

OSHA Fairness Coalition

Advocating for Balance

September 25, 2007

TO THE MEMBERS OF THE HOUSE OF REPRESENTATIVES:

We write to inform you of our strong opposition to H.R. 2693, “the Popcorn Workers Lung Disease Prevention Act,” which the House of Representatives is expected to consider this week. The bill directs the Occupational Safety and Health Administration (OSHA) to issue a standard regulating exposure to diacetyl (a substance used to impart butter flavor to various foods, most notably microwave popcorn) even though the science and data available are insufficient to allow OSHA to establish an exposure limit. Such a mandate would be completely at odds with all other laws, judicial decisions, executive orders and sound policy considerations under which OSHA promulgates standards and regulations.

This bill mandates that OSHA issue an interim final regulation within 90 days of enactment, and then a final regulation which would include a short term exposure limit and a permissible exposure limit, within two years of enactment. Unfortunately, data does not currently exist as to where these lines could be drawn. The very NIOSH document cited in the bill for support also states with respect to diacetyl and other flavorings: “Little is currently known about which chemicals used in flavorings have the potential to cause lung disease and other health effects, and what workplace exposure concentrations are safe....Most chemicals used in flavorings have not been tested for respiratory toxicity via the inhalation route, and occupational exposure limits have been established for only a relatively small number of these chemicals.” (NIOSH Publication 2004-110, pp.5-6).

Most importantly, this bill mandates that OSHA completely ignore the carefully developed, balanced, and necessary requirements for rulemaking that Congress and the courts have put in place to make sure OSHA standards reflect the best science available, are responsive to a specific hazard, and are both technologically and economically feasible for the affected employers. Both Congress and the Supreme Court have made clear that OSHA can regulate only after it has satisfied specific requirements for data and analysis as contained in Section 6 of the Occupational Safety and Health Act, and the Administrative Procedure Act including specific provisions designed to protect small businesses. Because regulations have a much different and more significant impact on small businesses, adhering to the strict rulemaking guidelines of the APA are that much more important to small businesses. The normal OSHA rulemaking process allows for regulatory impacts on small businesses (which according to the Small Business Administration are 50 percent higher than they are for large firms) to be assessed, and for important changes to be made to proposed regulations mitigating those impacts. Shortchanging that process could be potentially devastating to those small businesses which provide 60 percent of all new jobs in the United States.

The interim final regulation specified by this bill, which would have the legal effect of an OSHA standard, would not be produced under any rulemaking procedures. Indeed, this bill attempts to write the interim final standard directly, bypassing OSHA’s expertise and ability to tailor such a regulation to those circumstances where it is truly warranted. Under the bill the interim final standard would be issued without any analysis of its impact, or opportunity for those subject to it to provide comments or input, nor would it be subject to comments once issued as is customary for interim final rules. Because there is no data around which to formulate the short term exposure limit and permissible exposure limit, the two year timeframe specified for OSHA to issue the final regulation is

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too accelerated to permit the agency to conduct the necessary impact analyses and other small business-focused analyses that would normally accompany an OSHA rulemaking.

Finally, any need for this bill has been eliminated as a result of the world's largest producer of microwave popcorn, ConAgra Foods Inc., and another large manufacturer of microwave popcorn recently indicating their plans to eliminate diacetyl from their brands, and OSHA's announcement on September 24 that the agency will move forward with various measures to address the hazard of workplace diacetyl exposure including a rulemaking consistent with the full procedural safeguards.

H.R. 2693, while well intentioned, is ill conceived and would establish a devastating precedent of Congress mandating a regulation when there is no data available to use in setting the exposure limit, and trampling on regulatory procedure designed to protect the interests of small businesses. The Coalition urges the House not to pass H.R. 2693.

Sincerely,

American Bakers Association

Associated Builders and Contractors

International Food Distributors Association

National Association of Home Builders

National Oilseed Processors Association

NFIB

U.S. Chamber of Commerce

Plumbing-Heating-Cooling Contractors – National Association

American Foundry Society

Associated General Contractors

National Association of Convenience Stores

National Association of Manufacturers

Mason Contractors Association of America

Printing Industries of America

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