

THE WHITE HOUSE

WASHINGTON

December 15, 1993

MEMORANDUM FOR OSHA REFORM WORKING GROUP\*

FROM: Ellen Seidman 

SUBJECT: Next steps

As we discussed at our meeting on last week, the Reich letter is only a first step in the legislative OSHA reform process. Because it was just a first step, we were able to reach consensus relatively easily. At the same time, the process brought into the open areas of substantial concern with the provisions of the Kennedy-Ford bills. If the issue had been not whether this was an acceptable place to start, but rather whether the bill should be signed into law, consensus would have been far harder to achieve.

There are a multitude of issues, some cited in the letter as open, some relating to the five bulleted points in the letter, and some (such as standards for judicial review) not mentioned at all, on which the Administration will need to develop positions both at the start of and during the legislative process. As we go through the process, there will also be tactical decisions to be made, and tradeoffs to be evaluated. We will want to understand more about burdens -- including costs -- and benefits of alternative formulations.

The bulk of the effort must and will be carried out by the Labor Department. However, we have agreed to form an EOP team to work with Labor -- and, together, with congressional offices and stakeholders as appropriate -- to develop a top-notch bill that creatively responds to the problems we all know exist in the OSH Act and increases employee health and safety at, hopefully, a minimum net cost to the economy, and, moreover, can be enacted.

I would like to start the process by meeting with Labor to develop a list of critical issues, and by debriefing Labor on what they learned during their study process (and in other ways) about the effectiveness and impact of the current proposals, issues and problems raised by those proposals, potential alternatives, and the positions of various parties. From there, we can work on development of Administration positions on various issues, including, where necessary, gathering more factual or positional information.

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\* Bill Dickens, John Morrall, Mike Schmidt, Pam VanWie

I have asked my assistant, Gaylen Barbour, to take on the unenviable task of working out meetings for yet another NEC task force. However, she's very good at it, and we'll be in good hands. I'd like to get one meeting in before we scatter for the holidays, and Gaylen will be calling around to set a time. I look forward to working on this project.

cc: Bob Rubin  
Carol Rasco  
Laura Tyson  
Sally Katzen  
Belle Sawhill  
Tom Glynn, DOL  
Joe Dear, DOL

THE WHITE HOUSE

WASHINGTON

December 8, 1993

93 DEC 9 P1:08

MEMORANDUM FOR THE PRESIDENT

FROM: BOB RUBIN  
SUBJECT: OSHA Reform

I. ACTION-FORCING EVENT: Lane Kirkland will meet with you on Friday, December 10 and will want to know the Administration's position on OSHA Reform. While assuring Mr. Kirkland that we support reform, including the principles of the pending Kennedy-Ford bills, it will be important to avoid endorsing the specific provisions of those bills.

II. BACKGROUND/ANALYSIS: The Occupational Safety and Health Act has not been amended in 20 years. Substantial concerns have been raised about its efficacy, cost, and coverage. In March, Senator Kennedy and Chairman Ford introduced essentially identical bills that would, among other things:

- o Require all employers (subject to limited Secretarial exemptive authority) to establish comprehensive occupational safety and health programs, and all employers with more than 10 part- or full-time employees to establish joint safety and health committees at each worksite;
- o Increase whistleblower protection;
- o Expand OSHA coverage to public employees in 27 states not currently covered by approved state plans and to all federal employees (except congressional employees);
- o Increase federal criminal penalties and establish individual criminal liability for willful violations that cause serious bodily injury;
- o Put into effect a 1989 OSHA regulation concerning Permissible Exposure Limits for approximately 500 airborne substances that had been overturned by the Supreme Court because individual risk determinations were not made for each substance.

DOL estimates that compliance will cost the private sector approximately \$13 billion annually, state and local governments approximately \$1.8 billion, and non-OSHA federal agencies \$200 million. They estimate that over 1,000 fatalities and 1.4 million injuries will be prevented, and that over \$13 billion will be saved in reduced medical costs, workplace disruption and other related areas.

The most controversial areas are the requirement for joint worker-management committees and the coverage of state and local employees. Labor generally has made support of committees the litmus test for support of the bill; business has been equally adamant on the other side because of both costs and prospects that committees would be used to organize workers. AFSCME has made coverage of state and local employees -- many of whom work in very hazardous conditions -- one of its top priorities. On the other hand, for the 27 states that do not now cover public employees, coverage would be an unfunded state mandate.

Attempts by both DOL and congressional committees to bring labor and business together to find a bill both can support have failed. Labor, DOL and the bills' sponsors believe serious negotiations will begin only if the Administration takes a position supporting, at least in principle, the critical parts of the bills (committees, coverage, whistleblower protection), recognizing that compromises will be made during the legislative process. DOL also believes that support for the bills' critical elements is important to the Administration's broader agenda with labor and the two committee chairmen.

A story concerning a draft letter from the Secretary "strongly supporting" the bills appeared in the Wall Street Journal on Monday. That letter would have committed the Administration to supporting the actual language of the bills in the critical areas, not just the principles involved. The Labor Department and White House policy offices (NEC, OMB, CEA, DPC, OVP) have developed a revised DOL letter, at Tab A, that endorses principles, not provisions, and that all support.

The White House policy offices that worked on the letter, as well as Intergovernmental Affairs, are convinced of the need for OSHA reform, and the general validity of the bills' central principles. However, they are concerned that the bills' sponsors have not adequately addressed the cost of the bills as currently drafted to business (including in particular small businesses) and to state and local governments. They therefore strongly recommend that in your meeting with Mr. Kirkland you not commit to support specific provisions of the bills. Legislative Affairs and Political Affairs would be inclined to be more explicitly supportive of the bills, especially the provisions requiring labor/management committees and extending coverage.

Tab:

Tab A - Draft DOL letter

The Honorable Edward M. Kennedy  
Chairman  
Committee on Labor and Human Resources  
United States Senate  
Washington, D.C. 20510

The Honorable William D. Ford  
Chairman  
Committee on Education and Labor  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairmen Kennedy and Ford:

In testimony before the House Education and Labor Committee in April of this year, I stated that the time had come to reform the Occupational Safety and Health Act. I explained that improved workplace safety and health is an important aspect of this Administration's commitment to better jobs for all Americans in the New American Workplace. In a highly competitive global economy we cannot tolerate the high costs of workplace fatalities, injuries and illnesses. We must recognize that investment in our workers is the best investment we can all make in our future. As we have stated in Vice President Gore's National Performance Review, this Administration is committed to encouraging companies to embrace labor-management cooperation and to giving employees the tools to humanize the workplace.

As I committed to you in my testimony, we have been working diligently to explore the concerns of labor, management, the insurance industry, safety and health professionals, and the public with the framework of a law that has not been changed in more than twenty years. We held dozens of meetings with stakeholders, and staff have carefully considered technical issues. We have listened carefully to all, and explored avenues for reaching consensus. I have personally had meetings with several groups representing key stakeholders, and my senior staff and I have spent time considering both the individual questions presented and our overall approach to this issue.

The Department of Labor now joins you in support of rapid legislative action. Your bills introduce new ways to "reinvent" regulation of workplace health and safety through comprehensive health and safety programs and joint safety and health committees. Empowering workers to participate in safety and health activities and encouraging employees and management to cooperate to improve the places in which they work will save lives and tax dollars, and will make government regulation less burdensome. These concepts are the key to a new worksite-based model of injury and illness prevention.

We are therefore pleased to support your efforts to enact legislation that would:

- \* establish comprehensive occupational safety and health programs and joint safety and health committees, and improve whistleblower protection;
- \* address gaps in the protection of public employees;
- \* increase Federal criminal felony penalties, to complement those now available to State authorities, to enable us to appropriately punish both collective and individual conduct that is truly criminal in nature;
- \* place additional requirements on the construction industry to ensure efficient coordination of safety and health protection among the many and constantly changing employers on construction projects; and
- \* put into effect the Permissible Exposure Limits for airborne contaminants in general industry adopted by the agency under the prior Administration.

When the Congress returns from its recess, we will be prepared to testify on your legislation in detail. In addition to further explaining our position on the initiatives mentioned above, we will be ready to suggest changes that appear to be needed on such matters as employee litigation rights, procedures (including statutory deadlines) for standards action, changes to section 4(b)(1) of the Act, and administrative organization. This will give us time to ensure that other agencies which have expertise on particular technical features of the legislation have an opportunity to work with us.

We will also be able to refine our estimates of the resource needs, compliance costs, and benefits for Federal, State, and local government entities and the private sector. In so doing, we will take into account the bills' provisions granting the Secretary flexibility with respect to small worksites and low hazard employment, including, where appropriate, state and local government worksites and employment. We would also like to work with you to ensure that our budgetary and personnel policies can accommodate this important new initiative. In the interim, we would be pleased to provide continued technical assistance to your staffs, and to work with you to develop incentives to promote compliance that meet our goals.

In the context of our active support for OSHA reform, we see no need to wait when we can take action administratively. The recent confirmation of Joe Dear as Assistant Secretary will allow us to move quickly ahead on a number of initiatives that have been developed over the last few months and which are consistent

with the legislative initiative. By way of example, we intend to move ahead promptly with a regulatory effort to require employers to establish comprehensive occupational safety and health programs, and explore ways to have those programs and their implementation regularly certified by either private sector experts or suitable employee representatives. We are exploring a new approach to data collection that will allow us to target our limited compliance resources much more effectively. We have plans underway to increase the efficiency of inspectors through streamlining the inspection process, and to otherwise strengthen our enforcement efforts. We are also looking for ways to work with employers to encourage worker-management cooperation in the field of safety and health.

I want to assure you that my staff and I will be available to work with you as you press forward with OSHA reform legislation. You will have our full and active support in your endeavors.

Sincerely,

Robert B. Reich

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY  
WASHINGTON, D.C.  
20210

93 DEC 9 P6:06  
DEC 9 1993

MEMORANDUM FOR THE PRESIDENT

FROM: ROBERT B. REICH *RR*

SUBJECT: The Kennedy-Ford Occupational Safety and Health Reform Bill

Recommendation: The Administration should announce its support for the Kennedy-Ford OSHA reform legislation, while signaling limited reservations.

OSHA Reform Background:

The goal of the Occupational Safety and Health Act, enacted in 1970 and not amended since, is to prevent workplace injuries, illnesses and fatalities. OSHA embodies the recognition that a posture of laissez faire on workplace safety means undue risk to workers' safety and health. The Act added regulatory, enforcement, education and training initiatives to supplement the economic incentives--workers' compensation charges, wage premiums for dangerous work, tort judgments--that, by themselves, had proven inadequate to the task.

OSHA has made a difference. In 1970, an average of 38 American workers died of traumatic workplace injuries every day. Today's daily toll is less than half of that rate, in a workforce that is 50 percent bigger. Once-prevalent work-linked maladies, like brown lung from cotton dust, have become rare. But work-related injuries and illnesses continue to occur in enormous numbers--8.7 million Americans injured at work in 1991, including 3.3 million disabling injuries and total workplace accident costs exceeding \$115 billion. Work-related illness is inherently harder to track, but the Bureau of Labor Statistics recorded 380,000 cases of occupational illness in 1991, and tens of thousands of current and former workers die prematurely each year from work-related diseases like black lung and silicosis.

The government's resources to deal with this toll are quite limited. OSHA and approved state programs, which OSHA partly funds and oversees, currently employ 2,400 inspectors. These inspectors are called on to enforce standards covering 93 million workers in 6.2 million workplaces. OSHA's annual budget is approximately \$300 million--about \$3.00 per covered worker. Moreover, OSHA must operate within a legislative framework nearly a quarter-century out of date.

Senator Kennedy and Congressman Ford introduced the Comprehensive Occupational Safety and Health Reform Act (S.575 and H.R. 1280) in 1991. (Shortly afterwards, the urgency of OSHA reform was underscored when a food processing plant with egregious safety conditions--a plant which had not been inspected in eleven years--caught fire. Twenty-five workers died, and another 50 were injured, many trapped behind padlocked emergency exits.) By the end of the 102nd Congress, the House and Senate Labor Committees had each reported the reform bill, but no further action had been taken.

Key Provisions of Kennedy-Ford:

The Kennedy-Ford bill expands OSHA's domain, stiffens penalties, and--most importantly--mandates employee empowerment and employee involvement in the design and operation of employer safety and health programs.

The bill proposes two central innovations to make this happen: a requirement that every employer have a written safety and health program that includes methods of assuring employee involvement; and a requirement that employers with eleven or more workers establish a joint labor-management safety and health committee. The joint committees contemplated by the Kennedy-Ford bills would have employee representatives chosen by and from among the non-managerial employees. They would be empowered to make inspections, investigate accidents, and make recommendations for changes in workplace operations. Their role would be advisory only; they would have no power to compel the employer to adopt their recommendations.

Other important features of the bill include:

- o Coverage of all state, local, and federal employees under rules similar to those that apply to private sector firms;
- o Streamlined standards-setting;
- o Employers would no longer be able to delay correcting hazards pending their contest of a citation;
- o Special rules to govern multiemployer construction worksites and determine responsibility for preventing hazards;
- o Expanded whistleblower protection;
- o Tougher criminal penalties for willful violators.

Kennedy-Ford and the Clinton Workforce Agenda:

These factors are considerations in your decision about whether to support the Kennedy-Ford OSHA reform legislation:

**PRO**

--OSHA reform promises to reduce work-related injuries and illnesses by roughly ten percent.

--Preliminary estimates of quantifiable benefits arising from reform--counting lower medical costs and other savings, but not counting the non-quantifiable benefits of longer lives and better health--range from \$13 billion to \$18 billion, approaching or exceeding the estimated costs of reform. Adding to the benefits side of the ledger any reasonable figure for the value of fewer deaths, injuries, and illnesses would yield overall benefit estimates that clearly exceed the quantifiable costs.

--The legislation is important to Senator Kennedy and Representative Ford.

--OSHA reform is a top priority for the labor movement, which was heavily involved in drafting Kennedy-Ford.

--The focus on employee empowerment promises to help fill the gap between the government's limited resources and the efforts needed to assure safety and health.

--Your endorsement of Kennedy-Ford can trigger the broader discussions and negotiations over OSHA reform which are now stalled awaiting the Administration's response.

--OSHA reform can be linked thematically to health care reform.

--States that have enacted similar worker safety and health committee requirements have driven down their workers' compensation costs. There is no evidence to suggest that such committees lead to increased union activities.

**CON**

--Kennedy-Ford is likely to be attacked as an unfunded mandate by the 27 state governments that currently lack public-worker coverage. (Increased state and local costs may reach or exceed \$1.8 billion a year.)

--Preliminary estimates of incremental costs to employers range as high as \$13 billion in the first year and around \$8 billion annually in subsequent years. (In developing these estimates we selected cost assumption on the high side; the real costs are likely to be lower.)

--The selection requirement for employee members of joint labor management committees raises labor-relations issues that will alienate much of the business community.

--There will be budget consequences: OSHA estimates annual costs of \$143 million for increased OSHA responsibilities and \$200 million due to tougher safety and health requirements for other federal agencies.

--The bill, in its current version, is overly prescriptive in some of its mandates.

On balance, I believe the pros prevail.

1. It is true that business objects to almost every provision of Kennedy-Ford, and will not greet our endorsement warmly. Yet business groups--NAM, the Chamber, the NFIB, etc-- have not proven willing to seriously engage a compromise approach to OSHA reform. We have concluded that, absent an active legislative proposal, business will not depart from its fixed opposition to any new regulatory burden. Our support for Kennedy-Ford will get the negotiations underway.

2. Commonly-cited cost estimates represent gross costs. Quantifiable benefits alone counterbalance the cost burden even before considering central goals that cannot be meaningfully quantified--lives saved, lengthened, or made better by improved workplace safety and health conditions.

3. The core idea of better workplace health and safety through worker empowerment is utterly sound. What evidence there is--although the record remains somewhat thin--supports the efficacy of worker committees and written safety and health programs. And the increased reliance on worker involvement resonates strongly with the rest of our workforce agenda.

4. Our support for the bill is a paramount issue with Senator Kennedy and Representative Ford, and with the labor movement. In the current environment--in the wake of NAFTA, and with the prospect of passing much of our workforce agenda through the sponsors' committees--only far graver reservations than the bill actually summons would deter us from supporting the Kennedy-Ford proposal.

THE WHITE HOUSE

WASHINGTON

January 20, 1994

MEMORANDUM FOR CAROL RASCO

FROM: Mike Schmidt

SUBJECT: Occupational Safety and Health Act (OSHA) Reform and  
Unfunded Mandates

As you know, I am currently a member of the OSHA Reform Working Group that is examining the Kennedy/Ford OSHA reform bills and will be making recommendations on Administration positions on various sections of the bill. During the course of the group's work, the issue of unfunded mandates has become quite significant, especially as they apply to mandatory OSHA coverage of public sector employees. I have attached a paper on the subject that I adapted from a longer Issue Paper that DOL prepared for the working group on unfunded mandates and OSHA reform. You will have a chance to review and approve the working group's recommendations sometime in the next few weeks. However, I thought that you might be interested in taking a closer look at the issue of unfunded mandates in OSHA reform and how it applies to the Administration's overall position on the issue.

Current Working Group Strategies

At the last meeting of the Working Group, we discussed strategies that could be used to deal with the questions about "unfunded mandates" that we are certain will be raised during the course of the OSHA reform debate. At this point, the group agreed on the following strategy in preparing drafts of testimony and Q&As for Secretary Reich's and Undersecretary Deer's upcoming testimony on OSHA reform in early February:

- **Avoid taking the issue head-on:** in testimony and Q&A sessions, we will neither attempt to declare public sector coverage to be a mandate, or deny that it is one.
- **Focus on OSHA reform as a different kind of mandate:** in addition to the equity arguments that the Secretary has been making, we will focus on elements suggesting that if coverage is a mandate, it is different than other mandates (and pretty small as well) for a number of reasons, namely:

- a very large number of public sector workers are already covered, in both state Plan and non-Plan states;
- health and safety requirements will apply to the states and localities in their capacity as employers, rather than as governments;
- OSHA provides the enforcement unless states decide to become state Plan states;
- OSHA regulations will be implemented under an Executive Order that requires special consideration for and local governments, and;
- hopefully, we will have numbers to show that OSHA reform has a positive payback for the entities covered (in terms of reduced injury and illness rates).

Unfortunately, it is likely that CBO will score OSHA reform as an unfunded mandate. If this proves to be true, OMB and OSHA will determine what we can do to (i) change their minds, and (ii) keep the numbers small.

# OSHA REFORM AND UNFUNDED MANDATES

## BACKGROUND

After several months of study and outreach by the Occupational Safety and Health Administration, capped off by a period of White House review and comment, Secretary Reich released a letter to Chairmen Kennedy and Ford indicating the Administration's support for the rapid enactment of OSHA reform legislation that would, among other things, "address gaps in the protection on public employees."

The case for doing so was compelling for a number of reasons. First, at the present time, less than half of the states (24) provide OSHA safety and health protection for their employees<sup>1</sup>. This leaves more than 7 million state and local public employees uncovered by OSHA, although a number of states do provide some protections to employees under their own laws. The hazards facing public employees are no less serious than those facing their counterparts in the private sector, and the argument that the public sector should comply with laws imposed on the private sector is a powerful one. Moreover, coverage of public employees is strongly backed by public employee unions. Also, a number of governors and mayors in state Plan states who want the support of public employee unions may support the change. Finally, closing the gap in employee coverage is also included in the only OSHA reform bill introduced by the minority (albeit with an effective date delay several years longer than in the majority bills), and all minority members who spoke on this subject last year supported public sector coverage. This fact somewhat immunizes the issue from partisanship.

Having decided to "address gaps" in OSHA coverage, the problem for the Working Group is how to best square this commitment with the institutional concern of state and local officials that we not create another "unfunded federal mandate." This is a serious concern; many cities, towns, and villages have run out of the capacity to raise taxes. Accordingly, when the Federal government imposes a new duty, it may force them to cut back on police, fire, and other vital services. More generally, it forces them to reset their priorities -- not only differently than they would like, but sometimes without much warning.

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<sup>1</sup> These States have chosen to work with the Occupational Safety and Health Administration to become State Plan states, which allows them to take over enforcement of OSHA requirements and tailor federal regulations to meet their State's needs.

Many of those concerned about the mounting impact of unfunded mandates have argued that if a new Federal mandate is necessary, it should be fully funded out of the Federal taxbase. Those who have expressed this point of view (i.e. the 53 co-sponsors of the Kempthorne Bill) argue that exceptions not be made to this general principle. Thus, if OSHA reform is viewed as an unfunded mandate, they would argue that any costs associated with that mandate should be fully funded by the Federal government. Obviously, this creates some appropriations problems.

Other state and local officials take a more flexible view of the situation. They accept the fact that some unfunded Federal mandates will always be necessary. However, they demand that the Federal government make sure that all such mandates be scientifically valid and necessary, build in state and local participation up-front, and allow as much flexibility as possible in implementation. This approach, which will be addressed later in this paper, is similar to the Administration's current approach to the issue.

Accordingly, the Administration is presented with three general questions to consider:

- How does support for OSHA Reform fit with the Administration's current position on unfunded mandates in general?
- Is OSHA Reform an unfunded mandate?
- Given our position on unfunded mandates, how can we justify supporting OSHA reform?

This paper will consider these three questions in detail.

## **DOES OSHA REFORM FIT WITHIN THE ADMINISTRATION'S CURRENT POSITION ON UNFUNDED MANDATES?**

The Administration has clearly taken a strong public stand against the Federal government's imposition of unfunded mandates on state and local governments. Aside from a number of informal public statements on the issue, four examples stand out in this regard:

- **The National Performance Review.** Both in substance and in tone, the NPR called for a reduction in unfunded mandates. In addition to its recommendation that the "President should issue a directive limiting the use of unfunded mandates by the administration," the report also called for reviewing all agency regulations with the goal of eliminating half of them, and giving

cabinet secretaries and agency heads the authority to grant states and localities waivers from federal regulations or mandates.

- **Unfunded Mandates Day.** The President observed "Unfunded Mandates Day" (October 27, 1993) by meeting with Governors, Mayors, and other public officials to discuss the issue of unfunded mandates and their increasing burden on state and local governments. He also signed Executive Order 12875 on unfunded mandates (discussed below).
- **Executive Order 12866 -- Regulatory Planning and Review.** Through this Order, the President created a regulatory planning and review process that is more streamlined and will ensure that agencies regulate only when necessary and promulgate regulations that are cost-effective and sensible. Among other things, the Order requires each agency to consult with appropriate state and local officials before imposing regulatory requirements that significantly affect those entities, and asks agencies to strive to minimize regulatory burdens on state and local governments.
- **Executive Order 12875 -- Enhancing the Intergovernmental Partnership.** This Executive Order, also known as the "Unfunded Mandates" Order, attempts to reduce the imposition of Federal regulatory mandates on state and local governments and streamline the application process for discretionary waivers.

It is important to note that the unfunded mandates that the two Executive Orders listed above are referring to are **specifically limited to those regulations that are not required by law**. This is an important point, but is one that is not well understood. In the minds of most people, including Members of Congress and state and local officials, the Administration has taken a strong stand against unfunded mandates in general.

Given this perception, the danger inherent in supporting any kind of mandated coverage of state and local employees is that it may be viewed as contradicting the Administration's previous statements and actions on unfunded mandates, and therefore cut the Administration's credibility on the issue. This danger is especially worrisome given the current political environment surrounding unfunded mandates, including:

- **S-993 -- The Community Regulatory Relief Act (The "Kempthorne Bill"):** Senator Kempthorne's bill, which would require the Federal government to pay to state and local governments the direct costs incurred by those entities in complying with Federal

mandates, currently has 53 co-sponsors (including 10 Democrats).

- **U.S. Conference of Mayors and National Governors Association Resolutions on Unfunded Mandates:** In June, the Conference passed a resolution calling on the Congress and the President to pass legislation to end the practice of unfunded mandates. A similar resolution will likely be passed at the upcoming NGA meeting later this month.

In all, there seems to be a groundswell of political opposition to unfunded federal mandates coming from state and local communities. The Administration has, to date, responded positively to this rising tide of opinion by taking a public stand against unfunded mandates. The questions we must consider are: First, is OSHA reform an unfunded mandate, and; second, how do we square our support of OSHA Reform in light on our public statements and the current political mood?

## **IS OSHA REFORM AN UNFUNDED MANDATE?**

### Definition

What is an "unfunded mandate?" The term "Federal mandate" contained in the most prominent piece of legislation introduced on this topic, S. 993 (Kempthorne et al), reads as follows:

- ". . . a statute or regulation that requires a state or local government to --
- (A) take certain actions (including a requirement that a government meet national standards in providing a service), or;
  - (B) comply with certain specified conditions in order to receive or continue to receive Federal assistance and which requires the termination or reduction of such assistance if such government fails to comply with such conditions."

An "unfunded" Federal mandate is one which would not meet the requirement of section 4 of the bill that:

". . . any requirement under a Federal statute or regulation that creates a Federal mandate shall apply to the state or local government only if all funds necessary to pay the direct costs incurred by the state or local government in conducting the activity are provided by the Federal government for the fiscal year in which the direct cost is incurred."

## Arguments For and Against

There have been three main arguments offered against defining OSHA reform as an unfunded mandate." First, if the concept of unfunded mandates were really limited to the costs of "conducting an activity," it could be argued that the legislation does not create an unfunded mandate at all. Coverage of state and local employees does not require the state to run any new program -- only to comply in its employment practices with Federal rules, administered by the Federal government unless the state elects to run the program itself. Second, some have argued that OSHA reform deals with state and local governments in their capacities as employers, and not as governing entities (i.e. not in their capacity as service providers, or law and policy makers). Therefore, OSHA reform does not fall under the standard definition of an unfunded mandate. Finally, employee unions have asserted that the benefits of OSHA coverage demonstrably exceed the costs; if so, it can be argued that there is no net cost, and thus no unfunded mandate. At this point, DOL does not have the hard data available to confirm this argument.

In practice, however, the type of unfunded mandates which are the subject of complaint include many situations comparable to OSHA -- where the focus is on the cost of bringing state or local facilities into compliance with the law, just as private sector facilities must be in compliance with the law. The state and local governments who would for the first time be covered by OSHA reform will incur a new direct cost: the cost of compliance with OSHA requirements and regulations. In addition, even those state and local governments already covered will face incremental costs under the proposed legislation. Finally, from a political standpoint, OSHA reform will almost certainly be classified as an unfunded mandate by its opponents. Given these reasons, it would be difficult to argue that OSHA reform is not an unfunded mandate.

## **DOES OSHA REFORM MEET ACCEPTABLE CRITERIA FOR ENACTMENT?**

Fortunately, not all of those who are concerned about unfunded mandates take the Kempthorne approach insisting that ALL Federal mandates be fully funded. Rather, many have adopted a more middle-of-the-road approach. A good example of this approach has been articulated by Columbus Mayor Gregory S. Lashutka. In his testimony before the Senate Committee on Governmental Affairs, Mayor Lashutka, a longtime advocate against unfunded Federal mandates, offered four key principals that should guide the Federal government in enacting such mandates:

1. The legislation or regulation in question should be based on well-

founded science or fact;

2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available;
3. The Federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all, and;
4. Local governments should be treated as a full partner in the development of any new laws or regulations.

These four principals are similar in spirit to the Administration's Executive Orders on Unfunded Mandates and Regulatory Planning and Review, in that they do not advocate an **absolute** ban on unfunded mandates. Rather, both approaches call on the Federal government to make sure that any unfunded mandate be well justified and reasonable, build in up-front participation by state and local governments, and be as flexible as possible for state and local governments to implement.

Because Mayor Lashutka's key principals are similar to the Administration's approach, they can be used as a rough benchmark for trying to determine whether or not OSHA Reform meets acceptable criteria for enactment, even if it is not fully funded:

1. The legislation or regulation in question should be based on well-founded science or fact.
  - OSHA Reform goes a long way toward meeting this criteria. Secretary Reich presented a strong case for the need for OSHA reform in April, including the need for coverage of public employees. In addition, statistics collected by the Department of Labor show that workers in the public sector are at no less risk (and frequently more risk) than their counterparts in the private sector.
  - Any new regulation or requirement issued under the new law will be subject to the Administration's Executive Order on Regulatory Planning and Review, which ensures that they are based on well-founded science or fact.
2. Local governments should be able to prioritize their resources to achieve the greatest risk reduction possible from the funds available, and;

3. The Federal government should incorporate flexibility to allow for different local conditions, instead of one-size-fits-all;
  - In terms of administration, OSHA already provides states the option to set up a State Plan to meet local needs and priorities. The State Plan process allows states enormous flexibility in implementing OSHA rules and regulations.
  - Again, any new rules and regulations will go through the process set up by the Executive Order on Regulatory Planning and Review. This process specifically requires state and local participation and flexibility.
  - A delay of several years in the effective date of public sector coverage is agreeable to the sponsors of the majority bill and already contained in the minority bill. This delay, if enacted, will provide state and local governments adequate time to phase-in compliance efforts and thus minimize the disruption that any up-front investments might otherwise create for other pressing priorities.
  - The whole point of OSHA reform is to get public employers and their employees, just like those in the private sector, engaged in designing and implementing flexible solutions that fit local conditions and particular worksites.
4. Local governments should be treated as a full partner in the development of any new laws or regulations.
  - The Department of Labor and Congress have sought, and will continue to seek, the involvement of representatives of state and local governments in designing OSHA reform legislation. Specific state and local representation on DOL's OSHA advisory council has been discussed as a distinct possibility, and the OSH Administration meets regularly with state Plan designees.

Given the arguments listed above, it seems that a credible case can be made for supporting OSHA reform/public sector coverage while remaining true to the principles set forth in Executive Orders 12866 and 12875. How this case will be received politically, especially by state and local governments, however, remains to be seen. In the politically charged atmosphere surrounding the unfunded mandate debate, it is likely that the subtle distinction between "justified" and "unjustified" Federal mandates will not be appreciated or understood by everyone.