under-inclusive and under-protective – the SRE should see to it that apprentices are trained in safe work procedures for the work environment they are dispatched to, and that those workplaces themselves must be warranted on safety grounds.

Comment 5. ***The entirety of the regulatory proposal overall and the various provisions of proposed Section 29.22, Responsibilities and Requirements of Standards Recognition Entities should be re-reviewed and corrected to more fully and robustly comply with Recommendation 12 of the Task Force, Ensuring Equity: “Equal access to employment opportunities will be a defining element of the Industry-Recognized Apprenticeship program. Equity is about ensuring that each American has equal access and opportunity to the benefits of apprenticeship and employment....”***

It is simply untenable for the Labor Department to establish and condone differential and inequitable equal employment opportunity and affirmative action standards for Registered Apprenticeship as compared with the new SRE/IRAP program.

Respectfully submitted,

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