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August 26, 2019

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

Submitted Electronically Through <http://www.regulations.gov>

**Re: Notice of Proposed Rulemaking: Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations
RIN 1205-AB85**

Dear Ms. Gagliardi:

The National Coordinating Committee for Multiemployer Plans (“NCCMP”) appreciates this opportunity to comment on Employment and Training Administration (“ETA” or “Administration”), U.S. Department of Labor’s Notice of Proposed Rulemaking: Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, published at 84 Fed. Reg. 29970 (June 25, 2019) (“Proposal” or “SRE/IRP Proposal”). The Proposal sets forth a process for recognizing private Standards Recognition Entities (“SREs”), which will, in turn, recognize and govern Industry-Recognized Apprenticeship Programs (“IRAPs”).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America’s working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code Section 501(c)(4), with members, plans, unions, and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusted by employer and employee trustees.

The NCCMP agrees with the assessment of the ETA that apprenticeship programs have a vital place in the modern U.S. economy. The statistics maintained by the Administration demonstrate

the scope and reach of the existing Registered Apprenticeship Programs (“Registered Programs”). As noted by ETA, during fiscal year 2018:

- More than 238,000 individuals nationwide entered a Registered Program.
- More than 585,000 apprentices worked to obtain the skills they need to succeed while earning the wages they need to build financial security.
- 71,700 participants graduated from a Registered Program.
- Over 47,000 veterans participated in a Registered Program.
- There were over 23,400 Registered Programs across the nation.
- 3,229 new Registered Programs were established nationwide.¹

A substantial number of these programs have been established as partnerships between labor and management, as contemplated by the terms of the National Apprenticeship Act. In particular, in partnership with construction industry employers, North America’s Building Trades Unions (NABTU) and its affiliates have long sponsored and promoted Registered Programs as the most effective mechanism for bringing new workers into the building and construction industry, training them to understand all aspects of a trade, and providing them with the skills to safely perform complex tasks under ever-changing conditions. The Registered Programs they sponsor jointly with their construction industry partners comprise one of the largest post-secondary education programs in the country. Together, these jointly sponsored programs operate over 1,600 apprenticeship programs and invest nearly \$1.3 billion of their own funds annually in training programs that have prepared thousands of workers for good, sustainable, middle-class careers.

The NCCMP also agrees that we need to build on the proven effectiveness and efficiency of these Registered Programs, and that their benefits should be expanded to additional industries. The NCCMP fully recognizes the potential benefit to the economy and the U.S. workforce in expanding apprenticeship opportunities. It is for these reasons that the NCCMP is compelled to point out the shortcoming of the Administration’s proposal to establish a nation-wide program of SREs and IRAPs. The NCCMP has serious concerns that the Proposal, if adopted, would lead to a nation-wide hodgepodge of untried, untested, unproven, and largely unregulated programs that will have a deleterious effect on their intended recipients and undermine the existing system of Registered Programs.

¹ Apprenticeship, United States Department of Labor: Employment and Training Administration (2019), https://doleta.gov/oa/data_statistics.cfm.

SUMMARY OF THE COMMENTS

First, the NCCMP notes that the Proposal appears to exceed the Administration's legal authority under the National Apprenticeship Act ("NAA"), 29 U.S.C. § 50. The NCCMP is concerned that, if adopted, the SRE/IRAP Proposal could be the target of a successful legal challenge.

Second, the SRE/IRAP Proposal fails to meet the statutory requirement of protecting the interests of apprentices. Instead, it appears to privatize the apprenticeship system in a way that will create a black box of disparate and conflicting standards that are shielded from public, regulatory, labor, and employer scrutiny. This could well lead to a debacle that will harm the individuals seeking to benefit from the system and the industries that need the skilled workers that a well-constructed apprenticeship program can produce.

Third, the SRE/IRAP Proposal has the potential to cannibalize and undermine the existing model of jointly administered Registered Programs. In addition to weakening these existing programs and institutions, the Proposal has the potential to reduce both labor standards for apprentices and the capabilities of the journeyworkers who would have earned the dubious substandard credential of having "successfully" completed an inadequate IRAP.

Finally, the NCCMP wholeheartedly agrees with the recommendation of the Task Force on Apprenticeship Expansion ("Task Force") that any system of IRAPs be subject to testing on a pilot basis, rather than implemented nationwide on the expedited basis set out in the SRE/IRAP Proposal.

COMMENTS

I. The SRE/IRAP Proposal Appears to Exceed the ETA's Legislated Authority.

The NAA charges the ETA with the following mandate:

[T]o formulate and promote the furtherance of *labor standards necessary to safeguard the welfare of apprentices*, to *extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship*, to bring together *employers and labor for the formulation of programs of apprenticeship*, to *cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship*, and to cooperate with the Secretary of Education

29 U.S.C. § 50 (emphasis added). The Proposal appears to do none of these things. Instead, it delegates to private entities the ability to fashion their own apprenticeship standards without public, employer, union, or regulator review or comment. At most, applicants for the position of SRE are required to explain to the Administration how they intend to establish standards, without

any actual ETA review of those standards or of the IRAPs that they certify as meeting those standards. Furthermore, even that limited disclosure is not explicitly subject to public review.

Consequently, in terms of the exceptional delegation of governmental authority to private entities, the lack of transparency in the process, and the deviation from the Administration's statutory mandate, the NCCMP is concerned that the Proposal will be subject to multiple, potentially successful, legal challenges.

II. The Proposal Fails to Safeguard Apprentices or to Ensure Acquisition of the Necessary Skills and Experience.

As noted above, the ETA's enabling statute makes as its priority the protection of the welfare of apprentices. Additionally, it is undeniably deleterious to the employers who hire the graduates of apprenticeship programs if these journeyworkers lack the skills and training required to properly perform their jobs.

The importance of these dual goals – of serving the needs of both the individuals who participate in apprenticeship programs and the employers who will eventually hire them – is embodied in the Administration's requirements for federally Registered Programs. Among these crucial requirements are:

- A program must have written standards that conform to the Administration's standards of apprenticeship. These standards have a variety of required features, including:
 - A description of the scope and nature of the program's structured in-class and on-the-job training requirements so apprentices understand both the requirements they must meet and the program's obligations. 29 C.F.R. § 29.5(b)(2) and (3).
 - Program standards for the qualification of instructors, including substantive knowledge and training in teaching techniques. *Id.* § 29.5(b)(4).
 - A wage progression for apprentices, which must be consistent with the skills the apprentice is acquiring through the training program. *Id.* § 29.5(5).
 - Numeric ratios of apprentices to journeyworkers in any on the job training. *Id.* § 29.5(7).
 - Provisions for a safe environment in which the apprentice can learn, safe equipment, and safety training. *Id.* § 29.5(9).
 - Equal opportunity standards. *Id.* § 26.6(b)(1)(ii).
- These standards must be included in a written agreement with the apprentice, so that all parties involved know their duties, obligations, and rights, including:
 - Applicable wage rates.
 - Performance standards.
 - Protections against arbitrary dismissal.

New programs are initially reviewed for compliance with the ETA's requirements, and the ETA and State Apprenticeship Agencies ("SAAs") will refuse to register programs if their written standards fall short. *Id.* § 29.3. Furthermore, new programs are only provisionally approved for one year. *Id.* § 29.3(g). After the first year, the Registration Agency must then review the program for quality and compliance with the Registration Agency's requirements and, if it finds the program is not in compliance, the Agency must recommend deregistration. *Id.* § 29.3(g)(2). In addition, all programs must be reviewed again at least every five years. *Id.* § 29.3(h).

By contrast, the Proposal does not require that these protections and safeguards be included in the standards applicable to an IRAP. Instead, the standards are left to the discretion of the SRE.

By leaving so much to the discretion of the SREs, the Proposal fails to establish the minimum standards necessary to ensure that industries do not exploit entrants to the industry by simply calling them "apprentices," providing limited and inadequate training, and paying them less than the prevailing wage rates. The Proposal includes nothing to ensure that apprentices will receive "appropriate classroom or related instruction" or that the "structured work experiences" will be "adequate to help apprentices achieve proficiency." § 29.22(1)(4)(ii). The Proposal is similarly silent with regard to the any requirement that training be provided by qualified instructors. Although the Proposal refers to "structured work experiences," it includes no requirements regarding maintaining appropriate apprentice-to-experienced employee ratio in order to ensure that apprentices are learning the right lessons, that the work performed is of sufficient quality to meet the employer or customer's needs, or that the level of supervision is adequate to guarantee the apprentices' safety. Furthermore, the bare statement that training programs should include "structured mentorship opportunities to ensure apprentices have additional guidance on the progress of their training and employability," § 29.22(a)(4)(vi), is a non sequitur. Structured instruction does not involve "opportunities" for "additional guidance." It involves on-going, focused supervision and training by experienced co-workers and supervisors.

Without these protections, apprentices may find themselves exploited as a source of cheap labor, only to be cast aside at the conclusion of their so-called apprenticeship, lacking the skills they need to thrive in today's economy. There are no protections against arbitrary dismissal or suspension, nor any real standards to ensure apprentices have in fact acquired the skills and experience required to work in high skilled employment. Furthermore, the only wage requirement is that an employer not break the law by paying less than the minimum wage required by applicable law. There is no requirement that wages be commensurate with the work, or that there be any wage progression as an apprentice gains skills and experience

The lack of such protections and standards creates the prospect that the system of SREs and IRAPs authorized by the Proposal will fail. Such failure would be harmful to the apprentices, employers, and the U.S. economy in general.

III. The Proposal Lacks Sufficient Safeguards to Avoid Cannibalizing Existing Programs and Spurring a “Race to the Bottom”.

The Proposal itself expressly provides that the ETA’s intent is to “establish[] a parallel apprenticeship system that avoids undercutting the current registered apprenticeship system where it is widespread . . .” 84 Fed. Reg. at 29980. The Proposal in its current form, however, does not include the necessary safeguards to protect those existing programs. Additionally, despite singling out the construction industry for such protection, the Proposal’s protections are insubstantial, vague, and hobbled by an unnecessarily narrow definition.

A. The “Deconfliction” Formula is Not Adequate to Protect Existing Programs

The NCCMP generally supports the goal of the ETA to promote the extension of apprenticeship programs to industries in which there is no existing apprenticeship program infrastructure. In addition to the flaws in the proposed SRE/IRAP system itself, however, the NCCMP is generally concerned that the deconfliction formula will not prevent the degradation of existing programs.

In direct competition with more extensive and demanding Registered Programs, the new IRAPs may well draw off both students and resources. Lacking any real wage protection, IRAPs have the potential to draw unscrupulous operators looking to provide a source of cheap, marginally skilled labor. Protecting the existing Registered Programs and encouraging their further development and expansion should be the Administration’s priority. Instead, they are endangered by the Proposal, and not adequately protected by the vague, ephemeral, and largely undefined deconfliction formula.

B. The Registered Programs in the Construction Industry Deserve Protection.

Nowhere are apprenticeship programs more pervasive and successful than in the construction industry. In particular, the jointly administered multiemployer apprenticeship and training programs represented by the NCCMP provide a model of how these programs should work. Indeed, more than two-thirds of all civilian registered apprentices are trained in the construction industry, and seventy-five percent of construction apprentices are trained in the building trades’ joint labor-management training programs. As noted above, NABTU’s affiliates’ joint labor-management committees spend nearly \$1.3 billion annually of private funds to fund training in nearly 1,600 training centers across the country.

The need to protect these existing programs is particularly crucial in the construction industry. The construction industry is inherently dangerous. Despite constituting only 7% of the U.S. workforce,

construction workers accounted for 19% of private workforce fatalities in 2018.² That to say that of the 5,147 reported workforce deaths, 971 were in the construction industry. That is nearly three times the rate of fatalities. Additionally, the risk of acquiring an occupation-related disease over the course of a 45-year career is estimated to be 2 to 6 times higher for construction workers than for non-construction workers.³

High quality safety training has proven to be effective. Construction worksites in prevailing wage states are safer than in states without those laws. Because there are significantly more apprenticeship programs in states with prevailing wage laws than in those without, the impact of the building trades' major investment in apprenticeship training can be seen by comparing the performance of the construction industry in these two sets of states.⁴ Recent research shows that repeals of prevailing wage laws were associated not only with an increase in the prevalence of injuries, but with an increase in severity as well, due in part to the lower investment in the kind of safety training provided in Registered Programs.⁵ Mandatory safety training provided by

² U.S. Bureau of Labor Statistics (BLS), Labor Force Statistics from the Current Population Survey (2018), <https://www.bls.gov/cps/cpsaat18b.htm>.

³ Knut Ringen, *et al.*, *Risks of a lifetime in construction. Part II: Chronic occupational diseases*. 57 Am J Ind Med. 1235 (2014). <https://doi.org/10.1002/ajim.22366>.

⁴ For example, in 2012, states with prevailing wage laws had 65% more enrolled apprentices and 60% more graduating apprentices per hour of work than states without prevailing wage laws. Robert Bruno & Frank Manzo IV, *The Impact of Apprenticeship Programs in Illinois: An Analysis of Economic and Social Effects*, University of Illinois at Urbana-Champaign (2016), 3, available at https://ler.illinois.edu/wp-content/uploads/2015/12/PCMR-ILEPI-ImpactofApprenticeshipPrograms_NewCover.pdf. See also Frank Manzo IV & Kevin Duncan, *An Examination of Minnesota's Prevailing Wage Law: Effects on Costs, Training, and Economic Development* (2018), 12-13, available at <https://midwestepi.files.wordpress.com/2018/07/mepi-csu-examination-of-minnesotas-prevailing-wage-law-final.pdf> (summarizing research documenting an average of 40% decrease in the rate of apprenticeship training after repeal of prevailing wage laws); Peter Phillips, *Kentucky's Prevailing Wage Law: An Economic Impact Analysis* (2014), 2, available at <http://www.faircontracting.org/wp-content/uploads/2014/02/Kentucky-Report-2014-Philips.pdf>. (“Prevailing wage law repeals lead to a loss of registered apprenticeship training and a corresponding loss of skills and income.”)

⁵ Zhi Li, *et al.*, *The Effect of Prevailing Wage Law Repeals and Enactments on Injuries and Disabilities in the Construction Industry, Public Works Management & Policy*, 4 (2019).

instructors who are required to meet a high level of competency is one of the hallmarks of Registered Programs.

It is also no coincidence that workers in prevailing wage states are an average of 14% more productive than in non-prevailing wage states. Although prevailing wage standards are limited to government projects, the benefits of the higher training standards are pervasive and results in greater productivity on private sector jobs as well. The reason is that the higher training standards lead to an enhanced pool of skilled labor available to both public and private sector construction projects.⁶

The investment in these NABTU-affiliated Registered Programs has also yielded long-term financial advantages for the apprentices, for the industry, and for the public at large. An Illinois study showed that on average, construction workers who completed their apprenticeships increased their earnings by \$3,442 annually, or by nearly \$200,000 over their projected tenure in the trades (offsetting for out-of-pocket expenses).⁷ In Illinois, where joint labor-management construction apprenticeship programs make up 99.2% of all privately-funded apprenticeship expenditures, the “economic return on investment from these construction programs is \$9.14 per dollar spent on worker training”⁸ Expressed differently, if the added tax revenues and the savings on public benefits, including unemployment compensation, food stamps and other welfare costs, are taken into account, each dollar of investment results in a public benefit of \$10.98.⁹ Furthermore, the apprentices participating in Registered Programs graduate without incurring any student debt.

These Registered Programs in the construction industry have proven their worth over the decades that they have been in existence. They should be supported and encouraged, rather than undermined.

C. ETA’s Definition of the Construction Industry is Arbitrarily Narrow.

The Proposal states that ETA would not, “at least initially,” accept proposals from SREs in the “construction industry.” 84 Fed. Reg. 29981. In addition to its suggestion this protection is only temporary, the Proposal is flawed because it uses a definition of the “construction industry” that is arbitrarily narrow and unsuited to the stated goals of the Proposal. As stated in the Proposal:

⁶ Phillips, *supra* note 4, at 4.

⁷ Bruno and Manzo, *supra* note 4, at 17.

⁸ *Id.* at 22.

⁹ *Id.*

An apprenticeship program would be in construction if it equips apprentices to provide labor whereby materials and constituent parts may be combined on a building site to form, make, or build a structure.

* * *

The Department's proposed approach incorporates a long-standing definition of the building and construction industry from case law interpreting [Section 4203(b) of the] Employee Retirement Income Security Act, see 29 U.S.C. 1383(b), and [Section 8(f) of the National Labor] Relations Act ["(NLRA)"], see 29 U.S.C. 158(f).

84 Fed. Reg. 29981; *Ibid.* fn. 22. This narrow definition, however, was developed in response to two specific statutory provisions, and is inapposite here.

This definition of the construction industry was originally developed in the course of interpreting Section 8(f) of the NLRA. That provision allows construction industry employers and unions to enter into so-called "pre-hire" agreements without any showing of majority support for the union. *Carpet, Linoleum, and Soft Tile Local Union No. 1247*, 156 NLRB 951, 959 (1966) (*Indio Paint*). This is a narrow exception to the otherwise general rule that it is an unfair labor practice to enter into a collective bargaining agreement covering a bargaining unit where there has been no showing of majority support for the union. NLRA Section 8(a)(3), (b)(2). Similarly, in discerning Congressional intent in the special statutory provisions governing withdrawal liability for multiemployer plans and employers in the construction industry, the Courts have looked to the body of law developed under the NLRA. *Union Asphalts & Roadoils, Inc., v. MO-KAN Teamsters Pension Fund*, 857 F.2d 1230, 1234 (8th Cir. 1988).

Here, however, there is no reason to discern Congressional intent in its use of the phrase "construction industry" because there is no Congressional intent to discern. Instead, this phrase has been used by the ETA itself to describe the scope of the apprenticeship programs available within the construction industry.

In fact, Registered Programs in the construction industry provide training for a host of jobs that fall outside the ETA's proposed definition. In particular, excluded are the large numbers of fabrication and other related jobs that are performed in the shop rather than at the construction site. Furthermore, as offsite fabrication and assembly becomes more prevalent throughout the construction industry, the proportion of jobs in the industry falling outside the Administration's unnecessarily narrow definition will grow.

Therefore, the protection of the construction industry should both be made permanent and made broad enough to protect the programs now in existence.

IV. Any System of SREs and IRAPs Should be Limited to a Pilot Program to Prevent Irreparable Harm to Apprentices, Employers, and Existing Registered Programs.

One of the Task Force's key recommendations was the following:

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-Recognized Apprenticeship programs

The NCCMP supports this recommendation. For a variety of reasons, limiting any system of IRAPs to a pilot program is the only prudent course of action. This is especially the case with the untried and untested introduction of SREs, the lack of clear standards, and the lack of protection for existing Registered Programs. Instead, in an apparent rush to roll these programs out nationwide, the Administration has taken the opposite approach and proposes an expedited process for SRE approval. The NCCMP believes this would be a costly and injurious mistake.

First, as noted above, there is a serious question as to the Proposal's legal validity. Limiting the roll-out to a pilot project would provide time to test the merits of any court challenge before significant numbers of applicants will have wasted their time and energy in a fruitless effort to gain the training, experience, and credentials required to enter a career that would provide an entry into the middle class. This is simply unfair. A pilot program would also prevent employers and other entities from making large, potentially wasted investments in programs that may ultimately be declared legally invalid.

Furthermore, assuming the SRE/IRAP proposal does pass legal muster, a pilot program would enable the ETA to ascertain whether in fact the IRAPs approved by the SREs successfully create the skilled workforce that is the program's goal, whether it harms existing programs and other training opportunities, and whether the training provided enhances or imperils the safety of workers. In general, a pilot program would provide an opportunity to test the various aspects of the program to determine its strengths and weaknesses. The Administration would then have the opportunity to make adjustments to bolster those strengths and address the weaknesses. This would far better protect the interests of the prospective apprentices – and to prevent the deleterious effect on employers and the economy in general of a failed system – than a headlong rush into the uncertainty of an untested and potentially chaotic system.

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Office of Policy Development and Research
U.S. Department of Labor
RIN 1205-AB85
August 26, 2019
Page 11 of 11

CONCLUSION

The NCCMP supports the aims of the Task Force and the goal of the ETA to expand training opportunities through apprenticeship programs. The existing system of Registered Programs has worked well in expanding the opportunities for all workers, regardless of race, gender, or ethnicity, to earn the skills and credentials necessary for well-paying permanent careers that provide a sustainable path into the middle class. The NCCMP is particularly proud of the extraordinary results of its member multiemployer apprenticeship plans in achieving these goals.

The NCCMP, however, must express its serious concern over the both the legality and the shortcomings of the SRE/IRAP Proposal. We are concerned that, in its current form, the Proposal has the potential to violate the ETA's statutory mandate by failing to protect the interests of apprentices generally, by potentially degrading the existing Registered Programs, and by failing to provide the training, experience, and meaningful credentials needed by employers and the U.S. economy overall.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "m d scott", is centered on a light gray rectangular background.

Michael D. Scott
Executive Director