



Child Labor Coalition

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National Coordinator, Global March Against Child Labor

COMMENTS BY THE CHILD LABOR COALITION ON THE U.S. DEPARTMENT OF LABOR'S PROPOSED REVISIONS TO CHILD LABOR REGULATIONS RELATING TO NON-AGRICULTURAL EMPLOYMENT

July 3, 2007

Department of Labor, Wage and Hour Division
29 CFR Part 570
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The U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* on April 17, 2007 (volume 72, pages 19337-19273), in which it proposes various revisions to its child labor regulations in 29 C.F.R. Part 570. Comments by interested parties on the proposed revisions must be filed on or before July 16, 2007.

The Child Labor Coalition (CLC) welcomes the opportunity to comment on the U.S. Department of Labor's Notice of Proposed Rulemaking and Request for Comments related to child labor regulations. **Comments or questions related to the CLC Comments should be directed to Darlene Adkins Kerr, Coordinator, Child Labor Coalition at the address and telephone number listed on the CLC letterhead or by email at darlenea@nclnet.org.**

The CLC was formed in 1989 in response to escalating child labor violations in the United States and in foreign countries. Its goal is to create a network for the exchange of information about child labor; to provide a forum and a unified voice on protecting working minors and ending child labor exploitation; and to develop informational and educational outreach to the public and private sectors to combat child labor abuses and to promote progressive initiatives and legislation. The CLC has more than 30 member organizations, including human rights groups, church groups, labor unions, and various advocacy organizations. Its co-chairs are the American Federation of Teachers and the National Consumers League, and it is housed in the National Consumers League. The CLC is the largest grouping in the United States of advocates for the protection of the safety, health, and education of working children.

These comments are in line with the stated mission and objectives of the Child Labor Coalition. Further, they are endorsed by these organizations: A Better World Foundation; A Minor Consideration; AFL-CIO; American Federation of Teachers; American Federation of School Administrators; Americans for Democratic Action; Association of Farmworker Opportunity Programs; Farmworker Justice; International Initiative to End Child Labor; Migrant Legal Action Program; National Association of State Directors of Migrant Education; National Consumers League; Ramsay Merriam Fund; and the United Food and Commercial Workers International Union.

Before making our comments on the DOL proposal, we have two general comments.

First, we see little or no justification for the amount of time it has taken DOL to issue these proposals. More than five years ago, on May 2, 2002, the National Institute for Occupational Safety and Health (NIOSH) – the government’s premier research agency on safety and health on the job – published a report, commissioned by DOL, entitled *National Institute for Occupational Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders* (hereinafter the “NIOSH Report”). The NIOSH Report contained 176 pages of detailed facts and analysis in support of recommended changes and additions to Hazardous Occupations Orders -- commonly called “Hazardous Orders” or simply “HOs” -- in DOL’s child labor regulations, that prohibit children from working in jobs that have been determined by the secretary of Labor to be particularly hazardous. These regulations, as DOL recognized in commissioning the NIOSH Report, were far out of date, many of them not have been revised in 30 years or more, even despite many outmoded provisions. The NIOSH Report recommended that 13 of the 17 HOs relating to non-agricultural employment be revised, that 8 of the 11 HOs relating to agricultural employment be revised, and that 17 new HOs be created, for a total of 38 revised or new HOs in all. Now, more than five years later, DOL proposes to revise only five existing HOs, and even so DOL does not adopt many of the recommendations made by NIOSH about how to improve these five HOs. This is a rate of five proposed revisions in five years. The deaths and injuries and illnesses that working children have suffered as a result of DOL’s extraordinarily slow pace in taking steps to strengthen existing HOs and to propose new HOs are matters that will have to weigh on the consciences of those who could have, and should have, taken much more rapid action to protect working children.

Second, we are greatly disappointed that DOL does not make any proposals affecting children working in agriculture. The CLC and many other groups, in informal stakeholder meetings with former Wage and Hour Administrator Tammy D. McCutchen, urged that strengthening the child labor regulations affecting agricultural employment be DOL’s top priority, because of the well-known dangers of agricultural employment for children. As noted in the NIOSH Report, youth 15 to 17 years of age working in agriculture have over four times the risk of fatal injury of youth workers in other industries (NIOSH Report, p. 12). Youth younger than age 15 accounted for about three-fourths of the deaths of all working youth under age 15 during the six-year period 1992 through 1997 (ibid.). Based on this and many other data and information, NIOSH made many detailed recommendations for strengthening HOs in agriculture. In response, DOL has made absolutely no proposed changes, and has not even solicited suggestions for changes, in more than five years.

Our comments are set forth below in the same order in which DOL's proposed revisions are discussed in the preamble to its NPRM.

A. Occupations That Are Prohibited for Minors 14 and 15 Years Old (72 Fed.Reg. 19341-45)

1. Prohibited Machinery (pp.19342-43)

DOL proposes to clarify the existing rule that 14- and 15-year-olds cannot operate or tend any power-driven machinery other than office machines. This would be done by putting in a proposed new 29 C.F.R. 570.33 (e) the list of prohibited equipment that is now scattered in several different places, and by expanding the list of prohibited equipment to include golf carts, trimmers, weed-eaters, edgers, and certain other equipment. The proposed new 29 C.F.R. 570.33 says at the outset that the list of prohibited occupations “is not an exhaustive list.” We take this to mean that even if an occupation is not listed in 29 C.F.R. 570.33, it is nonetheless prohibited for 14- and 15-year-olds unless it is expressly permitted for children this young by 29 C.F.R. 570.34, which lists occupations that can be performed by 14- and 15-year-olds. We urge that the first sentence of 29 C.F.R. 570.33 be revised to say this explicitly, as follows: “The following occupations, as well as all other occupations not expressly permitted by 29 C.F.R. 570.34, constitute oppressive child labor within the meaning of the Fair Labor Standards Act of 1938 when performed by minors who are 14 and 15 years of age:”

The CLC would welcome both of these changes. We do regret that DOL has not seen fit to add all-terrain vehicles (ATVs) to the list of prohibited machinery. The serious hazards of operating ATVs have been extensively documented, and DOL should propose child labor regulations that would restrict, or prohibit altogether, their use by working children under age 16.

2. Loading of Personal Hand Tools Onto Motor Vehicles and Riding on Motor Vehicles (p.19343).

Under existing child labor regulations, 14- and 15-year-olds are forbidden to perform the following tasks:

- ? “The operation of motor vehicles and service as helpers on such vehicles.” (29 C.F.R. 570.33(c)).
- ? “Operations in connection with . . . [t]ransportation of persons or property by rail, highway, air, water, pipeline, or other means.” (29 C.F.R. 570.33(f)(1)).
- ? “Loading and unloading goods to and from trucks, railroad cars, or conveyers” (29 C.F.R. 570.34(b)(8)).

DOL proposes to make several changes in these regulations in order to incorporate “interpretations” that it has adopted over the years, and to incorporate an “enforcement position.”

DOL has interpreted the first two regulations above to prohibit 14- and 15-year-olds from riding outside of motor vehicles (such as in the bed of a pickup truck), but not to prohibit such youth from riding passively as passengers in the passenger compartment of the motor vehicle. In addition, DOL’s long-standing interpretation requires that a significant reason for the minors being passengers

in the vehicle is not for the purpose of performing work in connection with transporting, or assisting to transport, other persons or property. Moreover, each minor must have his or her own seat in the passenger compartment, equipped with a seat belt or similar restraining device, and the employer must instruct the minors that such belts or similar devices must be used.

With regard to the third regulation cited above, DOL proposes to add to the regulations an “enforcement position” that permits 14- and 15-year-old children to load and unload light tools and equipment from vehicles in specified circumstances. This enforcement position is directly contrary to the existing regulation. In justification of making this change, DOL makes two statements (72 Fed.Reg. 19343). First, DOL says that this enforcement position “has had extremely positive results” and that there are “strong indications” that work by 14- and 15-year-old children for state and local governments “does not interfere with their schooling or with their health and well-being.” DOL does not offer any factual detail whatever in the preamble to support this statement. Second, DOL says that it “carefully considered” the city’s request relating to the work of loading and unloading light, non-power-driven tools and, “using its prosecutorial discretion, decided that it would not assert a violation of the existing child labor violations” when 14- and 15-year-old children did such work. DOL does not provide any information whatever in the preamble to indicate what facts it took into account when it “carefully considered” the city’s request.

We explain more fully below, in section I, in our discussion of another “enforcement position” involving pizza dough rollers, why DOL’s adoption of “enforcement positions” that are directly contrary to child labor regulations are an extraordinarily unwise and unfair way in which to administer a system of regulations, in addition to being a practice of dubious legality.

For the moment, we will say only the following with regard to the loading and unloading of light tools that DOL has permitted 14- and 15-year-olds to do since 2000. When federal agencies wish in effect to revoke part of a regulation, particularly a legislative rule that has the force and effect of law, they are supposed to make a formal proposal to do so in the *Federal Register*, provide a factual justification for the proposal, invite comments from interested parties, review and analyze the comments, and then issue a final regulation after having taken the comments into account. In this case, DOL received a private request from one municipality, considered the request in private, and issued an opinion letter that set forth a new rule that directly contradicted the existing regulation. No one who relied on the regulations in the *Code of Federal Regulations* would have had any idea that what it said on this subject was no longer valid. DOL is now going through the required notice-and-comment rulemaking procedure that it should have used the first time, and it still provides no factual justification for the proposed change to the regulation— a change that, in practical effect, it made seven years ago. This approach to regulatory change by DOL unfairly stacks the deck against anyone who wishes to oppose DOL’s proposal, because employers who have learned of DOL’s stealth change seven years ago will argue that it would be unfair to them to reverse a position that they have relied upon for this long period. DOL’s “enforcement policy” is not an “interpretation” that arises reasonably out of language in an existing regulation; it is in direct opposition to an existing regulation.

For these reasons, we object to the proposed change to 29 C.F.R.34(b)(8) above. Without knowing DOL’s factual basis for adopting its “enforcement position” affecting this provision, we cannot adequately comment on it.

Apart from these serious procedural flaws, the CLC supports – with two recommendations for strengthening – the proposed amendment to the regulations to incorporate the earlier “interpretations” that DOL proposes in order to clarify the meaning of 29 C.F.R. 570.33(c) and 570.33(f)(1) above. The seat restraining devices should be required to be manufacturer-issued and not homemade, and the employer should be required to “ensure,” and not merely to “instruct” that the restraining devices be used by the children. These interpretations appear to us to grow logically out of the existing regulations and make their meaning clearer.

3. Work in Meat Coolers and Freezers (p.19344)

DOL proposes to incorporate into a new 29 C.F.R. 570.33(i) a position it states that it has taken since 1981, under which 14- and 15-year-old counter workers in quick service establishments and cashiers in grocery stores can “occasionally” enter freezers “only momentarily” to retrieve items. DOL’s longstanding position applies only to 14- and 15-year-olds in retail, food service, and gasoline service establishments, since they are now forbidden to work elsewhere. Because DOL proposes to permit 14- and 15-year-old children to work in many more types of establishments, there are likely to be more children working near walk-in freezers if DOL’s proposal is finally adopted.

A child who only temporarily steps into a walk-in freezer faces hazards, particularly if the door closes when the child is inside. The safest way to deal with this hazard is for DOL to require that the freezer door remain open when the child is inside. Since the proposed regulation would permit children to enter walk-in freezers only “occasionally,” and to be inside the freezer only “momentarily,” there is little practical reason not to require that the freezer door be left open during the entire time that the child is inside. Additionally, DOL should require that the freezer door have a panic bar or other kind of emergency release mechanism on the inside of the freezer so that if the door was inadvertently closed, then the child would be able to get out. DOL should also require that the emergency release mechanism be clearly marked and instructions for use be posted prominently next to it. In addition, there should be a prominent notice at the entrance to the walk-in freezer warning that no boxes or other obstructions should be placed near the door, in order to assure easy entry and exit. Even if DOL’s Occupational Safety and Health Administration (OSHA) has similar rules, these should be incorporated into the child labor regulations so that a DOL Wage and Hour Division inspector could assert a child labor violation rather than having the employer face two inspections, one by the Wage and Hour Division and another by OSHA.

4. Youth Peddling (p.19344)

DOL proposes to ban the employment of 14- and 15-year-olds in youth peddling (including loading and unloading motor vehicles, stocking and restocking sales kits and trays, and similar related activities). However, the proposed regulation would not bar legitimate fund-raising activities by nonprofit organizations where the workers are truly volunteers and receive no compensation (except for small prizes or trophies). The CLC welcomes this change, which is long overdue.

We do recommend two additional changes to the DOL proposal. First, the proposal would permit youth peddling “at . . . the youth-employer’s establishment,” which we assume means inside or directly outside the establishment, but not away from the establishment, such as on a street corner or parking lot. This should be made more explicit by barring youth peddling “in front or around the outside of the establishment.” Second, it is not entirely clear to us that the proposed regulation would prohibit sign-waving by 14- and 15-year-olds, even though “the attempt to make a sale” is prohibited. Both these matters should be addressed in the final regulation.

The hazards of youth peddling have been on the national agenda for 20 years, and many states have already changed their child labor provisions to protect minors from these dangers. DOL should have been in the forefront of this effort, and not following in the wake of 17 states that have already restricted or prohibited door-to-door and street sales by children.

In support of this proposal, DOL notes that youth involved in door-to-door sales and street sales have been injured and even killed, have sometimes been abandoned, have suffered injury from violence and motor vehicle crashes, and have often been intimidated by crew leaders. In addition, DOL notes that as a result of an exemption in the FLSA, people who do this work are “usually” exempt from minimum wage and overtime pay protections. In view of the great hazards that youth peddlers face, we deeply regret that DOL has not seen fit to bar 16- and 17-year-olds from doing this work as well. In 1994, after DOL issued a proposal dealing with youth peddling, the National Consumers League (which houses the CLC); the Defense for Children International, USA; and the Food and Allied Service Trades Department, AFL-CIO all called for such a bar, which would prohibit all children under the age of 18 from doing this work. It is not clear why DOL now appears willing to permit 16- and 17-year-olds to work in such exploitative and dangerous jobs and to do so under circumstances in which they will “usually” not be protected by the FLSA’s minimum wage and overtime pay protections. DOL’s approach here hardly comports with its stated desire to balance “the benefits of employment opportunities with the necessary and appropriate safety protections” (72 Fed.Reg. 19337). The benefits of an employment opportunity in which the children experiencing it are “usually” not entitled to minimum wage or overtime pay are difficult to understand.

5. Poultry Catching and Cooping (pp.19344-45)

DOL proposes to amend the regulations to state explicitly that 14- and 15-year-olds cannot catch or coop poultry for preparation for transport or for market. This change is based on an interpretation of existing regulations that, according to DOL, already prohibit such activity. However, because employers have raised questions about how the existing regulations treat such work, DOL proposes to make the regulations clearer on this point. Under the existing regulations, 14- and 15-year-old children are prohibited from working in “processing occupations” (29 C.F.R. 570.33(a)), prohibited from operating “power-driven machinery” (apart from office machines)(29 C.F.R. 570.33(b)), and from working in occupations in connection with the “[t]ransportation of . . . property by . . . highway . . . or other means” (29 C.F.R. 570.33(f)(1)). These are the three existing provisions that DOL interprets – reasonably, we think – to forbid poultry catching and cooping.

We welcome this change. The work is plainly too hazardous for 14- and 15-year-olds to perform, but the existing regulations do not indicate with sufficient clarity that such work is forbidden.

B. Occupations That Are Permitted for Minors 14 and 15 Years Old (72 Fed.Reg. 19345-47)

The CLC agrees with DOL's position that 14- and 15-year-olds would be able to work only in the jobs and industries expressly permitted by the DOL regulations, and that the list of prohibited jobs and industries is not exhaustive, but instead simply a listing of *some* of the prohibited jobs. We also agree with DOL's statement that the hours and times standards in 29 C.F.R. 6570.35, and the bar to 14- and 15-year-olds doing any work prohibited by HOs, would remain in full force.

The CLC does not agree with DOL's proposal for sweeping changes that would greatly expand the kinds of jobs, as well as the kinds of businesses, in which 14- and 15-year-olds could work. DOL's existing regulations permit 14- and 15-year-olds to work only in "retail, food service, and gasoline service establishments;" even in these three kinds of establishments, 14- and 15-year-olds can do only limited jobs as specified in the regulations. For example, 14- and 15-year-olds, under the existing regulations at 29 C.F.R. 570.34(a), can do the following jobs (among others):

- ? "Office and clerical work, including the operation of office machines."
- ? "Errand and delivery work by foot, bicycle, and public transportation."
- ? "Clean up work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds, but not including the use of power-driven mowers, or cutters."

DOL proposes, broadly speaking, two major changes. First, DOL would permit 14- and 15-year-olds to work in many more different types of establishments than the three to which the youth are now restricted. The only exceptions would be those spelled out in the list of prohibited industries and occupations in 29 C.F.R. 570.33, such as mining, manufacturing, or processing operations; jobs that are prohibited by the various Hazardous Orders that apply to 16- and 17-year-olds; working with any hoisting apparatus; work in boiler and engine rooms; public messenger service; warehousing and storage; communications and public utilities; construction; and certain other jobs.

The effect of DOL's proposed change would permit 14- and 15-year-olds to work, for the first time, in many kinds of establishments that are not considered to be retail. DOL has a list of such establishments in 29 C.F.R. 779.317, relating to the minimum wage and overtime pay exemption in the old retail and service establishment exemption in FLSA section 13(a)(2), which was repealed in 1990. Among the kinds of businesses in which 14- and 15-year-old children will be able to work for the first time are the following:

- (A) *Doctors' and dentists' offices and clinics, medical laboratories, nursing homes, and presumably also hospitals as well.*¹ The 14- and 15-year-olds who work here, if DOL's proposal is approved, would be exposed to blood-borne pathogens, a well-recognized health hazard in these settings. NIOSH estimates that 67,000 children of ages 15 to 17 worked in such places annually between 1992 and 1998 (NIOSH Report, p. 140).² DOL would allow 14- and 15-year-olds to work in such places. As we read the DOL proposed regulatory changes, these youngsters would be able to do clean-up work, which could include cleaning up blood and other bodily fluids, and to dispose of used syringes and other biohazards. Another hazard in many such offices is ionizing radiation from X-ray and similar machines. NIOSH regards exposure to such radiation as so hazardous that it recommends that HO 6 (29 C.F.R. 570.57) be strengthened to bar all children under age 18 from "[w]orking with any machine that generates ionizing radiation, including assisting in diagnostic or therapeutic radiology procedures involving ionizing radiation" (NIOSH Report, pp. 34-35). DOL declines to accept NIOSH's recommendation, and instead merely invites suggestions from interested parties about what new rules it might adopt (72 Fed.Reg. 19334-19335). The result of DOL's proposals is that, for the first time, 14- and 15-year-olds would be able to work in jobs in which they will be exposed to ionizing radiation. These facts alone demand that DOL completely rethink its proposal to expand so greatly the many kinds of businesses in which 14- and 15-year-olds can work.
- (B) *Petroleum and natural gas extraction.* Since 29 C.F.R. 779.317 says that oil well drilling is not retail, the same would be true, by logical extension, of petroleum and natural gas extraction generally. Children of ages 14 and 15 cannot now work in such industries, because they are not considered retail, but under DOL's proposal these youth would be able to work there. This work is considered so hazardous that NIOSH recommended that DOL amend HO 9 (29C.F.R. 570.60) to forbid any child under age 18 from doing such work (NIOSH Report, pp. 40-41). DOL rejects this proposal, and instead merely asks, "Are there some activities that 16- and 17-year-olds may safely perform?" (72 Fed.Reg. 19335). We recognize that under the DOL proposals, 14- and 15-year-olds would not be able to operate prohibited power-driven machines in the petroleum and natural gas extraction industries, but such youth would be able to do any kind of "clean up work" in the oil and gas fields, so long as they did not use "power-driver

¹ We understand that DOL may take the position that 14- and 15-year-old children are permitted to work in hospitals under the existing regulations, on the ground that hospitals are retail establishments. We are not aware of the basis for this position (if it does in fact reflect DOL's view), but even if such young children can work in hospitals now, they cannot work in the other kinds of medical facilities mentioned in this paragraph.

² The NIOSH data appear to be based on an age breakdown that has an age category of 15 to 17, rather than the child labor law age breakdown of 14 and 15, and 16 and 17. It is not clear from the NIOSH data whether any 15-year-olds worked in such health care settings, but if they did this would presumably be unlawful under the current regulations, since it is doubtful that hospitals and doctors' offices and medical laboratories would be considered retail establishments under the FLSA's special definition.

mowers, cutters, trimmers, edgers, or similar equipment” (proposed new 29 C.F.R. 570.34(h). In view of this poorly thought-out proposal, DOL needs to rethink this aspect of it as well.

- (C) *Janitorial and dry cleaning firms.* Since dry cleaners and laundries, at least those that clean for other businesses, lack a retail concept (see 29 C.F.R. 799.317), the same is doubtless true of janitorial firms as well. Permitting 14- and 15-year olds to work in such businesses opens up a whole new range of hazards. In dry cleaning firms, the exposure to cleaning solvents, particularly perchloroethylene, known commonly as “perc,” is most troubling. DOL’s own Occupational Safety and Health Administration describes perc as “a volatile organic solvent . . . which may pose serious health hazards if exposure is not properly controlled.” OSHA goes on to say that inhalation of perc vapors can cause dizziness, drowsiness, and loss of visual coordination; mild loss of memory, visual perception, and reaction time after several years of exposure; and redness and blistering of the skin after prolonged dermal contact.” We leave it to Wage-Hour to check with OSHA to get these and other details about perc’s likely human carcinogenic properties before continuing on the dangerous course that it is proposing here.

We note another hazard involving “clean up” work. Under existing regulations, children of ages 14 and 15, although restricted to working only in “retail, food service, and gasoline service establishments,” can do “[c]lean up work, including the use of vacuum cleaners and floor waxers,” but as a practical matter most such clean up work does not take long (as in the case of a fast-food restaurant), or is contracted out to janitorial firms. It would be exceptionally rare for someone in these three types of establishments to do such work full-time. But under DOL’s proposed change, a 14- or 15-year-old would be able to work for a janitorial firm 8 hours a day and 40 hours a week (during the summer when school is not in session) vacuuming and waxing floors, using heavy equipment all day long. This would appear to be exceptionally strenuous work for such youth.

- (D) *Painting contractors* are listed in 29 C.F.R. 799.317 as lacking a retail concept, so children cannot work for such firms now. Under the DOL proposal, even though children might not be able to paint houses if such work is considered part of construction (which 14- and 15-year-olds would still be prohibited from doing under DOL’s proposal), we interpret the DOL proposal to permit 14- and 15-year-old children to paint automobiles. Workers in such settings are regularly exposed, with few effective controls, to solvents and metal pigments and paint. A study at a typical owner-operator shop, published in the *Annals of Occupational Hygiene* by two Drexel University environmental experts in 1984, revealed high, short-term exposures to solvent vapors and occasionally lead and chromium pigments. Conditions were exacerbated by the workers' disinclination to use protective equipment or exhaust ventilation, particularly during cold weather. This is the kind of work environment to which DOL seems willing to expose 14- and 15-year-old children.

- (E) DOL’s proposal also appears to have a major impact on *messenger services*. Under existing regulations, 14- and 15-year-olds cannot work for a “[p]ublic messenger service.” This seems to permit them to work for private messenger services. But such private services – such as those that have standing contracts with law firms, accounting firms, and other types of businesses – would presumably not be considered “retail” establishments under the FLSA definition, so 14- and 15-year-olds cannot work for them now. (29 C.F.R. 799.317 says that messenger firms engaged in furnishing messenger service lack a retail concept.) It is true that 14- and 15-year-olds can do “[e]rrand and delivery work by foot, bicycle, and public transportation” now, though only for retail businesses. But under the proposed regulations, a 14- or 15-year-old could work for a private messenger or courier service, spending all day riding on a bicycle through crowded city streets. Any reasonable person who has seen such couriers rushing through city streets, dodging cars, pedestrians, and other cyclists to deliver important documents, would shudder to think that 14- and 15-year olds would be able to do this work, if DOL’s proposal becomes the final regulation.
- (F) *Business offices*, such as accounting firms, advertising agencies, mass mailing businesses, insurance companies, and many similar businesses are prohibited workplaces for 14- and 15-year-olds now, because they are not, according to 29 C.F.R. 799.317, retail businesses within the narrow FLSA definition. Under DOL’s proposal, 14- and 15-year-old children would be able, for the first time, to work in such business offices, and to do jobs with a wide range of office machines many of which did not even exist when 29 C.F.R. 570.34(a)(1) was first issued. Unfortunately, DOL does not appear to have given much if any thought to the hazards that office machines may pose to 14- and 15-year-old children. Paper shredders are one example. Some office paper shredders have openings as wide as 20 inches and use a conveyor belt to feed paper into them. It is not entirely clear that the paper-processing machines whose use is restricted by HO 12 (29 C.F.R. 570.63(a)) would include paper shredders. Paper shredders are clearly not paper balers or paper box compactors. Data processing machines are another example of potential hazards to the youngsters. These machines typically have moving belts, rollers, and gears, often exposed and lacking adequate guards and hoods and other protective devices. These machines are not processing paper for disposal, as balers and compactors are. Office machines like paper shredders and data processing machines – and particularly any exposed moving parts -- can sometimes catch necklaces, bracelets, loose clothing, long hair, scarves, and ties in their operating parts, and pull the fingers or arms or face of the operator dangerously toward, or even partly into, the machine. Such accidents affect adult workers, and are probably even more likely to befall 14- and 15-year-olds, because of their lesser maturity and other traits of such youth that make them more susceptible to injury.

The DOL proposal would permit 14- and 15-year-old children to work up to eight hours a day on non-school days and up to 40 hours a week in non-school

weeks at computers, typing or inputting data. This exposes such youth to the dangers of cumulative trauma disorder and repetitive motion injury. Such youth, under the DOL proposal, could also spend such long hours as photocopy operators where, in doing the minor servicing that the instructions on the machine encourage the operator to do, the children could become injured from touching the hot printing drum, clearing a paper jam, making an adjustment, or altering a malfunctioning part.

Just as DOL carefully reviewed the possible safety and health hazards in the many jobs in retail, food service, and gasoline service establishments before determining which specific jobs 14- and 15-year-olds would be permitted to do there, it needs to do the same now, given the many more types of establishments in which such youth could be able to work. In short, DOL needs to consider the wide panoply of hazards – of which the above examples are only a sampling – that 14- and 15-year-old youth will be exposed to if DOL carries through its proposal to permit youth to work in many more establishments than retail establishments, food service establishments, and gasoline service establishments. Given the limited information provided in the NPRM, the CLC cannot endorse a broadening of industries beyond retail, food service, and gasoline service industries. Before further consideration by DOL, the CLC strongly recommends that DOL specify the establishments that fall under the definition of “:retail” in the current application of Section 570.34; and identify new workplaces that would be open to youth under the proposal, with a review of possible hazards.

The second major change that DOL proposes would expand the list of jobs that 14- and 15-year-olds could perform in the expanded list of permissible types of establishments in which such youth could work.. The three new jobs that would be permitted are (1) work of a mental or artistically creative nature; (2) lifeguard (for 15-year-olds only, not 14-year-olds); and (3) employment inside and outside places of business where machinery is used to process wood products. Each of these proposals is considered in turn below.

1. Work of a Mental or Artistically Creative Nature (p.19345)

DOL indicates that “mental” work would include, “but not be limited to,” the following: “computer programming, the writing of software, teaching or performing as a tutor, serving as a peer counselor or teacher’s assistant, singing, the playing a musical instrument, and drawing.” DOL specifies that the work of an “artistically creative nature” would be limited to work “in a recognized field of artistic or creative endeavor.” This latter term is not clarified any further, but in another FLSA regulation that fleshes out an exemption depriving professional employees of minimum wage and overtime protection, this concept of such a “recognized field,” DOL says, “includes such fields as music, writing, acting and the graphic arts.” 29 C.F.R. 541.302 (b). DOL does not indicate whether the proposed child labor regulation would have the same meaning.

The CLC recognizes the potential merit of this proposal. Much of the “mental work” specified in the proposed regulation would be likely to help make those who do it better students in school, as well as giving them work experience that would not expose them to the various hazards that other DOL proposals would.

We would note, however, that singing and the playing of musical instruments are often in demand in bars, lounges, cabarets, and other places that 14- and 15-year-olds might best avoid. These and other settings could cause untoward effects on such youngsters' moral health, even if not on their physical health and safety. We urge DOL to consider carefully all the ramifications of this proposal before adopting it, even though the general idea seems prudent enough.

We also note another proposal. One job that the existing regulations permit is "car cleaning, washing, and polishing." DOL would strengthen the existing restrictions to require that such work can be done only by hand, thus making clear that 14- and 15-year-old children cannot use automatic car washers, power-driven buffers, and similar equipment. The CLC supports this proposal, but is deeply distressed, as indicated above, that car painting is not prohibited as well.

2. *The Employment of 15-Year-Olds (But Not 14-Year-Olds) as Lifeguards (pp.19345-46)*

DOL proposes to permit 15-year-olds to work as lifeguards. DOL reveals that since 2000, pursuant to an "enforcement policy," it has been permitting this practice, even though it is inconsistent with existing regulations, which do not allow any child under age 16 to work as a lifeguard. As justification for adopting this enforcement policy, DOL says, without any further explanation, that the Red Cross had revised its own rules and began certifying 15-year-olds as lifeguards. The proposed regulation would permit 15-year-olds to work at traditional swimming pools and certain areas of amusement water parks (but not at rivers, streams, lakes, reservoirs, wharfs, piers, canals, or ocean-side beaches), provided that they have been trained and certified in aquatics and water safety by the Red Cross or similarly recognized certifying organization. These youth would be forbidden from operating or tending "power-driven equipment including the elevated areas of power-driven water slides." Nor could these 15-year-olds enter or work in any mechanical rooms or chemical storage areas, including any area where the filtration and chlorinating systems are housed.

We have already noted above the deep reservations we have about "enforcement policies" that remove protections in existing regulations without first subjecting those changes to the notice-and-comment requirements of the Administrative Procedure Act.

But DOL's proposal to permit 15-year-olds to be lifeguards presents even more troubling issues. Perhaps most distressing is the fact that DOL gives no indication of what the Red Cross training requires. Is there any attempt to determine the psychological maturity of these children? Do they have the gravitas and authority to order older children and adults in a pool to follow the rules? Are they required to be of a minimal height and weight to be able to do their jobs? Can a scrawny 15-year-old be expected to rescue a 250-pound man who is frantically thrashing in water over his head? Are 15-year-old Red Cross-certified lifeguards required to work under the uninterrupted supervision of an adult lifeguard, or can they work alone, as might well be required in smaller swimming pools?

Children of age 15 could well, under such circumstances, be subjected to serious safety hazards of injury to themselves or even drowning, wholly apart from the hazards to which the swimmers and divers they are trying to save would be subjected.

We fully endorse the comments of the Lifeguard Standards Association to DOL, dated May 18, 2007, which oppose the proposed relaxation of the existing rule, which sets an age 16 minimum. As those expert comments point out, there are two deeply troubling problems that DOL's proposal would cause. The first is the profound psychological impacts that stem from being responsible for someone else's life, particularly if the lifeguard, as can occur, fails to save the swimmer's life. Even adults in such situations can be psychologically scared for life. The other major problem is that many drowning deaths involve would-be rescuers who try to rescue a person in distress. Even lifeguards trained to deal with such situations face such dangers, particularly those who lack the maturity, the strength, and the self-possession to react quickly in extreme emergencies.

The press has been filled with reports in recent years indicating a shortage of lifeguards, and we have learned that the Red Cross has long urged DOL to permit 15-year-olds to be lifeguards, which, as noted above, DOL did in 2000. Press accounts note various reasons for the shortage, many of them indicating that the wages and fringe benefits of lifeguards are low compared to the wages and benefits in other jobs that teenagers can hold under existing child labor regulations. Children in their late high school or early college years often are looking for jobs that will enhance their resumes and career prospects, and very few people become professional, year-round lifeguards. Moreover, the cost of the training needed in order to become certified – which can take 30 to 40 hours -- can be several hundred dollars. Many employers faced with these problems, particularly those who operate municipal swimming pools, have adopted various approaches that are designed to increase the number of lifeguards without seeking to lower the age minimum. Montgomery County, Maryland, has offered to pay for the lifeguard training for those students who promise to work for a year. Omaha, Nebraska, as another example, increased the wages of lifeguards by 50 percent in 2001, and as a result more than 70 percent of the lifeguards who had worked the year before came back to work in 2001. Many cities, including Omaha, have taken various other proactive steps to try to assure a larger pool of applicants and returning lifeguards, such as seeking out swimmers in schools, aquatic clubs, and other places, encouraging them to become lifeguards when they are old enough; by creating rescue award programs and competitions; by end-of-season social events; and by holding "Lifeguard Days" at which lifeguards are recognized by the mayor at a city-wide event.

The fact that DOL would require the lifeguards to be certified by the Red Cross (or a "similar certifying organization") in no way assures that the DOL proposal is prudent. Automobile drivers have to be certified by means of a written and road test, and in many states the minimum age for getting a license is age 16, but only if the teenager has had a lengthy driver's education course. Despite these requirements, two out of five deaths among teenagers in the United States are caused by motor vehicle crashes, according to the Centers for Disease Control and Prevention. The point we are making here is not that being a lifeguard is as dangerous to the lifeguard as driving a car is to the driver, but that the degree of maturity – and particularly the ability to make rapid yet wise judgments while maintaining a calm emotional state – is less evident the younger a child is.

There are many jobs that youth can perform at or near a swimming pool, under the DOL proposals that permit work beyond retail establishments, which are not as fraught with potential

danger as being a lifeguard. Some examples are customer service at the check-in desk, handing out and collecting inner tubes, inflated rubber balls, and other equipment to patrons; and walking among the patrons on the pool deck to answer questions and to remind patrons of the rules. But the responsibility for rescuing swimmers in the water, and otherwise assuring the safety of patrons, should not be entrusted to 15-year-olds, in view of the hazards to which such work would expose them (as well as the pools' patrons). It is not the purpose of the child labor laws to respond to the demands of employers who claim to face a labor shortage, particularly when the employers have not taken all the steps they could to deal with the problem short of putting children in harm's way.

An age 15 minimum for lifeguards puts the United States in a select company – of too little protection. The Canada Lifesaving Society, the national certifying agency in Canada, made a detailed study of this issue; after educational and psychological research and a worldwide inquiry of minimum ages in other countries, it concluded that 16 should be the minimum age. The United States is one of only a handful of countries in the world that permits an age 15 minimum.

We urge DOL to rescind its enforcement policy as soon as possible and to follow its existing regulations, and in addition to issue an opinion letter from the Wage and Hour Administrator notifying those who rely on opinion letters, rather than regulations, in order to determine what DOL's official position is.

3. The Employment of Certain Youth by Places of Business Where Machinery Is Used to Process Wood Products (pp.19346-47)

DOL proposes to permit children of ages 14, 15, 16, and 17 to work in places of business that use machinery to process wood products, with many restrictions. This regulatory change is designed to implement a provision of the 2004 DOL Appropriations Act that added section 13(c)(7) (29 U.S.C. 213(c)(7)) to the FLSA. This provision is typically referred to as the “Amish amendment” because it was intended to permit Amish youth to do certain jobs in woodworking factories. In this part of our comments, for ease of reference we call such underage youth who can work in with woodworking machinery “Amish youth.”

The CLC opposed this amendment, as did many other groups, largely on the ground that this work is extremely dangerous not only for youth but for adults as well. The industry category entitled “Sawmills, Planing Mills, and Millwork” had the fourteenth highest lifetime risk of 5.8 deaths per 1,000 workers of all ages (NIOSH Report, p. 28). DOL regulations for years have barred any child under age 18 from working in any sawmill, lath mill, shingle mill or cooperage-stock mill on the ground that such work was found by the Secretary of Labor to be “particularly hazardous.”

Section 13(c)(7) of the FLSA ignores these grave hazards with regard to any youth of ages 14, 15, 16, and 17 who “by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.” As a practical matter, this language exposes only Amish youth to the dangers of jobs involving woodworking machinery.

DOL's proposed regulations repeat the statutory language, but in some places they add to the statutory language. We comment here on those additions.

- A. The statute says that the Amish youth must be "required to use personal protective equipment to prevent exposure to excessive levels of noise and sawdust." The proposed regulations add the requirement that the Amish youth must actually use personal protective equipment; it is not sufficient if the employer merely requires the youth to use the equipment. This is a critically important addition that we support. Otherwise, the employer could escape liability by merely posting a sign saying that such equipment must be worn, or even by explaining orally, just once, to the youth to use such equipment. In view of the dangers that these youth will be exposed to, this proposed stronger requirement is entirely appropriate.

- B. The statute, in addition to requiring the use of personal protective equipment, also requires that the Amish youth be "protected from wood particles or other flying debris within the workplace" by a "barrier" or by "maintaining a sufficient distance from machinery in operation." The statute, however, does not describe what personal protective equipment must be worn, nor does it indicate what kind of "barrier" is required or how far a distance a "sufficient distance" is. DOL's proposed regulation states that compliance with these requirements will be "accomplished when the employer is in compliance with the requirements of (1) the applicable governing standards" issued by DOL's Occupational Safety and Health Administration (OSHA) or, (2) in those states that administer the Occupational Safety and Health Act (OSH Act) under an OSHA-approved state plan, the state plan's governing standards. This is a wise approach in our view, because DOL is proposing to use safety standards applicable to woodworking machinery that are already in existence and have been interpreted by OSHA and by the courts. There are other issues, however, that arise under this approach. It appears that under DOL's proposal, a Wage and Hour Division investigator would have to determine whether there was an OSHA violation, and if so the investigator would have to assert a child labor violation on the ground that one or more of the restrictive conditions under which Amish youth are permitted to work have not been met. Since the Wage and Hour Division investigators will have to become experts in the OSH Act and regulations (or at least consult closely with OSHA investigators) in order to enforce these requirements, it would make sense either for the Wage and Hour Division to enforce OSHA in this context by issuing OSHA citations that assert OSHA violations, or for the Wage and Hour Division investigator to notify OSHA of an OSHA violation and direct OSHA to investigate the matter as well for OSHA violations. The reason for this recommendation that the CLC makes here is that if there are OSHA violations that give rise to child labor violations, then the adults who work with the woodworking machinery are subject to the same workplace hazards as the children.

- C. Another condition under which an Amish child is permitted to work, according to section 13(c)(7) of the FLSA, is that the child must be “supervised” by an “adult relative” or by “an adult member of the same religious sect or division” as the Amish youth. These terms are not defined in the statute, but DOL’s proposed regulation fleshes them out. DOL’s proposed regulation says that the supervision must be “close, direct, constant, and uninterrupted.” In view of the serious hazards that the Amish youth will face, we believe that this requirement is essential. We assume that such supervision would require that there be one supervisor for each youth under age 18, and we urge that DOL add this requirement explicitly to its regulation in order to make clear how close and direct the supervision must be. DOL’s proposed regulation also says that an “adult” means someone at least 18 years old and that a “relative” means the parent (or someone standing in place of the parent), grandparent, sibling, uncle, or aunt of the young worker. We propose that DOL strengthen the language to specify that the supervisor must have experience within that industry or workplace.

There are still other problems with the Amish exemption that DOL needs to consider. The statute states that personal protective devices are required only to prevent exposure to excessive levels of noise or sawdust. There is no reference to preventing exposure to the toxic chemicals present in adhesives and coating agents that are used in woodworking operations. This is a serious deficiency in the law. Most of the toxic chemicals used in woodworking operations can be absorbed by the skin and thereby enter the bloodstream, and others are inhaled. Both nitrocellulose topcoats (lacquers) and acid-catalyzed coatings (conversion varnishes) contain solvents that are toxic to humans. These solvents have short-term effects such as irritation of the eyes, nose, and throat, as well as headaches, dizziness, confusion, fatigue and nausea. The longer-term effects include reproductive problems, central nervous system disorders, and damage to the lungs, liver, and kidneys. As for adhesives used in finishing wood products, the most hazardous are the solvent-based epoxy resin and urea-formaldehyde resin adhesives. Epoxy resin adhesives often have as their base methylene chloride, which has been shown to cause cancer in laboratory animals. In addition to these health hazards, there are serious safety hazards in woodworking shops. Chemicals in many of the solvents, lacquers, varnishes, and coatings are extremely flammable, and hence pose significant fire and explosion hazards. DOL needs to figure out some way to protect Amish children from these many and various hazards. DOL’s OSHA experts are familiar with these hazards.

Despite the great safety and health hazards summarized above, Congress did not see fit to require woodworking establishments that employ Amish youth to report to DOL all work-related accidents and deaths of youth who work in these places. This approach would have been the most prudent way to determine whether Congress’s policy judgment in permitting children to face such dangers was a wise choice. Even in the absence of such a reporting requirement, DOL can play an important role here by publicizing not only the hazards of working in such places of business, but also the results of any child labor investigations involving woodworking machines, in order to remind all American youth and their parents and their employers – and the Amish in particular -- of the grave dangers that these machines represent to working children. Such a

public education campaign might help reduce the number of deaths, injuries, and illnesses of children (as well as adults) who work in such establishments.

C. Periods and Conditions of Employment (72 Fed.Reg. 19347-48)

DOL proposes to add to the regulations several long-standing enforcement positions. These enforcement positions are reasonable interpretations of existing regulations (unlike other enforcement positions DOL proposes to put in its child labor regulations, which are inconsistent with existing regulations). We briefly summarize the DOL proposals and offer our comments on each of them below.

- (a) School would not be considered to be in session for a 14- or 15-year-old who (i) has graduated from high school; or (ii) has been excused from compulsory school attendance by the state or other jurisdiction once he or she has completed the eighth grade and his or her employment complies with all of the requirements of the state school attendance law; or (iii) has a child to support and appropriate state officials have waived school attendance requirements; or (iv) is subject to a court order prohibiting him or her from attending school; or (v) has been permanently expelled from the local public school that he or she would normally attend.

The CLC agrees with all of these changes except (iii) and (v). As for (iii), the CLC believes that it is ill-advised to excuse 14- and 15-year-olds from compulsory school attendance based on parental status. It serves the best interests of the 14- or 15-year-old parent, as well as the young parent's child, for the parent to complete his or her education, thus realizing a long-term benefit of increased and better employment in the future.

As for (v), it is possible that a child permanently expelled from public school might still be required, under state or local law or perhaps by court order, to attend some other school. For this reason, we recommend that proposed 29 C.F.R. 570.35(b)(1)(v) be changed to read: "Has been permanently expelled from the local public school he or she would normally attend, unless the child is required, by state or local law or ordinance, or by court order, to attend another school."

- (b) Make clear that the 3-hour limit of work time for school days applies to Fridays. The CLC supports this clarification. It makes clearer what the existing regulation already states.
- (c) Make clear that the term "week" in the hours restrictions means a standard calendar week, beginning at 12:01 a.m. on Sunday and not an employer's workweek (if it is different from the standard calendar week). The CLC supports this change.
- (d) Add to the regulations DOL's longstanding enforcement position the determination of when school is in session will be based on the normal school hours of the public school system in the child's district of residence. (This is stated in the FLSA in

section 13(c)(1) with regard to work in agriculture, but it is nowhere stated, in the law or the existing regulations, with regard to non-agricultural occupations.) The CLC supports this change. Private schools and parents who home-school their children may object to this proposal if their daily schedules are different from those of the local public school, but the CLC believes that any such objections are outweighed by the benefits of having one standard in each school district. All these benefits relate back to the requirement in section 3(l) of the FLSA (29 U.S.C. 203(l)) that the employment of 14- and 15-year-olds be “confined to periods which will not interfere with their schooling.” If the school day schedules established by private schools and by parents of home-schooled children could determine when children being educated in those settings governed here, there would be nothing in the DOL child labor regulations that would prevent such a school or parent from setting a schedule that would permit children to work during the hours that the public school system is in session. Indeed, non-public schools could be established by organizations whose prime goal is to provide 14- and 15-year-old working children to employers during normal business hours in the middle of the day, rather than to make sure that the children are in school during the hours when they are most alert and receptive to classroom instruction. We do not say that there would be many such schools or home-schooling parents, but the mere fact that such outcomes could occur should be reason enough to cause DOL to reject this approach. We recognize that in some school districts, the public schools may be closed during planting or harvest seasons to enable children to work in the fields. This approach, too, puts work ahead of schooling, but at least the school board officials who create such scheduling changes are answerable to the electorate in the public school district, either because they are directly elected or because they are appointed by county or other public officials who are directly elected. By contrast, those who operate private schools and those who home-school their children are not answerable to the electorate, either directly or indirectly.

DOL, in the preamble to the proposed regulation, states that it seeks information that will enable it to decide whether to make additional changes to the existing standard, which takes the position that children cannot work during the hours that the local public school is in session. There are three issues here, according to DOL. We address each in turn.

First, should DOL continue to use the standard of “the hours of operation of the local public school” even when the minor does not attend that school or may, for whatever reason, have different attendance requirements than other students attending the local public school? We have already answered this question above: DOL should most definitely use “the hours of operation of the local public school” as the governing standard.

Second, should DOL base the standard on each individual minor’s actual academic schedule? The CLC opposes this approach. We understand that in some schools, some students, particularly those with superior academic records, are permitted to go off-campus during lunch hours and study halls, and perhaps under other circumstances as well. These off-campus periods are during what are considered to be the hours of operation of the school, and hence under the existing regulations are presumably not hours during which 14- and 15-year-old children can

work. For DOL to adopt a regulation that would permit children to work during these periods of the school day would needlessly complicate any efforts by the school system, and by DOL, to determine whether the children in the school are in compliance with federal child labor requirements. There is no need for DOL to bend over backwards to try to assure that children have the absolute maximum opportunity to squeeze every possible minute of the day into the three hours that they can work during a school day. This approach seems to us to give far more emphasis to work experience for 14- and 15-year-olds than to their education.

Third, would the minor have greater opportunities and flexibility in seeking employment if the actual academic schedule and attendance requirements applicable to each minor were used as the standard? We have made clear in the previous paragraph that we object to using each student's individual schedule as the standard for determining when school is in session. We consider this an unworkable and needlessly complex standard. We readily admit that the standard would give 14- and 15-year-olds greater flexibility in seeking employment, but we are not at all certain that there would be greater opportunities for seeking employment. What fast-food restaurant would want to hire a 14- or 15-year-old child to work for 60 minutes or so over the lunch hour and then have the child run back to school for afternoon classes? The CLC is perplexed as to why DOL seems more interested in treating work as of higher importance than education.

D. Work-Study Programs (72 Fed.Reg. 19348-50)

The existing regulations (29 C.F.R. 570.35a) permit the establishments of work experience and career exploration programs (known as "WECEP"). These programs permit 14- and 15-year-olds to work longer hours than other 14- and 15-year-old children in three respects:

1. They can work during school hours, whereas other children cannot work at all during school hours.
2. The maximum amount of time they can work during a school week is 23 hours, whereas the limit for other children is 18 hours.
3. The WECEP children cannot work more than 3 hours on a school day (but this work can be during school hours).

DOL proposes to create a new regulation (29 C.F.R. 570.35b) that would relax these rules so that 14- and 15-year-old children can work as much as 8 hours a day when school is in session. Specifically, under the DOL proposal 14- and 15-year-old school children would be able to work, during a four-week cycle, up to 8 hours per day one day per week during three weeks of the four-week cycle, and up to two days per week (but not more than eight hours a day) in the fourth week of the cycle. All of this work could be on school days and during school hours (which is now illegal), and of course would be more than the existing rule that says 14- and 15-year-olds cannot work more than 3 hours a day on school days. DOL also proposes to

require any school that wishes to take advantage of this exception to the existing WECEP restrictions to file a letter of application with the Wage and Hour Administrator, who will either approve the program, or deny the application and explain why. There are various other requirements that we comment on below.

The CLC has several serious concerns about this program. The first is that this proposal is so narrowly tailored to a specific school system that it could easily bar other school systems that have similar, but not identical, approaches from taking advantage of the program. What is particularly troubling – and what DOL does not indicate in its preamble to the proposed regulation -- is that the only school system that appears to qualify for the proposed program is a private Roman Catholic system. DOL says that the system is known as the "Network," but DOL does not give the full, correct name: the Cristo Rey Network. The DOL proposal raises serious questions under the First Amendment to the United States Constitution, which forbids the government from favoring one religious sect over another. What DOL is proposing would do exactly this. It may be true that other religious sects could exactly imitate the Cristo Rey Network's unique work schedule and qualify for the proposed exception to the normal WECEP rules, but what if another sect, or even a non-sectarian private (or public) school wished to adopt a slightly different approach? For example, what if the Lutherans want to have a system that is slightly different and hence does not meet the requirements that DOL would establish?

Our second concern is whether DOL would be able to assure that no violations occur under this system. For example, a "teacher-coordinator" would have to assure that the children are employed in compliance with the child labor and minimum wage requirements of the FLSA. DOL does not specify how this will be assured.

Our third concern with DOL's proposal is the secrecy of the approval process that DOL would adopt. Any employer wishing to take advantage of this new provision would have to apply to DOL for permission to do this, and DOL would have to approve before operations could begin. The preamble to the proposed regulation say specifically that "DOL would not publish this information" (72 Fed.Reg. 19362). This is not transparent enough. DOL should be required to publish a *Federal Register* notice detailing every application and should have to invite comment during a specified period of, say, 30 or 60 days. In addition, DOL should be required to publish a *Federal Register* notice of every approval it grants. We understand that DOL thinks that anyone wanting this information should file a request under the Freedom of Information Act (FOIA). This is far too inadequate to assure transparency. DOL's record on responding to FOIA requests means that the request would not be answered until long after DOL had taken action on the request of a school system to take advantage of the proposed new exception to existing WECEP rules. Moreover, any DOL response to an FOIA request would go only to the requester, and hence many other interested parties who want to monitor what DOL is doing would not be informed. Publishing both the school's application and the action by DOL in the *Federal Register* assures public transparency.

Our fourth concern is that DOL's proposal would permit 14- and 15-year-olds to displace a worker at the establishment where they work, because the work schedules of five students would be arranged so that they share what amounts to a 40-hour-a-week job. Under the existing WECEP program, 29 C.F.R. 570.35a(e) expressly forbids the displacing of a regular worker in

this way. DOL offers no justification for this approach. It seems to us that the purpose of the Cristo Rey Network's approach is to make its 14- and 15-year-olds more attractive to employers by offering, in effect, a full-time youth worker.

We have looked at the Cristo Rey Network's Web site (www.cristoreynetwork.org). Cristo Rey is a rapidly growing network of Catholic parochial schools that caters to low-income children. The children are enrolled in the college preparatory curriculum, and the schools have an excellent record of getting the children in to post-secondary education. The children are able to afford the private not-for-profit schools because most if not all of what the corporations and other organizations where they work for 20 hours every four weeks pay to Cristo Rey goes towards the children's tuition expenses. These facts seem to be all to the good.

However, the Web site reveals other facts that are very troubling. First, Cristo Rey's work-study program seems to have been in existence for about a decade. If this is true, then Cristo Rey has been violating the existing WECEP rules during this period, evidently with the knowledge of DOL. Is this another example of DOL adopting an "enforcement position" that is in conflict with existing regulations?

Second, it is not at all clear from the press accounts on the Web site how much money -- if any at all -- goes to the children for the work they do. DOL claims to have put in protections in the proposed regulations to make sure that there will be no abuses, but that seems to be a dubious assertion.

Third, the Cristo Rey Web site says that the corporations, hospitals, and universities where these students now work are not considered to be their employers. Instead, Cristo Rey has set up an independent entity that it calls an employee leasing agency, which is the employer. But under the Fair Labor Standards Act, "employer" is so broadly defined that the hospital or other organization in which the children work could easily be considered an employer as well. DOL should make clear that the corporations or other organizations where these children work are deemed to be their employers under the FLSA.

E. Logging Occupations and Occupations in the Operation of Any Sawmill, Lath Mill, Shingle Mill, or Cooperage Stock Mill (72 Fed.Reg. 19350-51)

HO 4 (29 C.F.R. 570.54) currently forbids 16- and 17-year-olds from working in any job in logging or in the operation of a saw mill (or lath mill, shingle mill, or cooperage stock mill). There are various exemptions to this basic rule that permit 16- and 17-year-olds to work in timber culture, timber-stand improvement, or in emergency firefighting, as well as work in constructing or repairing living or administrative quarters in logging camps.

The NIOSH Report (pp. 27-31) recommends that this HO be strengthened in two ways:

- ? by expanding the HO to cover work in the operation of timber tracts and tree farms, and in forestry services (which includes firefighting). The timber tracts industry,

NIOSH notes, consist of establishments that operate timber tracts or tree farms for the purpose of selling standing timber; the forestry services industry involves services related to timber production, wood technology, timber cruising and estimation, and forest firefighting and fire prevention.

- ? by removing the existing exemption that permits work in constructing or repairing living or administrative quarters at logging camps.

DOL agrees to bar 16- and 17-year-olds from any jobs in forest fire fighting and in forest fire prevention. The CLC welcomes this strengthening of HO 4.

DOL declines to follow NIOSH's other recommendations, which the CLC supports. *First*, DOL says that it is inclined to bar 16- and 17-year-olds from jobs in timber tracts, tree farms, and forestry services, but it is concerned that there may be certain jobs in these industries that such youth can perform safely. DOL therefore seeks information and advice on what particular jobs in these industries are not particularly hazardous. Jobs in timber tracts, tree farms, and forestry services involve many hazards to which children under age 18 should not be subjected. If DOL, as it says, is inclined to bar youth under age 18 from doing such work, it is unfortunate that it did not issue proposed regulations to this effect, and thereby put the burden on those who oppose such restrictions to show that there might be a few jobs in those industries that children could perform.

In any event, we discuss some of the hazards of these industries. Working in the forestry industry can involve working at heights, to check for disease; to prune and trim trees (often with hand- and/or power-tools), particularly Christmas and other ornamental trees, some of which can be as tall as 20 feet and even taller. According to the Dictionary of Occupational Titles (DOT), for example, Christmas tree workers typically trim the tops and limbs of trees to maintain a conical shape, using machetes and pruning shears, and remove brush that interferes with the trees' growth, using mattocks and brush hooks. These workers also cut the trees with a chainsaw and drag them from the cutting area to a truck and then load them on to a truck. The CLC strongly urges DOL not to permit children under 18 to do any of this work, much of which is already prohibited by existing HOs.

Other forestry workers gather forest products, such as boughs, tree cones, medicinal plants and bark, and similar living things. Gathering boughs and cones requires the workers to climb trees. The NIOSH Report recommends that DOL establish a new HO for nonagricultural occupations prohibiting work at a height of six feet or more, and that DOL revise the agricultural HO to reduce the maximum height at which children under 18 may work from 20 to six feet (NIOSH Report, pp. 114-119, 79-81). The Report contains much information on the dangers of working at heights. In light of these data, children under 18 should not be able to work at heights in timber tracts or tree farms.

Much work in timber tracts and tree farms also poses the risk of musculo-skeletal injury. An example is planting tree seedlings. Workers who perform this task carry heavy bags with hundreds of tree seedlings in them; they hack a hole in the earth with a hoe-like implement called a mattock, planting hoe, or dibble, then reach into the bag to get one seedling, stoop down to

place the seedling in the ground and then close the hole using a twisting motion of their heel or toe. This is strenuous, almost back-breaking work that children should not be doing.

A few other jobs may well not be so dangerous or strenuous as these, but what is the compelling need to permit children under 18 to do them? An example is timber cruising. This involves walking through a timber tract and making a sampling of measurements and estimations to determine the total board feet or cord volume of the tract, as well as the grade, species, and value of the timber. Since this work often requires knowledge of algorithms and higher mathematical formulae, it may well be that there are few if any children under age 18 are doing the work now. Another example is seedling sorters and seedling pullers. These workers are in the tree nursery, the former examining seedlings and discarding substandard ones, and the latter stooping down to pull seedlings from the nursery soil to be placed in bags used by the planters. We see little value in reviewing all of the various jobs that may be available in these forestry-related industries and trying to determine whether one or two or three might be suitable for 16- and 17-year-olds. DOL should simply forbid those under 18 from doing any of these jobs. The NIOSH Report provides ample justification for adopting this approach.

Second, DOL has decided not to bar 16- and 17-year-olds from constructing and repairing living or administrative quarters in logging camps. Instead, DOL invites information, data and feedback on whether it should create one comprehensive HO relating to all aspects of construction, and what restrictions such a comprehensive HO should include. The existing HO prohibits children under age 18 from working in “[a]ll occupations in logging,” and in turn defines “all occupations in logging” to include “the constructing, repairing and maintaining of . . . camps used in connection with logging.” The proposed new regulation retains this exact same language. However, the proposed new regulation also states, in 29 C.F.R. 570.(a)(1)(iii), that one permissible job is: “Work in the construction, operation, repair, or maintenance of living and administrative quarters of logging camps.” These two provisions of the proposed regulation are inconsistent with one another. In common parlance, a “logging camp” means the living quarters for logging workers. Because DOL has given no justification – no data, no information, nothing -- for changing the existing regulation in this regard, it must leave it the way it is. Moreover, given that the existing regulation bars 16- and 17-year-olds from constructing and repairing living quarters, we see no logic in failing to bar these same activities with regard to administrative quarters. In other words, the Secretary of Labor having long since declared that the construction, repairing and maintaining of living quarters is “particularly hazardous” (within the meaning of 29 U.S.C. 203(l)) for 16- and 17-year-olds, there is no reason not to make the same declaration with regard to administrative quarters.

F. Occupations Involved in the Operation of Power-Driven Wood Working Machines (72 Fed.Reg. 19351-52)

HO 5 (29 C.F.R. 570.55) currently forbids 16- and 17-year-olds from working with power-driven fixed or portable machines that cut, shape, or otherwise transform wood or veneer, but not other materials such as metal or plastic.

The NIOSH Report (pp. 31-34) recommends that HO 5 be expanded to prohibit work on power-driven machines that cut, shape, etc., material other than wood. In the alternative, NIOSH recommends that this HO be combined with other HOs dealing with metal and paper cutting machines, so that a single HO will group all machines by function (cutting and similar operations) rather than by the material being processed. According to NIOSH, this alternative approach would make it easier to determine the hazards of such machines, because death and injury data relating to such machines are collected by the function of the machine, not by the material it cuts.

DOL declines to follow the NIOSH recommendation. Instead, DOL expands the protections of the HO by making it apply not only to machines that cut wood and veneer, but also “trees, logs, or lumber.”

We find DOL’s approach somewhat odd, and perhaps even self-defeating. DOL asserts in various contexts in the preamble to its proposed regulations, and even more so in the preamble to its Advanced Notice of Proposed Rulemaking, that NIOSH has not supplied sufficient data to justify its recommendations. With regard to power-driven woodworking machines at issue here, NIOSH recommends recasting some HOs to make the available safety and health data more useful to DOL, but DOL rejects the proposal. This rejection seems to undermine the ability of DOL to carry out its duty to assure the safety and health of working children. For this reason, the CLC recommends that DOL heed the NIOSH recommendation rather than reject it.

G. Occupations Involved in the Operation of Power-Driven Hoisting Apparatus (72 Fed.Reg. 19352-53)

HO 7 (29 C.F.R. 570.58) currently forbids 16- and 17-year-olds from (a) *operating* various power-driven hoisting machines, such as cranes, derricks, hoists, and forklifts, (b) *riding on* a manlift or freight elevator (except a freight elevator operated by an assigned operator), and (c) *assisting in* the operation of a crane, derrick, or other specified equipment.

NIOSH recommends (NIOSH Report, pp. 35-38) that HO 7 be strengthened in the following ways:

- ? Expand HO 7 so that it bars 16- and 17-year-olds not only from *operating* hoisting machines, but also from *repairing, servicing or disassembling* such machines, or *assisting in* performing such tasks.
- ? Expand HO 7’s protections to prohibit youth from riding on any part of a forklift as a passenger (including forks), and from working from forks, platforms, buckets, or cages attached to a moving or stationary forklift.
- ? Expand HO 7’s protections to prohibit work from truck-mounted bucket or basket hoists (commonly called “bucket trucks” or “cherry pickers”).

- ? Expand HO 7’s protections to cover commonly used manlifts that are not included in the current definition, specifically aerial platforms.
- ? Remove the exception that currently permits youth to operate an electric or air-operated hoist of less than one ton capacity.

The CLC supports the NIOSH recommendations. DOL purports to accept all of the NIOSH recommendations, as well. But, there appears to be a problem. Specifically, DOL does not bar 16- and 17-year-olds from *assisting in* the performance of the prohibited tasks (such as repairing, servicing, or disassembling various hoisting machines). Instead, DOL bars youth from “tending” such hoists, and it says that “tending” means “assisting in.” This is a dubious proposition. In normal speech, to “tend” the repair of a machine could well mean simply to observe or monitor the repairing of the machine by someone else, which is quite different from “assisting in” the repair of the machine. The better approach is to use the word “assisting in” rather than “tending,” or to use both expressions. Using only “tending” is too ambiguous, and could put children in harm’s way. In this connection, DOL should review its use of “tending” in other contexts in all the HOs, in order to correct this ambiguity.

H. Occupations in the Operation of Power-Driven Meat-Processing Machines and Occupations Involving Slaughtering, Meat Packing or Processing, or Rendering
(72 Fed.Reg. 19353-54)

HO 10 (29 C.F.R. 570.61) currently applies both to meat products manufacturing and the operation of meat-processing machines in retail, wholesale, and service establishments. It thus applies not only to meatpacking plants (slaughterhouses) but also to butcher shops, grocery stores, restaurants, and to similar establishments where any meat product is prepared or processed for retail purchase. There is an exemption that permits 16- and 17-year-old apprentices and student-learners to work in such environments.

The NIOSH Report (pp. 41-48) makes three recommended changes:

1. Expand the protections of HO 10 so that it prohibits 16- and 17-year-olds from working in *all* meat products manufacturing industries (including not only meat packing plants but also sausage and other prepared meat products, and poultry slaughtering and processing). In support of this recommendation, NIOSH points out that in the meat products manufacturing industry, the rates of disorders due to repeated trauma, also known as repetitive motion disorders (such as carpal tunnel syndrome), are extremely high. The incidence rates for such injuries in meatpacking and poultry processing plants are well above the threshold used by NIOSH to define industries in which workers face high risk of musculo-skeletal injuries. The hazards to children in particular are shown by the injuries to young athletes, whose experience suggests susceptibility to growth-related muscle, bone, or tendon injuries. Similarly, premature closure of bone plates has been observed in young pianists and gymnasts. In addition to these musculo-skeletal hazards, there are dangers of exposure to noise, and rubbing and abrading as a result of friction

or pressure, as well as exposure to infectious agents, airborne organic dust, bacterial endotoxins, and hazardous chemicals.

2. Relax the existing restrictions by permitting 16- and 17-year-olds to operate and feed power-driven meat and food slicers, but only in retail, wholesale, and service industry establishments.
3. Narrow the existing exemption that permits 16- and 17-year-old apprentices and student-learners to do all of the jobs prohibited by HO 10. Specifically, NIOSH recommends that the exemption apply only to jobs in retail, wholesale, and service industry establishments, and that the exemption no longer be applicable to meat products manufacturing industries. In support of this recommendation, NIOSH relies not only on the musculo-skeletal hazards summarized above, but also on the fact that meatpacking and poultry processing plants include diverse hazardous exposures frequently outside the control of individual supervisors or workers.

DOL accepts NIOSH's Recommendation 1 and would extend protections still further to occupations in deer and buffalo slaughtering, and to make clear that the list of animals is not exhaustive. In addition, DOL proposes to forbid the cleaning not only of the processing machines themselves, but also of the individual parts and attachments of the machines. The CLC welcomes these DOL proposals. (However, the exception that permits 16- and 17-year-olds to work in areas separate from the "killing floor" to kill and process "rabbits or small game," in 29 C.F.R. 570.61(c)(1), would remain.)

DOL declines to adopt NIOSH's Recommendation 2 to consider relaxing the existing rule that prohibits 16- and 17-year-olds from operating and feeding power-driven food and meat slicers in retail, wholesale and service establishments. The CLC welcomes this DOL position.

DOL declines to adopt NIOSH's Recommendation 3 based on its assertion that NIOSH's rationale here, as DOL claims to be the case with regard to every other NIOSH recommendation relating to apprentice and student-learner exemptions in various HOs, is insufficient (72 Fed.Reg.19354). It is no exaggeration to say that this assertion is preposterous. The NIOSH Report's discussion of HO 10, as summarized above, provides detailed facts that fully justify forbidding *all* youth under 18 (including apprentices and student-learners) from working in slaughterhouses, performing such jobs as killing animals, working on virtual assembly lines where they would make repeated identical cutting or eviscerating motions with their hands, and handling and working with animal blood, offal, fats, and other by-products.

Ignoring all this compelling evidence, DOL instead invites suggestions for criteria that would apply across the board in determining whether any particular HO should have an apprentice and student-learner exemption. This strikes the CLC as a delaying tactic that would result in little guidance of any value to DOL. The most that could be hoped for is that DOL will at some future date propose that in order for any HO to have an apprentice and student-learner exemption, eight factors, say, would have to be weighed in the decision. DOL should have had enough experience with the "employee v. independent contractor" problem (as well as similar issues) under the FLSA to know that relying on a list of relevant factors that applies to all situations in an attempt

to reach a decision in a particular situation is fraught with innumerable ambiguities. It makes much more sense in the child labor context to look at each HO, and then to examine the evidence of safety and health hazards in those particular prohibited jobs to see whether an apprenticeship or student-learner program could adequately protect against those hazards. This is exactly what NIOSH has done. DOL's approach is somewhat akin to arguing that even though it is well known that excessive drinking of alcoholic beverages, and high-speed driving, each raise the risk of auto accidents, we must avoid looking at each cause in isolation, but instead must first determine whether there are general rules that would apply to both situations before we can prohibit either activity. This argument, we are pained to say, borders on sophistry.

In the case of HO 10, NIOSH makes clear that there are significant dangers of repetitive motion traumas and that there are diverse hazards that are outside the control of supervisors or workers. Because of this lack of control, these hazards are much more difficult to guard against than clearly defined hazards of, for example, operating a table-top mixer in a restaurant. Moreover, the safety hazards in meatpacking and poultry processing plants apply both to children and to adults. Why expose children under 18 to these hazards, even if they are apprentices or student-learners, when the dangers to all age groups have been so amply documented?

If DOL were to apply to its own proposals to weaken various child labor requirements the same level of proof that it applies to NIOSH's recommendations, virtually every one of DOL's proposals would be subject to the same objection that DOL levels against NIOSH – namely, that DOL's rationale “either is vague or is not provided.” DOL appears to be using two standards of proof in this situation, and elsewhere in many of its proposals as well – a heavy burden of proof when it rejects a NIOSH recommendation to strengthen child labor protections, and a light one when DOL proposes to weaken child labor protections. The children of America deserve better protection of their safety and health on the job than this.

I. Occupations Involved in the Operation of Bakery Machines (72 Fed.Reg. 19354-55)

HO 11 (29 C.F.R. 570.62) currently forbids 16- and 17-year-olds from any occupation involving the operation (including setting up, adjusting, repairing, oiling, or cleaning) of a power-driven bakery machine, such as horizontal or vertical dough mixers and bread slicing and wrapping machines. It also expressly prohibits 16- and 17-year-olds from doing any of these activities with regard to a “dough sheeter,” which is a machine that flattens dough that is to be made into pizza, pita bread, and similar flat baked goods.

The NIOSH Report (pp. 48-49) recommends that DOL consider relaxing the current restrictions by permitting 16- and 17-year-olds to operate “counter-top models” of power-driven bakery machines, comparable to those intended for household use. If HO 11's restrictions are relaxed in this way, then NIOSH recommends that DOL establish a mandatory reporting period during which employers would be required to report to DOL all serious youth injuries and deaths resulting from previously prohibited activities. Such a reporting period, NIOSH notes, would

allow an additional assessment of whether the existing prohibitions should be reinstated, or further refined, to best protect working youth.

DOL adopts the NIOSH recommendation, except that it does not impose a mandatory reporting period or even mention this part of the NIOSH recommendation. DOL also notes that employers which it investigates have sometimes asked why 16- and 17-year-olds could not operate small power mixers; in the wake of these requests, DOL “recently” adopted an “enforcement position” under which it has not been asserting a violation of HO 11 in such circumstances. DOL is only now formally proposing a change in HO 11 to reflect this enforcement position. We must restate our objection to DOL’s highly questionable practice of adopting positions that weaken, and are inconsistent with, existing regulations, without first publishing a formal proposal in the *Federal Register* to make such a change and soliciting comments on its proposal. The CLC recommends that DOL include the mandatory reporting period, as proposed by NIOSH.

DOL proposes to relax HO 11 in another way (one not recommended by NIOSH, nor by the CLC). Specifically, DOL states that it has a “longstanding enforcement position” under which it does not assert a violation of HO 11 in situations in which 16- and 17-year-olds operate certain pizza dough rollers, even though this activity is prohibited by the existing HO. DOL says that its “enforcement experience” indicates that this work can be safely done by such youth -- but it does not provide any details about its enforcement experience. DOL proposes formally to incorporate this enforcement position into the HO by permitting 16- and 17-year-olds to operate – but not to set up, adjust, repair, oil, or clean – only those power-driven pizza-dough rollers that satisfy these three requirements:

- (a) are constructed with safeguards contained in the basic design so as to prevent fingers, hands, or clothing from being caught in the in-running point of the rollers;
- (b) have gears that are completely enclosed; and
- (c) have microswitches that disengage the machinery if the backs or sides of the rollers are removed.

DOL adds that operating such pizza dough rollers would be permitted only when all these three safeguards are present, are operational, and have not been overridden. DOL’s proposal also does not permit “setting up, adjusting, repairing, oiling or cleaning” pizza dough rollers by children under age 18.

DOL’s failure to describe or analyze its enforcement experience that it claims fully justifies this relaxation of HO 11’s safety requirements underscores that its justification is not “vague” – worse than that, it is “not provided.” This is another example of DOL applying a much lighter burden on itself to justify weakening child labor protections than the very heavy burden it places on NIOSH when NIOSH adduces facts and data in support of recommendations to strengthen child labor protections. DOL does not indicate whether all pizza dough rollers are required by OSHA or other government regulations to have warnings on them designed to prevent operators from injuring themselves in any way. Nor is there any indication whether the

rollers have special warnings for children's restricted use under the "enforcement policy" that DOL has already adopted. Evidence of the dangers of pizza dough rollers comes from reported court decisions, and since court decisions do not disclose all such injuries by any means, these court decisions are but a minuscule indication of the extent of such injuries. Manufacturers of these rollers brag that they have large hoppers, able to accept large pieces of dough to be flattened into pizza thickness. Human fingers, which feed pizza dough into the dough roller, are small enough to fit into these large openings. One type of machine turns off if any object thicker than 2-3/8 inches enters the feed tray where the rolling mechanism is located. Thus an operator could accidentally push his or her fingers into the rolling mechanism, and because the machine would not turn off automatically, it would be necessary to use the other hand (if fingers from both hands were not in the rolling mechanism) or the chin or elbow to activate the emergency shut-off bar that pivots and rotates. This same pizza dough roller's five stationary safety bars do not pivot or rotate, and they prevent the operator's arms – but apparently not his or her fingers – from coming in contact with the machine's rollers.³

The only satisfaction that we can take from DOL's misguided approach here that when a child worker is injured while operating a pizza dough roller – as will, alas, inevitably happen – then proposed new regulation states explicitly that this pizza dough roller exception to HO 11 applies only if all the required safeguards "are present on the machine, are operational, and have not been overridden." This language clearly means that even if the child who is injured, or even a coworker, disable any of the safeguards, the employer will have violated HO 11, even if the employer did not know of the disabling. This language also means that if DOL, during an investigation, discovers that a child is operating a pizza dough roller with any of its safety features disabled, the employer has violated HO 11 even if the child has not been injured. We hope that the DOL investigator is not injured when inspecting the pizza dough roller, in order to make certain that all of the required safety features are in proper operating condition.

We also have great procedural objections -- as summarized above in our discussion of the "enforcement position" relating to the loading and unloading of personal tools by 14- and 15-year-olds – to DOL's approach to regulatory change, by which means DOL in practical effect changes a regulation, and then after the change has been in effect a while, proposes to make the change permanent by formally changing the regulation.

The FLSA gives no indication whether or not 16- and 17-year-olds are prohibited from using and repairing pizza dough rollers. Under section 3(l) of the FLSA, 29 U.S.C. 203(l), must "find and by order declare" what jobs are "particularly hazardous for the employment of children between such ages or detrimental to their health or well-being." DOL did just this when it issued 29 C.F.R. 570.62, which prohibits 16- and 17-year-olds from operating or otherwise working on "dough sheeters." The only lawful way to change this prohibition, either by relaxing it or strengthening it, is for DOL to "find and by order declare" what the new prohibition – or lack of prohibition – is to be. DOL is only now doing this, many years after it adopted what it calls a

³ Details about the safety features and operation of this pizza dough roller come from the court decision in *EMW Mfg. Co. v. Lemons*, 741 S.W.2d 212, 217-218 (Tex.Ct.App., 2d Dist. 1987). This is a lawsuit by an injured worker against the manufacturer of the pizza dough roller. The manufacturer prevailed on the ground that safety features of the roller had been altered after it left the control of the manufacturer. The case is cited here because of its description of how the safety features of the dough roller operate when they have not been altered.

“longstanding enforcement position” that eliminated this requirement from the regulation without any finding or order achieving this result. DOL’s approach here, with regard to pizza dough rollers, as well as in other regards specified above, is of highly dubious legality.

Presumably DOL would not strengthen the protections of an HO by avoiding the notice-and-comment rulemaking procedures required by the Administrative Procedure. But DOL has no compunctions about bypassing the notice-and comment rulemaking procedures when it decides to weaken the protections of an HO. This double standard tips the scales not in favor of the safety and health of working children, but in favor of employers who, approaching DOL in private, ask it to relax a safety and health requirement without the relaxation being open to discussion and comment from all interested parties. The issuance of a DOL opinion letter that can be read on DOL’s Web site or in trade publications about child labor is not a sufficient alternative to the notice-and rulemaking requirement.

Even if DOL tries to argue that its approach is lawful under the Administrative Procedure Act, the approach is profoundly unfair to any reasonable notion of evenhanded public administration. It is one thing to have an “enforcement policy” that focuses on the greatest hazards to working children, with the result that hazards that DOL might consider to be of lesser importance are given less emphasis. For example, DOL might decide to devote greater child labor enforcement efforts to children working in agriculture – one of the most hazardous working environments for children -- and devote less effort to assuring that children work not one minute more than three hours on a school day. This is not eliminating the three-hour rule from the child labor regulations, but instead focusing more effort elsewhere. DOL has not done that with the pizza dough roller “enforcement policy”; DOL many years ago simply eliminated the pizza dough roller prohibition from the regulations altogether.

J. Occupations Involved in the Operation of Paper-Products Machines, Scrap Paper Balers, and Paper Box Compactors (72 Fed.Reg. 19355-57)

HO 12 (29 C.F.R. 570.63) currently prohibits 16- and 17-year-olds from operating, or helping to operate various power-driven paper products machines, including scrap paper balers and paper box compactors. Such youth are also barred from setting up, adjusting, repairing, oiling, or cleaning such machines. There are two important exemptions from these requirements.

Under the first exemption, 16- and 17-year-olds are permitted to load materials into – but not operate or unload – scrap paper balers and paper box compactors that have the following five safety features:

- (a) the machines cannot be operated while being loaded,
- (b) the machines meet American National Standards Institute (ANSI) standards, specifically Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors.

(c) the machines have an on-off switch with a key lock that is under the custody and control of an employee who is at least 18 years old,

(d) the on-off switch is kept in an off position when the machine is not in operation, and

(e) the employer posts a prominent notice on each machine that states, among other things, that the machine meets ANSI standards, that 16- and 17-year-olds may only load the machine, and that no employee under age 18 may operate or unload the machine.

The second exemption permits 16- and 17-year-old apprentices and student-learners to perform the tasks that the HO prohibits other youth from doing.

NIOSH makes four recommendations (NIOSH Report, pp. 50-54):

1. Incorporate into HO 12 the requirements of the Compactor and Baler Act of 1996.
2. Expand the protections of HO 12 by prohibiting 16- and 17-year-olds from operating or assisting to operate compactors and balers of materials other than paper, such as aluminum cans, plastic, foam, and rubber.
3. DOL should emphasize enforcement that assures that balers and compactors conform to construction and operational standards spelled out in the Compactor and Baler Act of 1996.
4. Retain the existing exemption that permits 16- and 17-year-old apprentices and student-learners to operate balers and compactors.

DOL's reaction to these recommendations is as follows:

As to NIOSH Recommendation 1, DOL notes that it did incorporate the requirements of the Compactor and Baler Act of 1996 into this HO in December 2004, and that they took effect on February 4, 2005. (This action by DOL had not yet, of course, taken place at the time that the NIOSH report was published in 2002.)

DOL agrees with NIOSH Recommendation 2 so that HO 12 will apply to all balers and compactors, -- not only those that process paper, but also those "designed or used to process materials other than paper." The CLC welcomes this strengthening of the existing regulation.

DOL does not address NIOSH Recommendation 3, but it does mention the requirement in the Compactor and Baler Act of 1996 that the equipment operated by children must meet ANSI standards. In this connection, DOL notes that before it issued its paper baler and paper box compactor regulations in 2004, it examined newer ANSI Standards than those mentioned in the text of the FLSA as amended by Congress, and determined that the new standards were just as protective as the ones specified in the FLSA's text. These new standards are Standard ANSI Z245.5-1997 for scrap paper balers and Standard ANSI Z245.2-1997 for paper box compactors.

What DOL overlooks is that ANSI has issued still newer standards for compactors and balers:

- ? Standard Z245.5-2004 (“Baling Equipment -- Safety Requirements for Installation, Maintenance and Operation”),
- ? Standard ANSI Z245.51-2004 (“Baling Equipment -- Safety Requirements”)
- ? Standard ANSI Z245-2-2004 (“Stationary Compactors -- Safety Requirements for Installation, Maintenance, and Operation”)
- ? Standard ANSI Z245.21-2004 (“Stationary Compactors—Safety Requirements”)

There are also two other ANSI Standards that appear to apply here. Since DOL is wisely proposing to expand the protections of HO 12 to cover materials other than paper, a compactor that processes such other materials must also meet the statutory requirements. The relevant standard that DOL needs to review appears to be Standard ANSI Z245.41-2004 (“Facilities for the Processing of Commingled Recyclable Materials – Safety Requirements”).

The other apparently applicable ANSI Standard relates to mobile, as distinct from stationary compactors. It is Standard ANSI Z245.1-2007 (“Mobile Wastes and recyclable Materials Collection, Transportation and Compaction Equipment – Safety Requirements”).

Unless DOL assures itself that these new standards are just as protective as the standards mentioned in the FLSA’s text and publishes that determination in the *Federal Register*, any employer permitting 16- and 17-year-olds to load such machines that meet these newer standards will have violated HO 12.

Apart from these problems, there is another issue here – one of simply knowing what these ANSI standards actually require. DOL states that the ANSI standards are protected by copyright, it therefore asserts that they cannot be incorporated in the HO or reproduced for distribution to the public. The CLC finds it difficult to believe that the copyright laws forbid DOL from saying anything about what the ANSI standards require. All books are protected by copyright, but the “fair use” doctrine presumably permits book reviewers and others to provide some indication of what the books say. This is done all the time, as anyone who reads a newspaper can readily note.

DOL does state that anyone who wants to see the ANSI standards applicable to balers and compactors must purchase them from ANSI, or go to a regional office of DOL’s Occupational Safety and Health Administration (OSHA), where a copy purchased by OSHA can be read. The total cost of the four standards in bullet points above, according to the ANSI web site, is \$204. The cost of the other two ANSI standards noted above is an additional \$105. The cost of purchasing the earlier ANSI standards is presumably about the same amount. We certainly hope that each of DOL’s Wage and Hour Division regional offices purchases a full set of the needed ANSI standards, and not rely on OSHA’s copies. There are only five Wage-Hour regional offices -- in Philadelphia, Atlanta, Chicago, Dallas, and San Francisco -- whereas OSHA has offices in these five cities and five more as well: Boston, New York, Kansas City, Denver, and

Seattle. DOL's Wage and Hour Division should assure that its lower-level District Offices in these five cities have the required ANSI Standards as well.

DOL is taking no action with regard to NIOSH Recommendation 4 to retain HO 12's apprentice and student-learner exemption. However, DOL does solicit suggestions as to what criteria that should be applied with regard to all HOs in determining whether there should be an apprentice and student-learner exemption. We have mentioned above that the kind of one-size-fits-all list of criteria that DOL intends to propose on the basis for its request for such information is not a wise approach to the problem. The better approach would be to figure out whether apprenticeship and student-learner programs would truly protect 16- and 17-year olds from the obvious hazards of balers and compactors, and decide on that basis how to proceed.

K. Occupations Involved in the Operation of Circular Saws, Band Saws, and Guillotine Shears (72 Fed.Reg. 19357-59)

HO 14 (29 C.F.R. 570.65) currently prohibits 16- and 17-year-olds from operating, or helping to operate, power-driven fixed or portable circular saws, band saws, and guillotine shears, unless the machines are equipped with full automatic feed and ejection (including a fixed barrier guard to prevent completely the operator or helper from placing any part of the body in the point-of-operation area). These prohibitions apply to any and all materials being cut by the saws or shears.

In addition, HO 14 forbids any 16- or 17-year-old from setting up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears.

These restrictions do not apply to apprentices or student learners.

The NIOSH Report (pp.56-58) makes two recommended changes:

1. Expand HO 14 to cover not just the three machines currently forbidden but all machines, such as chainsaws and abrasive cutting discs, which perform cutting and sawing operations through direct contact between the cutting surfaces and the material. NIOSH notes that the existing HO defines a saw as machinery that has notches or teeth, but that this definition would not apply to other cutting machinery, such as chainsaws and abrasive cutting discs, which do not have such features. *In the alternative*, NIOSH recommends that HO 14 be combined with parts of other existing HOs to create a single HO that covers all machinery that cuts or saws by direct contact of the cutting surface and the material.

2. Retain the exemption for apprentices and student-learners, except in the case of chainsaws and other hand-held power saws. NIOSH notes that these hand-held power saws are used in less controlled conditions -- and that the injury risk factors are both more diverse and more difficult to recognize or eliminate -- than is the case with other saws. Hence NIOSH recommends that no child under age 18, not even apprentices and student-learners, be permitted to use chainsaws and other hand-held power saws.

DOL's reaction to these recommendations is as follows:

1. DOL declines to expand HO 14 to cover all power-driven cutting and sawing machines where there is direct contact between the cutting surfaces and the material being cut. Instead, DOL expands HO 14 to cover just three additional kinds of cutting and sawing machines: chain saws, wood chippers, and reciprocating saws. DOL makes no comment on the NIOSH recommendation to prohibit children under age 18 from using abrasive cutting discs. The CLC welcomes the proposed inclusion of chain saws, wood chippers, and reciprocating saws in the prohibited activities, but sees no reason for DOL's failure to include abrasive cutting discs as well, particularly as DOL gives no reason for following this part of the NIOSH recommendation.

2. DOL, contrary to NIOSH's recommendation, declines to prohibit 16- and 17-year-old apprentices and student-learners from using (or setting up, adjusting, repairing, oiling, or cleaning) chainsaws and other hand-held power saws. Instead, DOL solicits information, data, and feedback on whether or not it should institute such a prohibition. We need hardly add our well-known views of this approach

L. Additional Recommendations of the [NIOSH] Report (72 Fed.Reg. 19359)

In this section of the preamble, DOL states that it is accepting NIOSH's recommendations to retain certain HOs as is, without making any changes to them. The CLC supports this DOL decision. The HOs in question are as follows:

- ? HO 3 (29 C.F.R. 570.53) – Coal-mining occupations
- ? HO 13 (29 C.F.R. 570.64) – Manufacture of brick, tile, and kindred products
- ? HO 15 (29 C.F.R. 570.66) – Wrecking, demolition, and shipbreaking operations

DOL also claims that it is accepting NIOSH's recommendations with regard to HO 17 (29 C.F.R. 570.68) relating to excavation operations. In fact, this claim is not entirely correct, because NIOSH recommended removing from HO 17 the exemption that permits 16- and 17-year-old apprentices and student-learners to work in excavation operations, but DOL declines to follow this recommendation. Instead DOL, as in all instances in which NIOSH recommends a change in the apprentice and student-learner exemption in any HO, asks for information, data, and feedback which will enable DOL to consider and develop criteria for determining, in general, when apprentice and student-learner exemptions are warranted. The CLC has already noted above its view of this DOL approach.

M. Subpart G—General Statements of Interpretation of the Child Labor provisions of the Fair Labor Standards Act of 1938, as Amended (72 Fed.Reg. 19359-60)

In this section of the preamble, DOL explains that since Subpart G of the child labor regulations has not been amended since 1971, it fails to reflect not only amendments to the FLSA relating to child labor, but also changes in the child labor regulations, since that time. DOL is therefore proposing various changes in Subpart G of the regulations to bring them up to date.

N. Miscellaneous Matters (72 Fed.Reg.19360)

In this section of the preamble, DOL says merely that it is correcting a typographical error in the title of HO 8 (29 C.F.R. 570.59), changing the word “operations” to “operation.” We agree to this typographical correction.