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THE IMPACT OF REGULATORY REFORM ON LABOR LAW: REDRESSING THE HISTORICAL BALANCE

Malcolm R. Lovell, Jr.*

INTRODUCTION

A key element in the Reagan Administration’s program for economic recovery is the reduction of the regulatory burden. The public focus of this effort has been to reduce costs on business imposed by ineffective and unnecessary Federal regulations. The rationale, in terms of the economic recovery program, is clear.¹ In recent years, the costs of federally imposed regulations have been estimated to account for more than 10 percent of total business investment.² These costs, as well as the uncertain future and direction of certain regulatory programs, have contributed to business uncertainty and diverted investment capital from expanding productive capacity. Because some of these costs are not imposed on foreign manufacturers who export to the U.S., they also contribute to the decline in the ability of U.S. manufacturers to successfully compete in an increasingly global marketplace.

The Reagan Administration’s efforts to reduce the costs of regulation have received considerable attention.³ Some commentators characterize the Administration’s regulatory “reform” program as merely a thinly disguised effort to dismantle important social (as opposed to economic) regulations that took decades of hard-fought regulatory battles to establish. These critics view this “dismantling” as a victory for socially insensitive business elements which are motivated solely by the desire to expand profit margins. In short, the government’s policy of reducing regulatory costs is seen as a

*Under Secretary of Labor.

1. See White House Office of the Press Secretary, Fact Sheet, President Reagan’s Initiatives to Reduce Regulatory Burdens, (Feb. 18, 1981).


3. See, e.g., Guzzardi, Reagan’s Reluctant Deregulators, FORTUNE, (Mar. 8, 1982); Regulation — the First Year, REGULATION, (Jan./Feb. 1982).
reactionary attempt to weaken or eliminate needed employee protections, which would not exist without governmental intervention. In reality, however, the opposite is true. Regulatory reform is a major key to continued social progress in America and to the preservation of the U.S. standard of living. This paper will address the impact of regulatory reform upon labor law and labor relations.

FOUNDATIONS OF LABOR LAW

18th Century to New Deal

In order to understand the regulatory reform approach taken by this Administration, we must first understand the historical antecedents of the regulatory explosion in the 1960's and 1970's. The industrial revolution brought increased economies of scale to the production of basic goods, supplanting self-sufficient family farms and small proprietorships as the primary means of producing goods. Technological advances in transportation and communications brought about similar economies of scale to the production of services. As a result of these changing economic relationships, public policy, particularly in the 20th century, was primarily concerned with the relationships between employers and employees. This concern can be traced through the continual growth of labor legislation and regulation. Indeed, today, the legal and regulatory relationships between employers and employees affect the lives of working men and women more than any other area of the law.

While increased attention to "individual/workplace" or "employer/employee" relationships dates back to the latter half of the 18th Century, it was during the New Deal that the Federal Government entered into many areas previously immune from governmental intervention. The goal of the Roosevelt Administration was to establish a legal framework and an administrative mechanism within which representational disputes and collective bargaining issues could be peacefully resolved. The passage of the Norris-LaGuardia Act 4 and the Wagner Act 5 effectively guaranteed the right of employees to organize and bargain collectively without governmental intervention. The Wagner Act left the parties free to determine and implement, independently, the substantive terms and conditions of employment. 6

6. It might be argued that, contrary to this general approach, laws such as the Fair Labor Standards Act (the FLSA) represented a clear imposition of Federal substantive standards. But a careful examination of even the FLSA suggests that it was not a deviation from the pattern.
Impact of Regulatory Reform

Prior to the end of the Second World War, and immediately thereafter, public support for free collective bargaining was eroded by a series of bitter work stoppages in key industries. In 1944, bituminous coal miners struck twice. A nationwide rail strike in 1946 resulted in President Truman’s call to draft strikers. In addition, union protests against wartime wage controls led to a growing public perception that unions had become too strong and that unfettered collective bargaining could harm the public interest.7

As a result of these perceptions, Congress enacted the Labor-Management Relations Act of 1947,8 more commonly known as the Taft-Hartley Act. Taft-Hartley,9 inter alia, stated that certain practices engaged in by labor organizations had the effect of burdening commerce. These activities included strikes, secondary boycotts, hot cargo agreements, and other activities which impaired the public’s interest in the free flow of commerce. During the 1950’s, various industrial disputes occurred; some cases led to demands from several sectors for immediate Taft-Hartley action.10 A notable example of the Act’s implementation was President Eisenhower’s obtaining a Taft-Hartley injunction during the lengthy steel industry strike of 1959. While such governmental intervention arguably altered the bargaining process, it nevertheless represented action aimed at policing the “rules of the road.” The government’s primary concern was the impact of strikes on the national economy, not the outcome of a collective bargaining agreement. Thus, Taft-Hartley did not alter the substantive rights of employers and employees.

The 1960’s and 1970’s

During the 1960’s and early 1970’s the focus of public labor policy shifted from one of defining the procedures for self-

PLSA did impose substantive wage and hour thresholds below which no employer/employee agreement could be made, but beyond this it did not interfere with the bargaining process. Like most New Deal labor legislation, the FLSA was consistent with the general approach; namely, to specify only the general parameters whereby employers and employees could govern themselves, with the government providing a framework for self-government. Indeed, much of the debates surrounding the establishment of a minimum wage approached the issue in terms of the National Economic Recovery Program. By establishing a minimum wage many felt that more income would be generated in the economy from wages leading to increased demand and ultimately to increased employment. See 29 U.S.C. § 201 (1976).

9. Id.
10. The Taft-Hartley Act provided for a labor injunction. However, the Act limited its use only against an unfair labor practice and only by a demand of an official of the National Labor Relations Board.
government and fine tuning the balance between employer and employee relationships to one of establishing the rights of individual workers. Initially, the extension of Federal regulatory activity was seen as a practical way to address and to resolve labor issues which appeared to require a Federal presence or authority. The use of the regulatory approach in resolving such issues was viewed as a speedy, uniform, and relatively inexpensive procedure for dealing with such intractable issues as worker health and safety, civil rights, and pension protection. Not only would the regulatory approach facilitate the power to adjudicate, it would also provide a mechanism whereby the government could initiate proceedings, investigate, and prosecute with the force of law. All of these elements were critical in dealing with interactions between employers and employees in areas involving scientific, medical, financial, and actuarial factors.

Almost imperceptibly these actions moved the Federal Government directly into the process of determining the outcome of disputes rather than the rules by which such outcomes would be determined between employers and employees. The effect of governmental intervention in the private market was to create a variety of “perceived” rights: ranging from the right to be free from discrimination to the right to work in a healthy and safe place with a secure pension. Once these perceived rights were established, federal bureaucracies were created to adjudicate and enforce them. This central role of government seriously weakened the earlier approach, which relied primarily on direct intervention between employers and employees, or on collective bargaining mechanisms.

The latter part of the 1970’s was a period of substantial regulatory activity in which the Government sought to implement the vast array of new regulatory legislative programs. In the area of labor law, the scope of this activity was very broad including issues of health and safety, pension rights, discrimination, hiring practices, and wage rate determinations. In conclusion, governmental intervention weakened free employer-employee bargaining.

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Limitations of the Regulatory Approach

The increased use of the power of the Federal Government to determine substantive rights through law and regulation, combined with more enlightened personnel practices by large employers, should have pointed the way towards resolving many of the problems in the workplace. However, this was not the case. Some critics argued that the regulatory programs, in some areas, had been a dismal failure. Others argued that considerable progress had been made. While objective measurement is difficult, it would be fair to say that, on balance, progress has occurred. But, the price of this progress only recently has been evident. The real costs of regulation are illustrated in the increased time which companies must expend in order to complete the numerous forms and to comply with other complex governmental barriers to ordinary transactions.

The effects of superimposing a rigid federal structure on private industry can be seen also in the economic competitiveness of U.S. manufacturers and their tendency towards large scale operation. The proliferation of regulations has created a new regulatory economy of scale. A manufacturer with a large unit volume derives a substantial cost per unit advantage over smaller competitors.

Rather than resolving the problems, the federal regulatory process has polarized the parties. Employers have typically opposed regulatory programs because such programs were seen as representing additional intrusions into areas where employers have had some freedom with trade unions. They argue that the rigidity of the regulations make such regulations ineffective by not allowing for creative solutions better suited to the individual needs of an industry or a corporation. Small businesses often encountered enormous administrative difficulties in complying with these regulations. Proponents of the regulatory approach, however, typically argue that these problems are attributable to regulatory efforts which have not gone far enough, either in their scope or their enforcement.

In many instances employees may have benefited from the protection provided by law; nevertheless, these employees have found that involvement in the regulatory process itself could be frustrating and ineffective. The resolution of issues required a

19. For a balanced discussion of this issue, see Dunlop, The Limits of Legal Compulsion, 27 LAB. L. J. 67 (1976).
20. Examples of these costs are professional fees for litigation, non-productive capital expenses, lost opportunity costs, and additional overhead for support staff within the corporate structure.
complex knowledge of the relevant laws and regulations; few employees could afford the time and expense of legal counsel to operate their way through the maze of adjudicatory processes. Thus, the federal regulatory process had the effect of driving an unresponsive barrier between the employer and the employee. Rather than building on the existing systems and using the federal process only as a court of last resort, the federal regulatory process has abrogated the traditional and historic institutional mechanisms of dispute resolution between employers and employees.

Labor organizations initially had been in the forefront of supporting regulatory programs, particularly in the areas of health and safety. This was evident because unions could gain substantial benefits, in some areas, through regulations which could achieve goals, in one nationwide application, which had not been attained uniformly at the bargaining table. However, as regulatory programs expanded, some labor organizations expressed opposition to increased federal regulation in such areas as equal opportunity and pension reform. These labor organizations sensed the obvious potential of equal opportunity and pension regulations to interfere with union negotiated seniority and pension plan arrangements. In addition, to the extent that federal law or regulations comprehensively protect worker welfare, there is less need for workers to be organized. With safety and health and welfare federally regulated, there is no necessity for bargaining on these issues. Notwithstanding some union opposition, various other groups argued that federal legislation and regulations were required to deal with these problems because the majority of workers were not represented by unions.

Governmental regulators, charged with the task of implementing this vast array of new labor law legislation, were viewed with dissatisfaction by both employer and employee groups. The regulators found themselves in an increasingly untenable position that was resolvable only through the application of more rigid rulemaking processes. Informal rulemaking required the application of highly legalistic processes. Lengthy procedural requirements to rulemaking were specified in the Administrative Procedure Act.

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27. 29 U.S.C. § 651.
Impact of Regulatory Reform

which required notice of proposed rulemaking and the development of a record, \textsuperscript{30} made public to all interested parties, from which a final rule was exclusively derived. Even the rulemaking process was subject to a system that was designed to prevent mutual accommodation by the parties affected by the rule. Compromises, if any, were to be made by governmental regulators acting as impartial judges. \textsuperscript{31}

On top of these legislated requirements, governmental regulatory agencies and Executive review procedures added further layers to the course of promulgating regulations. \textsuperscript{32} These procedures had the effect of further lengthening and weighing down the rulemaking process, essentially to ensure that all parties affected were included in the decision-making.

While these procedures have been important in assuring careful public scrutiny of regulatory proposals, and in assuring the fullest possible participation of parties affected by the rulemaking process, they nevertheless fail to address difficulties within the regulatory process; namely, the possibility of developing a single regulation capable of dealing with the complexity of situations to which the regulation must apply in real life situations. Current rulemaking and adjudicatory procedures do not have mechanisms for continually adjusting to new and differing situations whereby conflicting interests can be resolved among affected parties. The incentive to simplify and reduce regulatory problems to a single set of rules encourages simplistic thinking about complicated issues; hence, opposing parties are encouraged to argue their cases before the government in litigious and adjudicatory proceedings. Legal, administrative, and financial resources increasingly are being applied to the struggle for or against a regulation, rather than resolving problems or issues which the proposed legislation sought to address. \textsuperscript{33}

Legislation, litigation, and regulation are useful means for solving certain social and economic problems. But many of these regulatory approaches also imposed unnecessary costs and failed to achieve their objectives. The growth of regulations has outstripped

\textsuperscript{30} 5 U.S.C. §§ 556 (e) and 557.

\textsuperscript{31} Id. at § 556 (A)(3).

\textsuperscript{32} In addition to the procedural requirements established in Exec. Order No. 12,291, 3 C.F.R. 127-134 (1981), requiring agencies to perform economic analysis of regulations, there is serious discussion of developing a "regulatory budget" seeking to coordinate all Federal Government regulatory activity through a process similar to that now used in determining the Federal budget. See DeMuth, \textit{The Regulatory Budget}, \textit{REGULATION}, at 29-44, (Mar./Apr. 1980).

our capacity to develop a consensus and mutual accommodation to the solution of common problems. It is clear that an approach needs to be developed which operates through improving understanding, persuasion, accommodation and informal mediation. In short, the regulatory process, while a valuable tool, needs to be used more in conjunction with historical institutional mechanisms than as a substitute for them.

A NEW APPROACH TO REGULATORY REFORM

On February 17, 1981, less than a month after this Administration came into office, President Ronald Reagan issued an Executive Order setting out a comprehensive program of regulatory management.\textsuperscript{34} The order imposed two major procedures on all executive branch agencies. First, it required them to conduct regulatory impact analyses both before publishing proposed rules and before adopting final rules.\textsuperscript{35} Second, it required that these analyses be forwarded to the Office of Management and Budget to assure that the least burdensome or most cost-effective means of legally addressing the problem were chosen.\textsuperscript{36}

Many observers perceived these new procedures as simply another element in a long string of procedural requirements in the promulgation of a regulation. Indeed, a number of serious legal challenges to the requirements were filed based on the argument that the process illegally transferred to the Office of Management and Budget statutory authority rightfully vested only in regulatory agencies.\textsuperscript{37}

The procedural requirements of the Executive Order, with their apparent focus on cost reduction, do not reflect accurately the impact of the Order in the area of labor regulation. The concept of cost reduction is not applied as easily to the area of labor regulation as it is in economic or social regulation. It may be argued that the concept of "least burdensome" in the area of labor regulation does not allow the parties sufficient flexibility to resolve their conflicts. Inflexible labor regulations clearly are overburdensome and ineffective. "Least burdensome" in the area of social interaction between employers and employees cannot be measured along a simplistic continuum of stringent or less stringent, more regulation or less regulation, or greater or lesser enforcement. The burden or effectiveness of such

\begin{footnotes}
\item[34] Exec. Order No. 12,291, 3 C.F.R. 127-134 (1981).
\item[35] Id. at 128-130.
\item[36] Id. at 128.
\end{footnotes}
regulations must be measured by an operating framework which allows the parties flexibility while still addressing the regulatory problem. The nature of this "least burdensome" aspect in social regulatory behavior is best seen in specific examples.

**OSHA's Hazard Communication and Hearing Conservation Standards**

The proposed OSHA Hazard Communication Standard, commonly referred to as the OSHA "labeling" standard, informs workers of the presence of dangerous chemicals through greatly improved disclosure procedures. This approach is essentially "market-oriented" as opposed to the traditional "command and control" regulatory approach that has been incorporated into most OSHA standards. The Carter Administration proposal involved broad labeling coverage of all manufacturing industries. The labels were to be affixed to virtually all containers, pipes, valves, and support systems. This labeling approach involved the use of a highly specific evaluation procedure to determine what constituted a hazard. The requirement that labeling be used did not grant an effective means of dealing with the problem of trade secrets. Finally, the proposed regulation required that extensive record keeping be maintained for a three year period. Even in the case of an apparent nonhazardous chemical, the proposed standard required a certification to that effect.

The initial form of the proposed standard, *inter alia*, mandated an inflexible set of rules to be applied to every case with little concern for the potential costs. More importantly, the approach did not account for the difficulties workers would encounter in acquiring and utilizing the labeling information effectively. These problems created doubt about the utility of the standard. However, the agency went forward with the proposal despite the fact that its estimated costs to industry were quite onerous.

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39. By organizing information in an effective way, the approach allows the respective parties to choose whether or not the benefits of using hazardous chemicals outweigh their potential cost and risk. Presumably, the higher the hazard, the fewer the users of such materials and the attendant reduced demand for the product.

The current proposal indicates how costs can be reduced, while effectiveness is increased, by adopting a flexible regulatory approach. This revised proposal provides for integrating the labeling provisions with worker behavior through education and training. Additionally, it requires chemical manufacturers to assess the hazards of the chemicals they produce, and to provide such information to their employees. The Reagan proposal allows compliance plans to be tailored to specific industries. Record keeping requirements also have been reduced, thereby diminishing costs and helping to prevent an information overload to workers. In short, the current proposal integrates cost effective flexibility with the behavioral response of workers and is thus a standard truly “least burdensome.”

A similar case is demonstrated clearly by the original OSHA worker hearing conservation rule. The “noise” standard had a strict regulatory goal based on scientific findings. Additionally, the standard permitted employers flexibility in meeting industrial noise requirements. For example, the initial standard specified the precise manner in which employers were to measure sound levels. The revised standard simply requires noise monitoring, leaving employers free to decide whether to monitor the noise exposures of individual workers, measure general levels at a work station, or use some other method to determine whether employees are exposed to noise above 85 decibels, the noise level at which significant hearing impairment can occur.

The changes in the standard preserve the major protections afforded workers by the original amendment. These protections include monitoring workplace noise levels, mandatory hearing tests for employees, availability of hearing protectors, and training and education. The changes clearly allow flexibility in achieving the regulatory policy goals. This flexibility enables the affected parties to implement the provisions in an effective manner.

Changes in Regulations under the Davis-Bacon Act

The Employment Standards Administration has finalized changes in the regulations under the Davis-Bacon and related Acts. Presently, these Acts require contractors working on Federal and federally-assisted construction jobs to pay the “prevailing” wage rate.

42. Id. at 12,121.
43. Hearing Amendment, supra note 38 at 4,078.
44. Id. at 4,133.
45. Id. at 42,639.
The existing regulations often ignored industry practices and imposed excess costs on the taxpayers by creating a rigid and inflexible system. Among the areas addressed by the new regulations are: (1) restrictions on the use of the helper classifications on these projects; (2) the method of setting the wage rate on Davis-Bacon jobs; and (3) the requirement for weekly payroll submissions.

A key economic issue involves the current restriction on the number of nonjourneymen who may work on a project subject to Davis-Bacon. This procedure does not allow for the flexibility of recognizing local practices, including the widespread use of helpers. The revised regulations allow for greater use of semi-skilled classifications. Helpers may be used now as long as their ratio does not exceed two helpers for every three journeymen.

Another important economic concern involves the use of the “30 percent rule.” The Department previously defined the “prevailing” wage as that paid to at least 30 percent of the workers in a locality, assuming that no single rate was paid to a majority of workers in a particular classification on similar construction. The final revised regulation defines the prevailing wage, where there is no single rate paid to a majority of workers in a particular classification on similar construction in the locality, as the average rate. The regulation also explicitly prohibits the use of metropolitan area wage survey data in issuing a wage determination for a rural area (and vice versa). Further, under some circumstances, it excludes Federal projects from the wage base in setting prevailing wages.

The third issue—weekly submission of payroll records—imposed substantial paperwork burdens on contractors, while contributing little to the enforcement of the Act. The new regulation eliminates the old requirement that the contractor submit weekly payrolls, but retains the requirement that the contractor submit a certified “Statement of Compliance” every week, as required by the

47. Estimates of these excess costs have been placed as high as one billion dollars.
51. Id. at 41,463.
52. Only if no single rate was paid to at least 30 percent of the workers in an occupation in a locality did the Department set the average rate as the prevailing rate.
Copeland Anti-Racketeering Act. Agencies are permitted, however, to request submissions of payrolls when there is a specific compliance check underway.

**Proposed Changes in OFCCP**

Within the Department of Labor, the Office of Federal Contract Compliance Programs has the day-to-day responsibility for enforcing the executive order which prohibits discrimination in employment and requires affirmative actions to ensure equal treatment of all applicants and employees.

A review of the enforcement of this program showed that it was not working as effectively or efficiently as it should. The program has had an impact in promoting greater employment of women and minorities but, because it was run in a highly adversarial manner, it produced excessive paperwork, caused aggravation, and engendered contempt among contractors and the general public for the entire affirmative action concept.

OFCCP has proposed revisions in the regulations and has moved to renew the emphasis on voluntary compliance by contractors. It has sought to reverse the attitude of confrontation which weakened compliance capability. OFCCP now meets regularly with “Liaison Committees” formed by business and special interest groups and other organizations. These groups provide a forum for the exchange of technical compliance information and promote greater understanding of compliance problems. In this new spirit of cooperation, greater voluntary compliance with affirmative action policies should be achieved.

The proposed OFCCP regulations follow two basic premises. First, the contractual requirement to undertake affirmative action is not to be compromised. Second, unnecessary and costly paperwork is to be reduced. An illustration of these two premises in action is OFCCP’s proposal to change only one of the two “thresholds” of supply and service contractor coverage. Currently, OFCCP has jurisdiction over those contractors who have $10,000 or more in contracts. Such contractors are prohibited from discrimination in employment and also are required to engage in affirmative action. OFCCP does not propose to change this basic anti-discrimination and

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58. Id. at 42,976.
59. 41 C.F.R. § 60-1.5(a) (1981).
affirmative action threshold in any way. What is proposed is to change the second threshold relating to the preparation of written affirmative action programs (AAPs). Currently, contractors with 50 or more employees and with contracts of $50,000 or more are required to develop a detailed written AAP. These AAPs contain elaborate analyses in which the contractor determines whether minorities and women are being "under utilized" in the workforce. They are lengthy documents which are costly for the contractor to prepare and for OFCCP to review. Their meaning is insignificant to contractors with few workers. Without changing the basic obligations of supply and service contractors, OFCCP proposes to reduce this costly paperwork by eliminating the written AAP annual report requirement for contractors with less than 250 employees and contracts under $1 million.

The Department estimated that these proposed levels would reduce the number of companies required to submit written AAPs by 75 percent—from approximately 17,000 companies to approximately 4,100. These new threshold levels would maintain coverage for nearly 77 percent of the 26 million employees currently covered by AAPs. Special efforts would be taken to review companies which fall below the threshold levels for purposes of preparing an AAP, but which are still subject to the Executive Order.

CONCLUSION

The key to understanding these examples is that they simultaneously seek to address problems requiring federal intervention, while allowing for the maximum interplay between employers and employees. This interaction of employer-employee relationships promotes regulatory flexibility which can reduce the compliance and cost burden on both parties, while maintaining the efficacy of the standard. Indeed, if anything, the less burdensome regulations should produce better results because employers and employees will be encouraged to join in a mutual effort to achieve the goals of regulation rather than simply being directed to comply.

The implications of generalizing this approach to other areas of labor law are profound. It does not herald a reduction of the federal

61. 41 C.F.R. § 60-1.7(a) (1981). Holders of Government bills of lading totalling $50,000 in a 12-month period, depositories of Federal funds, and issuing and paying agents on U.S. Savings Bonds and notes are also subject to the written AAP requirement. Id. at 42,979.
63. Id.
64. Id.
presence in appropriate areas of labor law. Rather, it will lead to a strengthening of the foundations of labor relations between employers and employees. Only in this way can we avoid the ossification of our system of labor relations, leaving us with a set of inflexible rules promulgated and understood only by lawyers. Our goal can and must be to reverse this process and to return to a system which, again, relies more heavily on the collective bargaining process. Such a system, with an appropriate role for federal regulations, has served us well as a mechanism to resolve disputes and allocate economic rewards. The federal regulatory process itself should seek to utilize the bargaining process to the greatest extent possible, thereby allowing for the most efficient and flexible way to achieve essential regulatory goals.