March 18, 2024

Michelle Paczynski
Administrator, Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

RE: National Apprenticeship System Enhancements (RIN: 1205-AC13)

Dear Ms. Paczynski:

The undersigned state officials, all of whom are charged with implementing apprenticeship programs in their states or represent constituents with a substantial interest in apprenticeship programs, file this comment in response to the Employment and Training Administration of the U.S. Department of Labor's request for comment on its notice of proposed rulemaking entitled, "National Apprenticeship System Enhancements."[1]

As this comment details, we believe, if implemented, the net result of these regulatory changes would be a significant decrease in the number of apprenticeship programs and the workers who participate in them in our states and nationwide. Such losses in programming and participation would only exacerbate what already is well-reported as a significant reduction in skilled labor across the country, particularly in the construction and manufacturing industries.[2]

We believe what the Department proposes through this rulemaking would: (1) exceed its statutory authority; (2) illegally federalize all apprenticeship and career technical education programs, making them less flexible and less effective in training workers and students for skilled jobs in the new economy; and (3) impose overly burdensome recordkeeping requirements on apprenticeship program administrators.

The Department's Apprenticeship Proposal Exceeds Its Statutory Authority

In addition to being the wrong approach at the wrong time to the national skilled labor shortage, the Department's proposed regulations far exceed the authority given it by Congress.

First, the National Apprenticeship Act clearly envisions a significant role for state agencies in apprenticeship programs. Indeed Section 1 of the Act states that the Secretary of Labor must work with state agencies on apprenticeship programs: "*the Secretary of Labor is hereby authorized and directed … to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship*."[3] Rather than cooperate with state agencies, the

[1] 89 Fed. Reg. 3118 (Jan. 17, 2024).
[2] Eric Revell, "America's skilled worker shortage impacting construction, manufacturing industries," Fox Business (Aug. 28, 2023).
[3] National Apprenticeship Act of 1937, 50 Stat. 664 (codified as amended at 29 U. S.C. 50). (Emphasis added.)

proposed regulations strip state agencies of any meaningful participation in apprenticeship programs. If this proposal goes into effect, state agencies would have no opportunity to be innovative in creating apprenticeship programs designed to meet the needs of the communities they serve. Rather, every aspect of their programs would be subject to the approval of the federal Office of Apprenticeships. State agencies would be paper pushers and nothing more. On its face that is not what Congress intended.

Second, the proposal's severability provisions are an interesting component of this expansive rule, which rewrites regulations that have been in place since 1977 and subsequently revised in whole in 2008 and in part in 2016.[4] It is questionable that Congress envisioned in 1937 the scope of regulations that would be finally promulgated in 1977, much less this extensive rewrite of those regulations and the creation of a complete new federal regulatory framework for career technical education (CTE) programs. The proposal generally references the Department's "statutory responsibility to protect the welfare of apprentices"[5] and to "facilitate" statutory "directives." But we assert the 1937 statute does not authorize this broad rule.

The Supreme Court has been clear that only Congress can implement a regulatory structure of this breadth.[6] And many in Congress do seem interested in reforming the way apprenticeships work in the twenty-first century. In the current Congress alone, there have been 240 bills introduced concerning apprenticeship programs.[7] And another 496 bills concerning CTE programs.[8]

Question: Did the Department consider referenced Supreme Court precedent in its analysis of its authority to promulgate these rules? Why did the Department decide to include the two severability provisions in its proposed rule?

Third, nowhere in the NAA is there a mention of any requirement to use apprenticeships as part of a "diversity, equity, inclusion, and accessibility (DEIA) strategy for program sponsors," as the proposed rule requires.[9] Indeed, considering the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. Harvard*, the legality of DEIA programs is very much in doubt.[10] Immediately following the Court's decision, Equal Employment Opportunity Commissioner Andrea Lucas encouraged employers "to review their compliance with existing limitations on race- and sex-conscious diversity initiatives."[11] She warned of the practical risks of such programs in light of "the Supreme Court's rejection of diversity, nebulous 'equity' interests, or

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[4] 89 Fed. Reg. at 3121.
[5] 89 Fed. Reg. at 3119.
[6] Biden v. Nebraska, 600 U.S. ___ (2023); *West Virginia v. EPA*, 597 U.S. __ (2022); *Michigan v. EPA*, 576 U.S. 743 (2015); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)
[7] Congress.gov.
[8] Congress.gov.
[9] 89 Fed. Reg. at 3121.
[10] *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. __ (2023), Docket No. 20-1199.
[11] Andrea R. Lucas, "With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs," Reuters, June 29, 2023.

societal discrimination as justifying actions motivated — even in part — by race, sex, or other protected characteristics."[12]

Remarkably, *Students for Fair Admissions* is not referenced even once in the 181 pages of Federal Register text. Considering EEOC Commissioner Lucas' warnings following that case, at a minimum, any introduction of DEIA policies into apprenticeship programs would require significant assistance from legal counsel to ensure that they are legally applied. ***Question: Did the Department review the legality of mandating the use of DEIA as a strategy in apprenticeship programs in light of Students for Fair Admissions, Inc. v. Harvard?***

Moreover, as of March 2, three states have enacted legislation that have banned DEI programs in higher education and public offices, another eight states have passed such legislation through at least one chamber, and another 20 states have had anti-DEI legislation introduced.[13] ***Question: How does the Department suggest these states structure their apprenticeship considering Supreme Court precedent and these state bans?***

The Department's Apprenticeship Program Illegally Federalizes All Apprenticeship Programs, Making Them Less Flexible and Less Effective in Training Workers for Skilled Jobs in the New Economy

Despite the clear directive in the NAA that the Secretary of Labor *cooperate* with states on the formulation and promotion of apprenticeship standards, the proposed rule would write states out of the process altogether.

When it comes to narrowing the skilled labor gap, flexibility is key. One-size-fits-all programs like that envisioned in the proposed rule do not account for the different labor needs of different states. In addition, these draconian regulations threaten to quash the great strides many states are making to address these labor shortages.

SAA states, in particular, pay close attention to the data regarding the occupation shortages in their states. While Iowa might have a shortage of workers in farming, Massachusetts may be working to address a shortage of workers in healthcare. Moreover, states have relationships to the employers in their states – relationships that likely do not exist at the federal level. The bottom line is states are better positioned to identify the worker needs in their states and capitalize on long-standing relationships with in-state employers.

National Approval of All New Apprenticeships: Section 29.7 would require all new occupations to be approved by the Administrator of the National Office of Apprenticeships. Yet, states are leading the way in tailoring apprenticeships for work in the modern economy. For example, during the 2022-23 program year, Florida registered thirty-six new apprenticeship programs (303 active programs) and twelve new registered apprenticeship programs (62 active programs)

[12] Id.

[13] Char Adams and Nigel Chiwaya, "Map: See which states have introduced or passed anti-DEI bills," NBC News, March 2, 2024.

in the state.[14] This has helped account for a fourteen percent increase in the total number of active apprentices and preapprentices; a thirty-three percent increase in the total number of registered apprenticeships; and an eleven percent increase in the total number of registered apprenticeship and preapprenticeship programs over the previous program year.[15] The expansion of these programs is critical as Florida expects to have twenty-six million residents by 2030.

At best, federalizing these decisions by requiring states to ask the OA Administer for permission to create a new apprenticeship program will result in delays of expansions like those in Florida. At worst, the OA Administrator will deny these expansions and our review of the proposed regulation does not indicate states would even have an opportunity to appeal the Administrator's decision.

Moreover, there is a real concern that many such expansions would not take place at all given the massive transfer of authority from states to the federal government on decisions about "occupation suitability determinations"[16] and the requirement that every new occupation "lead to a sustainable career," a prohibition on apprenticeships "confined to a narrowly specialized subset of skills," and a prohibition on apprenticeships that are similar to another covered occupation." Such transfers of authority from states to the federal government would require states to combine many existing apprenticeships into one long, intensive program. And, once again, it would stifle the ability of states to not only be creative, but also address the particular needs of their state. For example, electricians in Louisiana, where the climate is very humid, will have different training needs than those in a dryer community, like Arizona.

Shift Away From Competency-Based Models of Training: We also strongly disagree with the Department's requirement that apprenticeship programs meet a uniform minimum of 2,000 hours of on-the-job training. Right now, many states and employers in those states use competency-based models for training. Competency-based training works. It increases efficiency by matching the training to what is required to do the job. It is cost-efficient by focusing on where the apprentice needs to improve and not wasting time on the development of a skill the apprentice has already mastered. It creates motivated employees – the sense of mastery of their job skills leads to higher job satisfaction and motivation to work. And, as a result, all of it creates a better product.[17] By requiring a 2000 hour minimum, the proposed rule just introduces inefficiency into apprenticeship programs and, like so many other aspects of this proposed rule, will make recruiting employers to participate in apprenticeship programs more difficult.

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[14] Florida Department of Education, Florida Department of Economic Opportunity, and Career Source Florida, "Apprentice Florida: Florida's Annual Apprenticeship and Preapprenticeship Report," Program Year 2022-2023.
[15] Id.
[16] 89 Fed. Reg. at 3267.
[17] Jon Kennard, "Competency-based assessments: Benefits and types that you must know," Training Journal, Oct. 11, 2019.

Federalization of CTE Programs: To date, CTE programs are administered, and primarily funded by state and local governments (although the Perkins Act provides some federal funding for these programs). With that as background, we are genuinely concerned about the Department's efforts to federalize this program. A quick Google search produces hundreds of examples of successful state and local CTE programs. CTE programs offer a range of benefits to students, educators, and the broader economy by providing skills-based training that prepares individuals for high-demand careers. In addition to closing the skills gap, such programs result in higher employment rates and increased earning potential.[18] These programs are successful, in large part, because of their flexibility. Yet the Department's top-down requirements for how CTE programs should operate, including the requirement for a minimum of 540 hours of instruction, will result in fewer CTE programs for our nation's youth.

Moreover, we believe that this proposed regulation represents nothing more than an illegal power grab of CTE programs by the federal government. Again, if federal intervention is required, Congress, as the legislative body, should enact such legislation. It should not be done through rulemaking. Just as with apprenticeship programs, Congress has been highly active introducing legislation concerning CTE programs. As of March 14, 991 bills had been introduced on the topic.[19]

Question: What is the Department's specific statutory authority for creating an expansive regulatory structure for CTE programs?

Changes to State Law: The Department acknowledges that states may need to amend laws governing apprenticeships to comply with these proposed regulations. Undoubtedly that is true and would impose yet another tremendous burden on states to determine what legal changes need to be made and push those changes through its legislative bodies. All of this would require tremendous financial and personnel resources. ***Question: Will states be required to pay the millions of dollars it is likely to cost them to implement this law?***

The Department's Proposed Regulations Would Impose Overly Burdensome Recordkeeping Requirements on Apprenticeship Program Administrators

Regardless of whether a state administers its apprenticeship programs through a State Apprenticeship Agency or through the federal Office of Apprenticeships, under this proposed regulation, the amount of recordkeeping and reporting will be crushing. As the agency has already noted:

"Some State partners suggested that the Department should avoid adding to or changing the regulations at all because some existing or potential stakeholders have expressed that the current regulation, the part 30 regulations and associated EEO responsibilities for States and

[18] U.S. Department of Education, "CTE Data Story." (Website last visited March 14, 2024.)
[19] Congress.gov

programs, and overall administrative requirements within the system were too long, complicated, or burdensome."[20]

We could not agree more.

Among other things, section 29.25 of the proposed rule would require states and sponsors of apprenticeship programs to collect a myriad of data and quality metrics ranging from individual demographic data of apprentices to wage records and surveys, cohort completion rates, and the median length of time to complete a program. The proposal also would require employers and sponsors to keep records regarding employment decisions, apprenticeship agreements, records of apprentice performance and progress, wages and benefits and more.

Like other aspects of the proposal these dramatic expansions of data collection, recordkeeping, and reporting requirements would disincentivize employers from participating in apprenticeship programs.

Conclusion

The Department's proposed rule is an illegal takeover of state programs and would result in a significant decrease in the number of apprenticeship and CTE programs offered throughout the nation. Apparently acknowledging this reality, President Biden recently issued an Executive Order directing agencies to maximize the use of apprenticeships.[21]

States are best positioned to innovate and need flexibility to do so. This top-down, one-size-fits-all proposal would crush innovation and flexibility in these programs at a time that the nation faces a skilled labor shortage. We urge the Department to withdraw this proposed rule.

Sincerely,

John R. "Jay" Ashcroft
Secretary of State
Missouri

Ryan Walters
State Superintendent of Public Instruction
Oklahoma

Andy Gipson
Commissioner of Agriculture and Commerce
Mississippi

Ellen Weaver
Superintendent of Education
South Carolina

Tom McMillin
Member, State Board of Education
Michigan

[20] 89 Fed. Reg. 3270

[21] Executive Order on Scaling and Expanding the Use of Registered Apprenticeships in Industries and the Federal Government and Promoting Labor-Management Forums (March 6, 2024)

Representative Ben Carpenter
Chair, Legislative Budget and Audit Committee
Chair, Ways and Means Committee
Alaska House of Representatives

Representative Sarah Vance
Chair, Fisheries Committee
Chair, Judiciary Committee
Alaska House of Representatives

Representative Brandi Bradley
Member, Health and Human Services Committee
Colorado House of Representatives

Senator Adrian Dickey
Chair, Workforce Committee
Iowa Senate

Representative Dave Deyoe
Chair, Labor and Workforce Committee
Iowa House of Representatives

Representative Joanna King
Assistant Majority Floor Leader
Vice Chair, Veterans Affairs and Public Safety Committee
Indiana House of Representatives

Representative Mark Wright
House Majority Leader
Louisiana House of Representatives

Senator John Damoose
Minority Vice Chair, Education Committee
Michigan Senate

Representative Jaime Greene
Vice Chair, House Education Committee
Michigan House of Representatives

Senator Charles Younger
Chair, Agriculture Committee
Mississippi State Senate

Representative Manly Barton
Speaker Pro Tempore
Mississippi House of Representatives

Representative Donnie Bell
Chair, Workforce Development Committee
Mississippi House of Representatives

Representative Rob Roberson
Chair, Education Committee
Mississippi House of Representatives

Representative Lee Yancey
Chair, Business and Commerce Committee
Mississippi House of Representatives

Representative Sherri Gallick
Member, Economic Development Committee
Missouri House of Representatives

Senator W. Ted Alexander
Chair, State and Local Government Committee
North Carolina Senate

Senator Jerry Alvord
Vice Chair, Aeronautics and Transportation Committee
Oklahoma Senate

Senator Tom Davis
Chairman, Labor, Commerce, and Industry Committee
South Carolina Senate

Representative Bill Taylor
Member, Ways and Means Committee
South Carolina House of Representatives

Representative Jody Barrett
Member, Commerce Committee
Tennessee House of Representatives

Representative William Slater
Vice Chair, Education Administration Committee
Tennessee House of Representatives

Representative Ken Ivory
Chair, House Health and Human Services Committee
Utah House of Representatives

Delegate Nick Freitas
Member, Education Committee
Virginia House of Delegates

Delegate Daniel Linville
Assistant Majority Whip
Chair, Technology and Infrastructure Committee
West Virginia House of Delegates