



November 17, 2010

VIA ELECTRONIC SUBMISSION

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Michael Niss
Director
Division of Longshore Workers' Compensation
Office of Workers' Compensation Programs
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room C-4315
Washington, DC 20210

Re: Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Recreational Vessels; 75 Fed. Reg. 50718 (August 17, 2010).

Dear Secretary Solis and Mr. Niss,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments to the U.S. Department of Labor (DOL) regarding its proposed rule entitled, *Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Recreational Vessels*.

Advocacy is concerned that the proposed rule will have a significant economic impact on a substantial number of small businesses. DOL's Initial Regulatory Flexibility Analysis (IRFA) does not properly identify the small businesses affected by the rule and minimizes the economic impact of this rule. Advocacy believes that DOL's proposed rule does not conform to the congressional intent of the American Recovery and Reinvestment Act amendment which sought to exempt repairers and dismantlers of recreational vessels from coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA). According to small business representatives, this proposed rule may actually increase the numbers of small entities including boat manufacturers and boat repair operations in the recreational marine industry that would be required to obtain the more expensive LHWCA insurance. Advocacy urges DOL to consider the significant alternatives to this rulemaking that have been recommended by small entities that would meet the agency's objectives without jeopardizing small businesses.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The recently passed Small Business Jobs Act of 2010 codifies Section 3(c) of Executive Order 13272, which requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Background

The Department of Labor oversees the implementation of the Longshore and Harbor Workers' Compensation Act (LHWCA), a federal program which requires employment-injury protection workers who are injured on the navigable waters of the United States, or in adjoining areas.⁵ The current LHWCA lists eight categories of workers who are excluded from the definition of "employee" and therefore excluded from LHWCA coverage. Section 2(3)(F) of the statute excluded from coverage "individuals employed to build, repair, or dismantle any recreational vessel under 65 feet in length," provided that such individuals were "subject to coverage under a state workers' compensation law."⁶

The American Recovery and Reinvestment Act of 2009 (ARRA) contained amendments to the LHWCA, and this proposed rule implements these amendments. The new amendments exempt all entities conducting repair and dismantling of recreational vessels from LHWCA coverage, regardless of vessel length.⁷ The section still requires exempted entities to have state workers' compensation insurance. In addition to implementing the ARRA amendments, DOL also added to the definition of a "recreational vessel." The proposed rule also sets out parameters for when an employee "walks in/or walks out" of qualifying employment for the purposes of the LHWCA.⁸

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

³ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁴ *Id.*

⁵ Department of Labor website, available at: <http://www.dol.gov/owcp/dlhwc/lsmisss.htm>.

⁶ 18 U.S.C. § 902(3)(F).

⁷ Public Law 111-5 § 803.

⁸ 75 *Fed. Reg.* at 50729.

Regulatory Flexibility Act Requirements

Under the Regulatory Flexibility Act (RFA), when an agency proposes a rule, it must perform an Initial Regulatory Flexibility Analysis (IRFA), unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.⁹ The requirements of an IRFA include: a description of the objectives and legal basis for the proposed rule; a description of the number of small entities affected by the proposed rule and the projected compliance requirements to these entities; an identification of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule; and a description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact.¹⁰

Advocacy Comments on DOL's Regulatory Flexibility Analysis

DOL published an IRFA in the proposed rule. Advocacy believes that DOL's IRFA does not adequately capture the number of small businesses affected by the rule or the economic impact on small businesses. DOL's IRFA also does not provide significant alternatives to the proposed rule that would minimize the economic impact on this rule, as required by the RFA.

1. The IRFA Does Not Properly Identify the Small Businesses Affected by the Rule

Advocacy believes that a large majority of entities affected by this rulemaking are considered small entities under SBA size standards. Although DOL's IRFA correctly identifies recreational boat manufacturers as being impacted by this rule, the analysis does not properly identify the small entities that repair and dismantle recreational vessels.

Boat manufacturers are classified by the SBA as a small entity if they employ less than 500 employees (NAICS code 336612).¹¹ According to 2007 Census data, 97.4 percent of boat builders are considered small entities under this definition (1,040 small entities).¹² According to a comment letter from the National Marine Manufacturers Association (NMMA), there were 5,284 recreational marine manufacturers in 2008, employing slightly more than 135,900 people. Over 90 percent of NMMA's boat manufacturing members reported that they employ less than 500 members.¹³

DOL's proposed rule uses the Census category of "Other Personal and Household Goods Repair and Maintenance" (NAICS code 811490) to determine the numbers of small entities that repair boats. However, this is a broad Census category for general repairs of personal and household goods.¹⁴ According to NMMA's comment letter, DOL's IRFA

⁹ 5 U.S.C. § 603, 605.

¹⁰ *Id.* at 603.

¹¹ SBA's Size Standards website, available at:

http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.

¹² SBA's Office of Advocacy website analyzes Census data by the number of employees and by annual revenues. This information is available at: <http://www.sba.gov/advo/research/data.html>.

¹³ Comment letter from Cindy Squires, Esq., Chief Counsel, National Marine Manufacturers Association to the Department of Labor (Nov. 12, 2010) (*NMMA Comment Letter*).

¹⁴ 75 *Fed. Reg.* at 50726.

should have properly identified the small businesses such as boat dealers and marinas that conduct repair work on vessels.¹⁵ Boat dealers (NAICS code 441222) are small businesses if their annual receipts are less than \$30 million dollars.¹⁶ According to 2002 Census data, 94.8 percent of boat dealers have annual receipts of less than \$10 million dollars (4507 entities) and 99.5 percent of boat dealers have annual receipts of less than \$50 million dollars (4698 entities).¹⁷

Marinas (NAICS code 713930) also conduct boat repair work, and are considered small entities if their annual receipts are less than \$7 million dollars.¹⁸ According to 2002 Census data, 98.2 percent of marinas have annual receipts less than \$10 million dollars (3836 entities).¹⁹ According to the Association of Marina Industries, all of their members and nearly 100 percent of marinas are small businesses.²⁰ The Marine Industries Association of South Florida, an organization that represents 800 member businesses such as boatyards, marinas and other related businesses, estimates that 99 percent of its members are small businesses.²¹ According to 2008 NMMA data, there were more than 33,000 retail/service repair boating businesses, employing 217,718 people.²²

2. DOL's Economic Analysis Minimizes the Economic Impact of this Rule

Advocacy has spoken with small business representatives and congressional staff who are concerned that DOL's proposed rule does not conform to the congressional intent of the ARRA amendment to exempt repairers and dismantlers of recreational vessels from LHWCA coverage. This proposed rule may actually increase the numbers of small entities in the recreational marine industry that would be required to obtain the more expensive LHWCA insurance, resulting in higher compliance costs than DOL estimates in its IRFA.

DOL's Economic Analysis Estimates Low Compliance Costs for Small Entities

The ARRA amendment exempts businesses that repair and dismantle recreational vessels 65 feet or greater in length that had previously been required to purchase LHWCA insurance. DOL does not have estimates of compliance costs for this rule, however the agency assumes that there will be cost savings to small entities because the agency estimates that LHWCA insurance is 50 to 100 percent more expensive than state workers' compensation insurance.²³ DOL has added two provisions that define "recreational vessels" and determine when employees fall into LHWCA coverage, but the agency does not believe that these amendments will add any costs for small entities. The agency states that it "does not anticipate that the proposed rule will cause many businesses that would

¹⁵ *NMMA Comment Letter*, at 4.

¹⁶ *Small Business Size Standards: Retail Trade; Final Rule*, 75 *Fed. Reg.* 61597 (October 6, 2010). SBA recently updated the boat dealer size standard, and this was effective November 1, 2010.

¹⁷ *See* note 12. The Census data do not capture the annual receipt size of under \$30 million dollars.

¹⁸ *See* note 11.

¹⁹ *See* note 12. The Census data do not capture the annual receipt size of under \$7 million dollars.

²⁰ Comment letter from Wendy Larimer, Legislative Coordinator, Association of Marina Industries to the Department of Labor (Oct. 15, 2010) (*AMI Comment Letter*).

²¹ Comment letter from Gordon Connell, Director of Marine Advocacy, Marine Industries Association of South Florida to the Department of Labor (Nov. 15, 2010) (*MIASF Comment Letter*).

²² *NMMA Comment Letter*, at 5.

²³ 75 *Fed. Reg.* at 50727.

otherwise be exempt from the LHWCA to fall under the statute: the rule is designed to clarify the definition so there is no ambiguity what vessels are recreational, and not to reduce the number of vessels categorized as recreational.”²⁴

DOL’s Proposed Rule Does Not Follow Congressional Intent and Increases Potential Costs by Expanding Number of Small Entities Included in LHWCA Coverage

Congressional authors of the LHWCA amendments to the American Recovery and Reinvestment Act have publicly commented that “we are deeply troubled with the scope and intent of certain aspects of the proposed regulations, believing that it undermines clear congressional intent.”²⁵ The authors of this provision sought to exempt all entities conducting repair and dismantling of recreational vessels from the more expensive federal LHWCA coverage because recreational vessels exceeding 65 feet in length are now quite common.²⁶ These members of Congress are concerned that DOL’s addition of two provisions in addition in implementing the ARRA amendments undermine Congressional intent because they place these entities that repair and dismantle recreational vessels back into the more expensive LHWCA coverage and may create confusion in the recreational marine industry.²⁷

A) The New Definition of a Recreation Vessel Will Expand the Number of Small Businesses Covered by the Act

Under the new ARRA amendments, DOL was required to exempt all entities conducting repair and dismantling of recreational vessels from LHWCA coverage, regardless of vessel length. However, DOL chose to go beyond this mandate and create a new definition of a “recreational vessel.” Under this new definition: (a) a recreational vessel means a vessel—(1) being manufactured or operated primarily for pleasure; or (2) leased, rented, or chartered to another for the latter’s pleasure; (b) recreation vessel does not include a—(1) passenger vessel, (2) small passenger vessel; (3) uninspected passenger vessel; (4) vessel routinely engaged in commercial service; or (5) vessel that routinely carries passengers for hire.²⁸

According to the comment letter by the Congressional authors of the LHWCA, this proposed restrictive definition “fundamentally alters” the scope of vessels affected in the amendment and is contrary to congressional intent because it brings many of the workers back into LHWCA coverage.²⁹

Small entities are concerned about this definition of “recreational vessel” because it requires boat manufacturers and boat repairers to know and keep track of the intent of the purchaser of the boat and utilize this information to determine LHWCA coverage. According to NMMA, recreational boats are typically sold through a dealer network and

²⁴ *Id.*

²⁵ Comment letter from Congressional members Ron Klein and Debbie Wasserman Schultz to the Department of Labor (Nov. 16, 2010) (*Congressional Comment Letter*).

²⁶ *Congressional Comment Letter*, page 1; citing Section 9101 of H.R. 679, H. Rept. 111-4.

²⁷ *Id.* at 1.

²⁸ 75 *Fed. Reg.* at 50729.

²⁹ *Congressional Comment Letter*, page 2.

can be sold and resold numerous times. Since a recreational vessel manufacturer is generally without any knowledge of what use the ultimate retail purchaser will make of the vessel, this manufacturer should only be required to determine that it is building boats to the recreational boat regulations and industry standards. Additionally, boat repairers may encounter and fix recreational vessels but have no knowledge how the actual owner/operator is utilizing this boat.³⁰

B) The “Walking In or Walking Out” of Qualifying Employment Provision May Result in More Boat Manufacturers and Boat Repair Operations Being Covered by the Act

DOL’s proposed rule sets out parameters for when an employee “walks in/or walks out” of qualifying employment for the purposes of the LHWCA coverage.³¹ The proposed regulation states that an individual is a covered “employee” if he or she performs at least “some work” in the course of employment that qualifies as “maritime employment.” The regulation does not have an objective test or definition of how much work would constitute “some work,” but only adds that the vague statement that the maritime employment should not be “infrequent, episodic, or too minimal to be a regular part of his or her overall employment.”³² The proposed rule states that “this approach therefore leaves the determination to the adjudicator in each case to assess the coverage on the facts presented.”³³

Congressional authors of the LHWCA amendments have commented that this provision goes against congressional intent because it would likely place many employees that repair and dismantle recreational vessels back into LHWCA coverage.³⁴ Small entities and insurance brokers that contacted Advocacy have expressed concern that this provision is not clear regarding how much commercial work is needed to trigger LHWCA coverage. These entities are worried that this rule would require mandatory LHWCA coverage, which would result in devastating compliance costs for small businesses.

Boat Manufacturers

The National Marine Manufacturers Association (NMMA) commented that this provision would leave recreational boat builders and manufacturers without a clear understanding of when LHWCA coverage is necessary. For example, state agencies and law enforcement often seek out camouflaged recreational vessels for police boats. A boat manufacturer may only produce 10 percent of their recreational boats for commercial purposes in a given year, but under this new provision they may have to get LHWCA for all of their workers because the term “some” commercial work is undefined. These recreational boat manufacturers also have the option of turning down these government orders, but rejecting these orders is not good public policy and it is even more difficult to do in these bad economic times. NMMA noted that during the recent Gulf Oil Spill, recreational boat sales were frozen because large areas were closed to boating and fishing. However, there was a great need for recreational boats by state agencies to be used for the commercial

³⁰ *Id.*

³¹ 75 *Fed. Reg.* at 50729.

³² *Id.* This proposed provision will be codified at Section 701.303.

³³ *Id.* at 50724.

³⁴ *Congressional Comment Letter*, at 2.

purpose of installing oil containment booms and to recover wildlife. Under this new regulation, these small boat manufacturers may have had to add expensive LHWCA coverage in order to take these orders.³⁵

Under this new rule, boat manufacturers would also be put in the untenable position of attempting to ascertain the ultimate use of their vessel at the point of purchase. In some cases, a manufacturer would have no way to know that a boat it produced for the recreational boat market was then resold by a boat dealer to a government agency.

Boat Repair Operations

Advocacy spoke to small marinas, boatyards, boat dealers, and insurance brokers that represent small entities that repair recreational boats. Marinas and boat dealers often have boat repair operations, or have boats pull up to their facility and hire third-party boat repair operations. These small entities were concerned with how this vague “walks in/or walks out” provision would work in practice, because there are no guidelines or bright line rules to define how much commercial boat repair work constitutes “some” work for purposes of requiring LHWCA coverage.

Advocacy spoke to a broker who insured one marina where 98 percent of the boats they repaired were recreational vessels and the rest were commercial vessels. Under this new rule the two percent of commercial work may constitute “some” commercial work, and may require this marina to obtain LHWCA insurance for their whole workforce, turn down this work or risk liability. For example, such marinas may have to turn down repairs for law enforcement vessels and other commercial vessels. A marina also may not have any control or interaction with a third-party contractor who arrives at a marina to fix a person’s commercial boat; however this marina may be required to obtain LHWCA because “some” commercial work was completed on their facilities.

These entities that complete boat repair are concerned that the vague “walks in/or walks out” provision will also add major compliance costs to small businesses already struggling due to the recession, and may force these businesses to close. Boat repair representatives are concerned that the price for LHWCA insurance will actually be higher than the DOL estimate that LHWCA insurance is 50 to 100 percent higher than state workman’s compensation insurance.³⁶

According to one insurance broker that represents over 200 recreational marinas and boatyards in Maryland, Delaware and Virginia, the proposed rule may actually increase the insurance premiums for these businesses by 200 to 300 percent. For example, one of this broker’s clients has 20 employees and completed over \$445,000 of recreational repair work and \$4,500 of commercial repair work last year. Under the current system, this marina was able to obtain a state workers compensation premium at a rate of \$4.55 per hundred dollars of payroll for the recreational repair work and a LHWCA federal premium at a rate of \$11.99 per hundred dollars of payroll for the commercial repair work. The businesses’ employees were able to work on either type of project. If the proposed rule’s “walks in/or walks out” provision is finalized, this same business may have to obtain

³⁵ *NMMA Comment Letter*, at 10.

³⁶ *75 Fed. Reg.* at 50727.

LHWCA insurance for all of its employees, increasing the insurance premiums from \$20,000 to \$53,000—an increase of 265 percent. This insurance broker stated that his company also would be reluctant to insure these recreational marine businesses because the risk and potential payouts under LHWCA for this many employees are so high.

A survey of Marine Industries Association of South Florida (MIASF) members showed the impact of the requirement to carry the LHWCA insurance results in additional costs of up to \$100,000. These businesses indicated that monies saved would be used to hire additional employees.³⁷ One of MIASF's members providing electrical services to the boating industry stated that the price of LHWCA is even higher in Florida. According to this business, the state compensation rate for electricians is approximately \$13.10 per hundred hours of payroll. However, premiums under the federal LHWCA currently have a multiplier of 3.98; this means that the LHWCA rate would be \$52.10 per \$100 of payroll and this high rate may be required for their entire staff. This small business predicted this would lead to layoffs for the first time in 58 years.

Advocacy received dozens of e-mails from small businesses in the boat repair industry that were concerned that this vague “walks in/or walks out” provision would require mandatory LHWCA insurance for their entire workforce, and their businesses could not sustain these high insurance premiums. The recreational marine industry represents roughly 220,000 jobs in the State of Florida with an \$18.4 billion dollar economic impact.³⁸ According to MIASF, South Florida's recreational marine industry represents an economic impact of \$8.9 billion and 107,000 jobs. This would be crippling for an industry that has already lost \$4.7 billion and 55,000 jobs since 2005 due to the economic recession.³⁹ These small entities are reluctant to turn down commercial boat work to avoid LHWCA coverage, due to the lack of boat repair jobs in this economic climate. One of MIASF's members believes that this rule will create an uneven playing field with our international competitors, because a boat can easily be repaired in the Bahamas instead of Florida due to the significantly cheaper labor rate. One insurance broker stated that this rule may result in shutting down legitimate businesses that follow the labor laws, leaving in its place less scrupulous boat repair businesses.

3. The IRFA Is Inadequate Because It Does Not Discuss Significant Alternatives

Agencies must consider alternatives to regulatory proposals in an IRFA. DOL's IRFA is inadequate because it does not provide any viable significant alternatives that would minimize the impact of this rule for small entities. DOL's only alternative is that “businesses that perform work on both recreational and non-recreational vessels as defined in the proposed rule can reduce their insurance-cost burden by segmenting their workplace into recreational vessel and non-recreational vessel operations, further minimizing any cost implications of the proposed rule.”⁴⁰

According to NMMA, “segmenting the workplace is an impossible task for a small boat builder or boat repair facility...due to the size of these companies and because the

³⁷ *MIASF Comment Letter*, at 1.

³⁸ *Congressional Comment Letter*, at 2.

³⁹ *MIASF Comment Letter*, at 1.

⁴⁰ 75 *Fed. Reg.* at 50728.

production processes would make that extremely cost prohibitive.”⁴¹ Many small businesses performing boat repairs that contacted Advocacy had as few as 10 employees, and these entities stated that there would not be enough work available to segment its workforce. Additionally, sometimes an employee could make a component that could be stored for future use. There would be no way to know at the time that a particular component was manufactured what boat it would be installed on.

Small Business Regulatory Alternatives

Small business representatives that contacted Advocacy offered the following regulatory alternatives:

1. DOL Should Create A New Definition of Recreational Vessel That More Closely Confirms to Statutory Intent

NMMA recommends that DOL include in a final rule the following definition of a recreational vessel, which would be applicable to boat manufacturers and boat repair facilities:

*A recreational vessel for a boat manufacturing facility building new vessels or conducting boat repair work (e.g. performing warranty repairs) means a vessel which by design and construction is intended by the manufacturer to be operated primarily for pleasure, or to be leased, rented or chartered to another for the latter’s pleasure (rather than for commercial or military purposes).*⁴²

This definition addresses the intent of the manufacturer to build a boat for the recreational market, and avoids the unintended consequence of requiring manufacturers to ascertain the intended use of a retail purchaser.

2. DOL Should Provide An “80 Percent of Work” Test to Trigger the LHWCA Exemption

NMMA, the Association of Marina Industries, Congressional staff and many other small businesses that contacted Advocacy recommended that DOL provide the following objective test to trigger the LHWCA exemption:

The LHWCA exemption would apply to all employees at the facility so long as at least 80 percent of the work performed at the facility in a calendar year is done on qualifying recreational vessels.

This objective test would improve upon DOL’s “walks in/or walks out” provision because it would allow boat manufacturers and boat dealers to decide whether to accept government contracts and other orders for recreational boats utilized for commercial purposes. Boating facilities that repair vessels would have a clear threshold under which they could stay to remain a state workers’ compensation facility, and continue to complete needed commercial jobs.

⁴¹ NMMA Comment Letter, at 11.

⁴² NMMA Comment Letter, at 9.

Conclusion

Advocacy appreciates the opportunity to comment on DOL's regulations implementing the Longshore and Harbor Workers' Compensation Act (LHWCA), and we hope these comments are helpful and constructive. Advocacy is concerned that the proposed rule will have a significant economic impact on a substantial number of small businesses. DOL's IRFA does not properly identify the small businesses affected by the rule and minimizes the economic impact of this rule. Advocacy believes that DOL's proposed rule does not conform to the congressional intent of the American Recovery and Reinvestment Act amendment which sought to exempt repairers and dismantlers of recreational vessels from coverage under the LHWCA. According to small business representatives, this proposed rule may actually increase the numbers of small entities in the recreational marine industry that would be required to obtain the more expensive LHWCA insurance. Advocacy urges DOL to consider significant alternatives to this rulemaking recommended by small entities that would meet the agency's objectives without harming small businesses. Please contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

//signed//

Janis C. Reyes
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs