

Total Pages: 7

LRM ID: MNB234

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

URGENT

Wednesday, September 23, 1998

URGENT

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below
FROM: *Janet R. Forsgren* Janet R. Forsgren (for) Assistant Director for Legislative Reference
OMB CONTACT: Melissa N. Benton
PHONE: (202)395-7887 FAX: (202)395-6148
SUBJECT: JUSTICE Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.

DEADLINE: 4:30 p.m. Wednesday, September 23, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Note: Senator Specter has requested this letter ASAP, as the legislation may be added to the FY 1999 Labor-HHS-Education appropriations bill. Justice would like to send the letter today.

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LRM ID: MNB234 SUBJECT: JUSTICE Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- You may also respond by:
- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
 - (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melissa N. Benton Phone: 395-7887 Fax: 395-6148
Office of Management and Budget
Branch-Wide Lino (to reach legislative assistant): 395-7362

FROM: _____ (Date)
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The following is the response of our agency to your request for views on the above-captioned subject:

☐ Concur
☐ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

**U.S. Department of Justice****Office of Legislative Affairs**

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Arlen Specter
Chairman
Subcommittee on Labor, Health and Human Services,
and Education
United States Senate
Washington, DC 20510

This letter sets forth the views of the Department of Justice on H.R. 4257, a bill to amend the Fair Labor Standards Act of 1938 ("FLSA") to permit certain minors to perform certain work with wood products. We are advised by the Department of Labor that consideration is being given to adding this legislation to the Labor/Health and Human Services appropriations bill in the Senate. The following discussion concerns the version of the bill that Representative Pitts introduced in the House on July 16, 1998. Our views necessarily are tentative, because of several factual questions (discussed below) as to which we do not have sufficient information. Based on the information available to us at this time, however, H.R. 4257 as drafted would, at the very least, raise serious concerns under the Establishment Clause of the First Amendment to the Constitution.

H.R. 4257 would amend the FLSA's provisions on child labor to permit the employment of certain minors "inside or outside places of business where machinery is used to process wood products." H.R. 4257, § 1 (proposing 29 U.S.C. § 213(c)(6)(A)). The FLSA prohibits minors under 16 years of age from working in manufacturing, including sawmill operations. See 29 U.S.C. § 212(a) (prohibiting shipment and delivery of goods produced in establishment employing "any oppressive child labor practice"); id. § 203 (defining "oppressive child labor"). In addition, as permitted by the FLSA, see id., the Secretary of Labor has by order designated occupations in logging and sawmill operations as "hazardous occupations" and has prohibited the employment of persons under 18 years of age in such operations. 29 C.F.R. § 570.54 (Hazardous Occupations Order No. 4). H.R. 4257 provides that it shall not be considered an oppressive child labor practice to employ in a sawmill operation an individual who is between the ages of 14 and 18 and who "is a member of a religious sect or division thereof whose established teachings do not permit formal education beyond the eighth grade."

It is a "principle at the heart of the Establishment Clause" that the government "should not prefer . . . religion to irreligion." Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 703 (1994); see also Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (noting that "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause"). Thus, as a general rule the government may not exempt religious adherents from obligations by which nonadherents must abide; instead, exemptions from otherwise generally applicable prohibitions must be drawn on a religion-neutral basis in order to pass muster under the Establishment Clause. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Kiryas Joel, 512 U.S. at 703-05.¹

The exemption in H.R. 4257 would permit children in certain religious sects or divisions to be employed in places of business where other children may not be employed. This preference for religion over "irreligion" would violate the Establishment Clause, unless it could be defended as a permissible accommodation of religious exercise. A statutory exception exclusively for religion may be a permissible accommodation where, *inter alia*, the exception has the purpose and effect of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions," Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335, 339 (1987), or of otherwise removing "a significant state-imposed deterrent to the free exercise of religion," Texas Monthly, 489 U.S. at 15 (plurality opinion); see also Kiryas Joel, 512 U.S. at 705 (noting that "the Constitution allows the State to accommodate religious needs by alleviating special burdens" on religious belief and practice) (emphasis added).

It is not apparent, based on the limited facts of which we are aware, how H.R. 4257 would satisfy this part of the test for permissible accommodations. As we understand it, the Amish religion forbids or strongly discourages formal education beyond the eighth grade. Accordingly, the Supreme Court has held that states must, in certain circumstances, permit Amish children to be excused from compulsory educational requirements for older teenagers. Wisconsin v. Yoder, *supra*. This accommodation, as we

¹ In Texas Monthly, for example, the Court invalidated a sales-tax exemption provided exclusively to religious periodicals. The plurality reasoned that "when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." 489 U.S. at 15 (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment)). A government may, of course, provide such benefits to religious adherents when such persons are included in a broader class of similarly situated beneficiaries, defined in secular terms and reflecting some legitimate secular aim. See Texas Monthly, 489 U.S. at 15-17 (plurality opinion) (scope of beneficiary class must reflect legitimate "secular aim," and not have the "purpose or effect of sponsoring certain religious tenets or religious belief in general").

understand it, alleviates what otherwise would be a governmentally imposed burden on the exercise of the Amish religion. We are not aware of any congressional finding or understanding that the Amish religion also requires or strongly encourages its minors to work in sawmills. It may be that the Amish religion encourages or requires that children work alongside other members of the community, in order to instill in the children certain work ethics and values of self-reliance that are an important part of an Amish education.² And it also may be the case that many adults in Amish communities work in sawmills. But, unless it is the case that the FLSA prohibition on employing children in sawmills significantly burdens the religious exercise of those within the community, or significantly interferes with the ability of the Amish "to define and carry out their religious missions," *Amos*, 483 U.S. at 335—as opposed to simply imposing an economic burden on the Amish community—the exemption would not appear to satisfy the requirement of the accommodation doctrine that the preference for religion alleviate a significant government-imposed burden on religious mission or exercise. Federal law does not, of course, wholly prevent the Amish from instructing their children in vocational pursuits—it merely prohibits children from working in a discrete number of dangerous environments. Whether this imposes a burden on religion, and if so, whether and under what circumstances that burden is "significant" or "special," will depend upon factual circumstances that we are in no position to evaluate.

Moreover, assuming that the FLSA child-labor prohibition does impose a significant burden on religious exercise in some cases, any statutory exemption should be crafted in a manner that is directly related to the alleviation of that burden. As presently drafted, the exemption from the FLSA in H.R. 4257 would be triggered by a minor's connection to a religious sect or division with certain prohibitions on formal education; the exemption would not in any way reflect whether or not the FLSA's child labor prohibitions would, in any particular case, impose any burden on religious exercise or the community's religious mission where a minor already has been exempted from certain of a state's compulsory education requirements.

Because we lack sufficient information, we are unable to conclude with any certainty whether the child labor laws relating to sawmills significantly burden Amish religious exercise. Even if such laws do impose such a significant burden, however, H.R. 4257 would raise two other potential Establishment Clause problems. First, the exemption would be triggered not by an individual's religious belief or exercise, but by an individual's membership in a certain religious sect or division. The Establishment Clause prohibits the government—except upon an extraordinary showing --- from favoring certain religious sects, or favoring religious belief that comports with that of established religious sects. See *Larson v. Valente*, 456 U.S. 228 (1982); *Kiryas Joel*, 512

² See *Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196, 198 (4th Cir. 1989) (describing another religious sect that "sincerely believe[s] that vocational training [by members of the sect] has spiritual as well as secular worth").

U.S. at 706-07 ("whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored"); see also Frazee v. Illinois Department of Employment Security, 489 U.S. 829, 834 (1989) ("Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). It may that all or most of the minors who would satisfy the proposed exemption do belong to particular religious sects or divisions. But the Constitution does not permit the government to make such affiliation a condition of receiving preferential treatment: the exemption, if it is to pass constitutional muster, must at the very least be extended to cover other persons who can make a sincere claim that their religious exercise is significantly burdened by the child labor law at issue but who do not belong to designated or defined religious sects or divisions. See, e.g., Wilson v. NLRB, 920 F.2d 1282 (9th Cir. 1990), cert. denied, 505 U.S. 1218 (1992); Davis v. State, 451 A.2d 107, 112-14 (Md. 1982); Dalli v. Board of Educ., 267 N.E.2d 219, 223 (Mass. 1971).

Second, even if the exemption would lift a significant or "special" government-imposed burden on religion, extending such an exemption only to religious adherents might nevertheless raise Establishment Clause concerns if it "burdens nonbeneficiaries markedly." Texas Monthly, 489 U.S. at 15 (plurality opinion); see also Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating religious preference that did not lift government-imposed burden and that imposed "significant" and "substantial" burdens on nonbeneficiaries). We do not have sufficient information to determine whether the proposed exemption would be intended to alleviate a significant burden on the ability of the Amish "to define and carry out their religious missions," Amos, 483 U.S. at 335, or to alleviate a significant burden on the religious exercise of Amish minors, or both. Assuming, however, that Congress's intent is to alleviate a significant burden on the Amish religious communities' ability to "define and carry out their religious missions," then any significant threat of harm to the health of minors that results from the exemption might raise serious constitutional questions.³

³ For related discussion in the context of Free Exercise claims, see Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death."); id. at 170-71 (rejecting Free Exercise challenge to child labor law restriction); Yoder, 406 U.S. at 230 (emphasizing in the Free Exercise context that "[t]his case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred"); id. at 234 (reemphasizing that "[t]he record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child"); id. at 233-34 ("To be sure, the power of a parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child"). See also Wendell's Woodwork, 867 F.2d at 199 (in addition to the interest in protecting children's health, "we may not ignore the interest of competing employers who comply with the relevant labor laws and feel the need to be free from competition with employers who do not comply").

Thank you for the opportunity to present our views on this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Tom Harkin
Ranking Minority Member

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

JUL 22 1998

The Honorable William F. Goodling
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodling:

I understand that the Committee on Education and the Workforce will soon consider H.R. 4257, which would allow certain youths as young as 14 years of age to work in industries that process wood products (including sawmills) if they are members of a religious sect whose teachings do not permit formal education beyond the eighth grade. Since his pledge in the 1998 State of the Union Address, President Clinton has expanded the United States' efforts to eradicate the most abusive forms of child labor around the world, calling upon foreign nations to join us in the fight. While we are sensitive to the cultural and religious traditions of the Amish and similar American communities, we believe the benefits of facilitating those traditions must be balanced against our longstanding concern for the safety and welfare of children. The Department of Labor looks forward to working with the Committee to see how we can protect children's health and safety while allowing Amish children, no longer in school, to work in their communities.

The bill is intended to address the concerns of Amish families whose faith prescribes that children complete their formal education at age 14 and work alongside other members of their community. As farm land becomes more scarce, working alongside their families increasingly means working in non-farm occupations, including lumber and wood processing.

Under the Fair Labor Standards Act, minors under the age of 16 are prohibited from working in manufacturing operations, including sawmills. In addition, the Act gives the Secretary of Labor the authority to prohibit the employment of minors under 18 years of age in occupations or industries found and declared by the Secretary of Labor to be particularly hazardous or detrimental to their well-being. Hazardous Occupations Order No. 4 (HO 4) specifically prohibits youth under the age of 18 from working in sawmill operations and the logging industry. Hazardous Occupations Order No. 5 (HO 5) specifically prohibits such youth from operating power-driven wood-working machines.

Injury data collected over several decades consistently show that the lumber and wood products industry is particularly hazardous work for adults, let alone children. The 1996 occupational fatality rate of 25.6 work-related deaths per 100,000 workers was more than five times the national average "all private industry" rate of 5.1 per 100,000 workers and had actually increased over the 1995 rate. The frequency of all non-fatal injuries was almost twice as high in the lumber and wood products industry (14.2 per 100 full-time workers) as the national average for

all industries (7.4 for every 100 workers). Even for those workers who do not operate power-driven equipment, sawmills present significant occupational risks. The Occupational Safety and Health Administration has documented examples of workers who were crushed by falling loads, run over by front-end loaders, and injured from rolling logs.

These dangers are exacerbated for youth. Their limited experience in any workplace (let alone a highly hazardous one), lack of training, and immaturity make them significantly more prone to errors in judgment. Judgment errors and their smaller size increase the odds that children will experience serious injury or even death in the workplace.

The bill would allow children to work in places where machinery is used to process wood products, so long as an adult supervisor is present and the young workers do not personally operate or assist in the operation of power-driven woodworking machines. The Department of Labor is concerned that these conditions would not adequately protect the children's safety. Adult presence in the workplace would not be able to protect children from the split-second mistake that could cost them a finger, hand, or worse. Preventing children from operating machinery would still leave them at risk from forklifts, front-end loaders, falling loads, and rolling logs.

In addition, we have a number of serious concerns with the language of the bill as drafted. First, we have been advised that the Department of Justice has serious concerns about the constitutionality of the proposed legislation as drafted. Second, the bill appears to be drafted more broadly than its stated purpose, as it is not limited to workplaces in which Amish work alongside other members of their community, but instead provides exemptions from the child labor laws for these children to work in any workplace. Third, we are concerned that this proposal could lead to requests to open up other hazardous workplaces to child labor for select communities and see no clear governing principle to determine when to accede to such requests.

We are sure that the Committee shares our concern for the safety of these children and sensitivity to the traditions of the Amish. We hope we can work together to find a reasonable way to balance these interests. The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,


Kathryn O. Higgins

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET****Route Slip**

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	For your information	☒
	See remarks below	☒

From: Melissa Benton

Date: July 22, 1998

Remarks: To follow is the final signed version of the Labor letter on H.R. 4257 (the Amish FLSA child labor exemption bill). The Education and the Workforce Committee is scheduled to mark up the bill at 11:00 a.m. today

To: Barbara Chow
Barry White
Larry Matlack
Debra Bond
Sarah Rosen
Lisa Brown
William Marshall
Julie Fernandes
Broderick Johnson
Kate Donovan
Maureen Shea
Karen Tramontano

cc: Janet Forsgren

From: Melissa N. Benton on 07/21/98 03:29:18 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: URGENT--REVISED LABOR Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.

----- Forwarded by Melissa N. Benton/OMB/EOP on 07/21/98 03:28 PM -----

Total Pages: _____

LRM ID: MNB208

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Tuesday, July 21, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Melissa N. Benton

PHONE: (202)395-7887 FAX: (202)395-6148

SUBJECT: **REVISED LABOR Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.**

DEADLINE: **5 p.m. Tuesday, July 21, 1998**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS:

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Please include the LRM number shown above, and the subject shown below.

FROM: _____ (Date)
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_____ **Concur**

_____ **No Objection**

_____ **No Comment**

_____ **See proposed edits on pages** _____

_____ **Other:** _____

_____ **FAX RETURN of** _____ **pages, attached to this response sheet**

DRAFT 07/21/98 3:22 PM

The Honorable William F. Goodling
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodling:

I understand that the Committee on Education and the Workforce will soon consider H.R. 4257, which would allow certain youths as young as 14 years of age to work in industries that process wood products (including sawmills) if they are members of a religious sect whose teachings do not permit formal education beyond the eight grade. The Department has serious concerns about the bill as drafted. We look forward to an opportunity to consider, with the Committee, how we might best achieve the objective of accommodating the goals of the Amish, consistent with a need to protect children's safety and health.

The bill is designed to address the concerns of Amish families whose faith prescribes that children complete their formal education at age 14 and work alongside other members of their community. As farm land becomes scarcer, working alongside their families increasingly means working but in non-farm occupations, including lumber and wood processing, to which the Amish are turning to support their families and sustain their communities.

Currently, ~~Under the Fair Labor Standards Act's child labor provisions,~~ minors under the age of 16 are prohibited from working in manufacturing operations, including sawmills. In addition, the Act gives the Secretary of Labor the authority to prohibit the employment of minors under 18 years of age in occupations or industries found and declared by the Secretary of Labor to be particularly hazardous or detrimental to their well-being. Hazardous Occupations Order No. 4 (HO 4) specifically prohibits youth under the age of 18 from working in sawmill operations and the logging industry. Hazardous Occupations Order No. 5 (HO 5) specifically prohibits such youth from operating power-driven wood-working machines.

Injury data collected over several decades consistently show that the lumber and wood product industry is particularly hazardous work for adults, let alone children. The 1996 occupational fatality rate of 25.6 work-related deaths per 100,000 workers was more than **five** times the national average "all private industry" rate of 5.1 per 100,000 workers and had actually increased over the 1995 rate. The frequency of all non-fatal injuries was almost **twice** as high in the lumber and wood products industry (14.2 per 100 full-time workers) as the national average for all industries (7.4 for every 100 workers). Even for those workers who do not operate power-driven equipment, sawmills present significant occupational risks. The

Occupational and Safety Administration has documented examples of workers who were crushed by falling loads, run over by front-end loaders, and injured from rolling logs.

These dangers are exacerbated for youth. Their limited experience in any workplace, let alone a highly hazardous one; lack of training; and immaturity make them significantly more prone to errors in judgement. Judgement errors and their smaller size increase the odds that children will experience serious injury or even death in the workplace.

For these reasons, the Department of Labor is concerned about a broad exemption from child labor laws for children in workplaces where machinery is used to process wood products, even though the bill would require the presence of a supervisory adult and prohibit the young workers from operating or assisting in the operation of power-driven woodworking machines. Adult presence in the workplace will not be able to protect children from the split-second mistake that could cost them a hand, finger, or worse. ~~Presence in the workplace even at a distance from the machinery puts children at risk from forklifts, flying debris, choking sawdust, deafening noise, and vibration.~~ While we are sensitive to the important cultural and religious traditions of the Amish and similar American communities, we should balance that sensitivity against our concern for the safety and welfare of children, and insure that there is no less hazardous way of facilitating the cultural values that the Amish seek to preserve.

In addition, we have a number of specific concerns with the language of the bill. First, we have been advised that the Department of Justice has serious concerns about the constitutionality of the proposed legislation as drafted. Second, the bill as drafted is not limited to workplaces in which the Amish children work alongside other members of their community, but instead provides exemptions from the child labor laws for these children to work in any workplace. Third, we are concerned that this legislation would be followed by requests to open up other hazardous workplaces to children.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration.

Sincerely,

Kathryn O. Higgins

Barbara Chow/OMB/EOP
Sandra Yamin/OMB/EOP
Barry White/OMB/EOP
Larry R. Matlack/OMB/EOP
Debra J. Bond/OMB/EOP
Sarah Rosen/OPD/EOP
William P. Marshall/WHO/EOP
Lisa M. Brown/OVP @ OVP
Julie A. Fernandes/OPD/EOP
Maureen T. Shea/WHO/EOP
ABERCROMBI_G @ A1@CD@VAXGTWY@VAXGTWY
Kate P. Donovan/OMB/EOP
Broderick Johnson/WHO/EOP
Robert G. Damus/OMB/EOP
Karen Tramontano/WHO/EOP
James C. Murr/OMB/EOP
Janet R. Forsgren/OMB/EOP

July 21, 1998

The Honorable William F. Goodling
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodling:

I understand that the Committee on Education and the Workforce will soon consider H.R. 4257, which would allow certain youths as young as 14 years of age to work in industries that process woods products (including sawmills) if they are members of a religious sect whose teachings do not permit formal education beyond the eighth grade. I am writing to provide you with the views of the Department of Labor on this legislation.

move recomm to beginning (concerns about log. want to work to them)
The bill is designed to address the concerns of ~~Amish~~ ^{an sect} families whose faith prescribes that children complete their formal education at age 14 and work alongside other members of their community. ~~(Working along side their families, the Amish believe, their children learn values of hard work, diligence, cooperation, and responsibility -- values important to their faith.)~~ As farm land becomes scarcer, working along side their families increasingly means working, not on farms, but in non-farm occupations, including lumber and wood products, to which the Amish are turning to support their families and sustain their communities.

Currently, U
Currently, under the Fair Standards Act's child labor provisions, minors under the age of 16 are prohibited from working in manufacturing operations, including sawmills. In addition, the Act gives the Secretary of Labor the authority to prohibit the employment of minors under 18 years of age in occupations or industries found and declared by the Secretary of Labor to be particularly hazardous or detrimental to their health and well-being. Hazardous Order No. 4 (HO 4) specifically prohibits youth under the age of 18 from working in sawmill operations and the logging industry. Hazardous Occupations Order No. 5 (HO5) specifically prohibits such youth from operating power-driven wood-working machines.

which are most common
Injury data collected over several decades consistently show that the lumber and wood product industry is particularly hazardous work for adults, let alone children. The 1996 occupational fatality rate of 25.6 work-related deaths per 100,000 workers was more than **five** times the national average "all private industry" rate of 5.1 per 100,000 workers and, had actually increased over the 1995 rate. The frequency of all non-fatal injuries was almost **twice** as high in the lumber and wood products industry (14.2 per 100 full-time workers) as the national average for all industries (7.4 for every 100 workers). Even for those workers who do not operate power-driven equipment, sawmills present significant occupational risks. The Occupational and Safety Administration has documented examples of workers who were ~~suffocated by saw dust~~, crushed by falling loads; run over by front-end loaders and injured from rolling logs.

For these reasons, the Department of Labor is concerned about a broad exemption from child labor laws for children in workplaces where machinery is used to process wood products, so long as an adult supervisor is present and the young workers do not personally operate or assist in the operation of power-driven woodworking machines. (Though the bill provides for adult supervision, adult presence in the workplace will not

Moreover, ~~in addition~~, we have a number of specific concerns with the language of the bill. ~~First, we have been advised that the Department of Justice has serious concerns about the constitutionality of the proposed legislation as drafted. (Second, the bill as drafted is not limited to workplaces in which Amish work alongside other members of their community, but instead provides exemptions for the child labor laws for these children to work in any workplace.)~~ ③ ~~expansion to other industries.~~

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration.

Kathryn O. Higgins

The Honorable William F. Goodling
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodling:

I understand that the Committee on Education and the Workforce will soon consider H.R. 4257 which would allow certain youths as young as 14 years of age to work in industries that process wood products (including sawmills) depending on their particular religious affiliation. I am writing to provide you with the views of the Department of Labor on this legislation.

Under the Fair Labor Standards Act's child labor provisions, minors under the age of 16 are prohibited from working in manufacturing operations, including sawmills. Hazardous Occupations Order No. 4 (HO 4) specifically prohibits youth under the age of 18 from working in sawmill operations and the logging industry. Hazardous Occupations Order No. 5 (HO 5) specifically prohibits such youth from operating power-driven wood-working machines.¹ The proposed legislation will provide an exception from those child labor restrictions for boys and girls between the ages of 14 and 18 who are members of any religious sect or division that precludes formal education beyond the eighth grade. Under this bill, children would be allowed to work anywhere inside a sawmill or other woodworking establishment if an adult supervisor is present as long as the young workers do not personally operate or assist in the operation of power-driven woodworking machines.

The Department of Labor opposes H.R. 4257 because it would allow young children to work in hazardous woodworking and sawmilling occupations and because it would create special rules for members of certain religious persuasions. The lumber and wood products industry, which includes sawmills, is extremely dangerous. The 1996 occupational fatality rate of 25.6 work-related deaths per 100,000 workers was more than **five** times the national average "all private industry" rate of 5.1 per 100,000 workers and, had actually increased over the 1995 rate. The frequency of all non-fatal injuries was almost **twice** as high in the lumber and wood products industry (14.2 per 100 full-time workers) as the national average for all industries (7.4 for every 100 workers). Even for those workers who do not operate power-driven equipment, sawmills present significant occupational risks. The Occupational and Safety Administration has

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documented examples of workers who were suffocated by saw dust; crushed by falling loads; run over by front-end loaders and injured from rolling logs.

The Department also objects to special treatment under the child labor laws for members of designated religious orders because it provides unfair competitive advantages for some employers. Unlike other employers, employers of the same religious community as the excepted youths (including family-owned or religious-affiliated businesses) would be in a better position to avail themselves of a ready supply of teenage workers who need only be paid at the youth subminimum wage of \$4.25 for their first 90 days of employment. Similarly, employers located in geographic areas that have large populations of youth in the designated religious sect – and therefore an available labor pool – would also enjoy an unfair competitive advantage over their competitors in other parts of the country. Young members of qualifying religious sects would themselves have a hiring advantage over other workers and could displace entry-level adults who, unlike the youths, must be compensated at the full minimum wage.

The Secretary of Labor is charged with protecting the safety and health of working children without regard to their religious beliefs, ethnic origin, or cultural heritage. The Department believes that work experience can be beneficial for young people, but the work must be safe. This proposed legislation would allow inexperienced children to be employed in work environments that are recognized as some of the most dangerous in America. We have been advised, as well, that the Department of Justice has serious concerns about the constitutionality of the proposed legislation as drafted. If the legislation passes, we would urge the President to veto it.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration.

Sincerely,

Kathryn O. Higgins

Should say something
about recognizing that
~~some sects~~ w/in some
religious communities,
~~none~~ it is expected
that children btm 14 1/2
will leave school to work
w/their families.
However, . . . (safety)

Suggest ~~another~~ bill
or if broadened
to allow other
sects; ensure safety.

Don't want to
look anti-relig

No veto threat

From: Melissa N. Benton on 07/20/98 07:59:14 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: LABOR Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.

Total Pages: _____

LRM ID: MNB206

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

Monday, July 20, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Melissa N. Benton
PHONE: (202)395-7887 FAX: (202)395-6148

SUBJECT: **LABOR Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.**

DEADLINE: 11:30 a.m. Tuesday, July 21, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: This bill is being marked by the House Education and the Workforce Committee up the morning of Wednesday, July 22nd.

NOTE VETO THREAT IN SECOND TO LAST PARAGRAPH.

DISTRIBUTION LIST

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Karen Tramontano
James C. Murr
Janet R. Forsgren

LRM ID: MNB206 **SUBJECT:** LABOR Report on HR4257 A bill to amend the Fair Labor Standards Act of 1938 to permit certain youth to perform certain work with wood products.

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Melissa N. Benton Phone: 395-7887 Fax: 395-6148
 Office of Management and Budget
 Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur
_____ No Objection
_____ No Comment
_____ See proposed edits on pages _____
_____ Other: _____
_____ FAX RETURN of _____ pages, attached to this response sheet



Hr4257.wp



hr4257_ih.t

Message Sent To:

Barbara Chow/OMB/EOP
Sandra Yamin/OMB/EOP
Barry White/OMB/EOP
Larry R. Matlack/OMB/EOP
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ABERCROMBI_G @ A1@CD@VAXGTWY@VAXGTWY
Kate P. Donovan/OMB/EOP
Broderick Johnson/WHO/EOP
Robert G. Danus/OMB/EOP
Karen Tramontano/WHO/EOP
James C. Murr/OMB/EOP
Janet R. Forsgren/OMB/EOP
1 = US@2 = TELEMAIL@5 = JMD@7 = Deborah@6 = Clifton@mrx@Ingtyw
cla @ sba.gov @ inet
clrm @ doc.gov @ inet

URGENT

Total Pages: 6

LRM ID: MNB206

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

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_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

DRAFT 07/20/98 4:22 PM

The Honorable William F. Goodling
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodling:

I understand that the Committee on Education and the Workforce will soon consider H.R. 4257 which would allow certain youths as young as 14 years of age to work in industries that process wood products (including sawmills) depending on their particular religious affiliation. I am writing to provide you with the views of the Department of Labor on this legislation.

Under the Fair Labor Standards Act's child labor provisions, minors under the age of 16 are prohibited from working in manufacturing operations, including sawmills. Hazardous Occupations Order No. 4 (HO 4) specifically prohibits youth under the age of 18 from working in sawmill operations and the logging industry. Hazardous Occupations Order No. 5 (HO 5) specifically prohibits such youth from operating power-driven wood-working machines.¹ The proposed legislation will provide an exception from those child labor restrictions for boys and girls between the ages of 14 and 18 who are members of any religious sect or division that precludes formal education beyond the eighth grade. Under this bill, children would be allowed to work anywhere inside a sawmill or other woodworking establishment if an adult supervisor is present as long as the young workers do not personally operate or assist in the operation of power-driven woodworking machines.

The Department of Labor opposes H.R. 4257 because it would allow young children to work in hazardous woodworking and sawmilling occupations and because it would create special rules for members of certain religious persuasions. The lumber and wood products industry, which includes sawmills, is extremely dangerous. The 1996 occupational fatality rate of 25.6 work-related deaths per 100,000 workers was more than five times the national average "all private industry" rate of 5.1 per 100,000 workers and, had actually increased over the 1995 rate. The frequency of all non-fatal injuries was almost twice as high in the lumber and wood products industry (14.2 per 100 full-time workers) as the national average for all industries (7.4 for every 100 workers). Even for those workers who do not operate power-driven equipment, sawmills present significant occupational risks. The Occupational and Safety Administration has

¹ HO 4 and HO 5 stem from the Department of Labor's statutory charge to prohibit the employment of minors under 18 years of age in occupations or industries found and declared by the Secretary of Labor to be particularly hazardous or detrimental to their health and well-being. Injury data collected over several decades consistently show that sawmills are particularly hazardous workplaces for adults, let alone children.

documented examples of workers who were suffocated by saw dust; crushed by falling loads; run over by front-end loaders and injured from rolling logs.

The Department also objects to special treatment under the child labor laws for members of designated religious orders because it provides unfair competitive advantages for some employers. Unlike other employers, employers of the same religious community as the excepted youths (including family-owned or religious-affiliated businesses) would be in a better position to avail themselves of a ready supply of teenage workers who need only be paid at the youth subminimum wage of \$4.25 for their first 90 days of employment. Similarly, employers located in geographic areas that have large populations of youth in the designated religious sect – and therefore an available labor pool – would also enjoy an unfair competitive advantage over their competitors in other parts of the county. Young members of qualifying religious sects would themselves have a hiring advantage over other workers and could displace entry-level adults who, unlike the youths, must be compensated at the full minimum wage.

The Secretary of Labor is charged with protecting the safety and health of working children without regard to their religious beliefs, ethnic origin, or cultural heritage. The Department believes that work experience can be beneficial for young people, but the work must be safe. This proposed legislation would allow inexperienced children to be employed in work environments that are recognized as some of the most dangerous in America. We have been advised, as well, that the Department of Justice has serious concerns about the constitutionality of the proposed legislation as drafted. If the legislation passes, we would urge the President to veto it.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration.

Sincerely,

Kathryn O. Higgins

[DISCUSSION DRAFT]

JUNE 23, 1998

105TH CONGRESS
2D SESSION**H. R. _____**

IN THE HOUSE OF REPRESENTATIVES

Mr. PITTS introduced the following bill; which was referred to the Committee
on _____

A BILL

To amend the Fair Labor Standards Act of 1938 to permit
certain youth to perform certain work with wood products.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXEMPTION.**

4 Section 13(c) of the Fair Labor Standards Act of
5 1938 (29 U.S.C. 213(c)) is amended by adding at the end
6 the following:

7 "(6)(A) Subject to subparagraph (B), in the adminis-
8 tration and enforcement of the child labor provisions of

June 23, 1998 (5:01 p.m.)

1 this Act, it shall not be considered oppressive child labor
2 for an individual who—

3 “(i) is under the age of 18 and over the age of
4 14, and

5 “(ii) is a member of a religious sect or division
6 thereof whose established teachings do not permit
7 formal education beyond the eighth grade,
8 to be employed inside or outside places of business where
9 machinery is used to process wood products.

10 “(B) The employment of an individual under sub-
11 paragraph (A) shall be permitted—

12 “(i) if there is an adult present in a supervisory
13 capacity; and

14 “(ii) if the individual does not operate or assist
15 in the operation of power-driven woodworking ma-
16 chines.”.

June 23, 1996 (5:01 p.m.)

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUL 1 1998

The Honorable Arlen Specter
United States Senate
Washington, D.C. 20510-6025

Dear Senator Specter:

This is in further reference to your letter on behalf of Amish sawmill owners who have been seeking special accommodation by way of relief from certain Federal restrictions on child labor. As indicated in my previous letter, the Department of Labor was examining specific proposals regarding the existing prohibitions on 16- and 17-year-old youths working in sawmills.

This issue arose as a result of a child labor compliance initiative conducted in western Pennsylvania in 1996 and early 1997 which targeted several industries where hazardous conditions are known to exist, including sawmills. Serious child labor violations involving very young children – in one case as young as 13 years of age – were documented and employers were assessed child labor civil money penalties. All employers immediately came into compliance with the child labor provisions and in all but one case, the penalties have been paid and our files have been administratively closed.

The lumber and woods products industry, which includes sawmills, continues to be a very dangerous industry. The industry's occupational fatality rate of 25.6 work-related deaths per 100,000 workers in 1996 was more than five times the national average "all private industry" rate of 5.1 per 100,000 workers, and increased over 1995. The industry's occupational injury rate is also quite high (please see enclosed fact sheet in this regard).

We have carefully examined the two specific proposals made during our July meeting with House Members and representatives of the Old Order Amish – which included site visits to operating sawmills – and have concluded that we cannot make the requested accommodations.

One proposal was to allow 16- and 17-year-olds to work in the sawmill building as long as they remained at least 150 feet away from the sawmill equipment. Our review identified the following very serious practical problems with this proposal:

- This rule would be difficult to enforce. It would be difficult, if not impossible, to substantiate whether or how often any distance rule was observed

WORKING FOR AMERICA'S WORKFORCE

- It would be difficult for employers to comply because the teens would likely be called upon or seek to help with work closer to the equipment putting them in danger of injury, either by the equipment or by projectiles from the equipment.
- Even 150 feet away, minors would still be exposed to other dangers in a mill, such as excessively loud noise and airborne sawdust.
- Further, this proposal is not likely to be feasible. The sawmills visited by our staff, which were representative of the industry, had such compact operations that any workers who must stay 150 feet away from the sawmill equipment would be outside of the building. The sawmill equipment is massive and takes up a lot of space. Any remaining space is used to store pallets and other materials. Virtually the only permitted work for the minors would involve clean-up work or stacking or loading that is not done by machines. It is not practical that young workers would be employed to clean only the area that is at least 150 feet away from the sawmill equipment.

The second proposal we examined would allow 16- and 17-year-olds to work in a physically separate part of a sawmill building. We identified the following practical concerns with this proposal:

- This is also not likely to be feasible. Based on our visit to the sawmills, there are no apparent operations that could take place in a separate walled-off room within a sawmill. Logs first enter a machine that removes the bark (either in the yard or in the sawmill building). The logs are then transported by conveyor through a series of saws to be cut into boards. The boards are then graded and are either processed into high-grade lumber used for furniture manufacturing or low-grade lumber used for pallets. In either case, the wood is further processed in the mill and then bundled or stacked, usually by machine, and transported for storage or shipment, usually by forklifts.
- Even in a physically separate part of a sawmill building, minors may still be exposed to some danger. The existing Hazardous Occupations Order was explicitly based not just on hazards from the equipment, but on hazards inherent in the sawmill operations, such as falling lumber, noise and vibration.
- As Secretary of Labor, I am required by law to protect the safety and health of working children. This charge extends to the children of our nation without regard to their religious beliefs, ethnic origin, or cultural heritage. For all the above reasons, I have concluded that it

would be inconsistent with the purpose of the Hazardous Occupations Orders and dangerous to their health and well-being to allow youth – including Amish youth – to be employed in sawmills in any circumstances.¹

Nonetheless, the Department of Labor fully shares your constituents' belief that such work experience can be beneficial for young people, but such experience also must be safe. Let me once again state our repeated offer to the Amish community to provide compliance education and outreach so that the community's employers more fully understand and appreciate their child labor compliance obligations, and we can help them identify the many safe, legal employment opportunities available to their youth.

Sincerely,



Alexis M. Herman

Enclosure

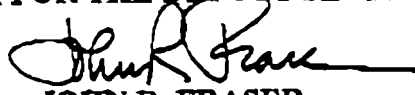
¹ Like all of the existing 17 nonagricultural hazardous occupations orders, HO 4 stems from the Department of Labor's statutory charge to prohibit the employment of minors under 18 years of age in occupations or industries found and declared by the Secretary of Labor to be particularly hazardous or detrimental to their health or well-being. Injury data collected over several decades consistently show that sawmills are particularly hazardous workplaces for adults, let alone children.



FEB 6 1998

MEMORANDUM FOR THE DEPUTY SECRETARY

FROM:


JOHN R. FRASER
Acting Administrator

THROUGH:

BERNARD E. ANDERSON
Assistant Secretary for
Employment Standards

SUBJECT:

Request by Four Congressman on Behalf of the Old Order
Amish for Special Relief from Certain Child Labor Provisions

ISSUE

Congressman Peterson (R-PA), along with Congressmen Souder (R-IN), Pitts (R-PA), and English (R-PA), on behalf of the Old Order Amish Steering Committee of Kinzers, Pa., asked that we consider two possible accommodations that would permit Amish children to work in sawmills, employment prohibited for those under 18 years of age by the child labor regulations under the Fair Labor Standards Act (FLSA).))

BACKGROUND

The FLSA prohibits minors under 16 years of age from working in manufacturing, including sawmills. Hazardous Occupations Order No. 4 (HO 4) prohibits youth under 18 years of age from working in sawmill operations and the logging industry. HO 4 was issued because of the historically high rate of fatalities experienced in these industries—a rate that is still four times greater than the national average (1995 data). HO 4 contains a very limited exception which permits 16- and 17-year-olds to perform such tasks as cleaning up the yard and working in offices and repair and maintenance shops that are not in the sawmill building.

A 1996 FLSA enforcement initiative by our Pittsburgh district office found many child labor violations in area sawmills. Children as young as 13 were found working illegally in 8 of the investigations. Three of the establishments found in violation were Amish-owned and many of the others employed Amish youngsters. Child labor civil money penalties were assessed and several of the cases (including all three Amish-owned mills) were appealed and are awaiting hearing before an ALJ.

Working for America's Workforce

We met with the Old Order Amish Steering Committee on May 20, 1997, at a meeting hosted by Congressman Pitts and attended by staff of several other Congressional offices. The Amish leaders noted that their children, with the permission of State education systems, leave school and enter the workforce at the age of 14. They believe meaningful work is critical to the development of their youth, especially when many may be considering leaving the community for the "modern world." The Amish leaders contend that, as family farms no longer provide sufficient jobs for their youth, they must seek employment in the non-farm sector. Working in sawmills and furniture manufacturing, they feel, would allow their youth to acquire skills and contribute to family incomes without compromising their religious beliefs.

At a second meeting in July, Congressman Peterson requested that we consider two possible accommodations for the Amish—that their children be permitted to work in sawmill buildings:

- (1) as long as they remain some distance (Congressman Peterson suggested at least 150 feet away) from the power-driven equipment; or
- (2) if they work in an area segregated from the sawmill equipment by a physical partition.

Wage and Hour spent a considerable amount of time examining the feasibility of these options, including sending staff to Pennsylvania for on-site visits to working sawmills. Wage and Hour and SOL have been discussing these options, in particular whether we can make an accommodation and, if so, how we could make such an accommodation. The two methods under discussion for making any accommodation, if appropriate, involve (1) a novel legal interpretation of the regulations, or (2) a special enforcement policy. There are issues that arise from this second question that also need to be discussed.

URGENCY

The four Congressmen and Senator Arlen Specter (R-PA) have written the Secretary urging special consideration of this issue. The appropriations report for our 1998 budget contained a statement urging the Department to resolve, by the end of 1997, all outstanding child labor issues relating to the Amish community. With the upcoming budget hearings, we would like to resolve this issue before the hearings.

INTERESTED PARTIES

The National Consumers League has written Congressman Porter (R-IL) of the House Appropriations Committee challenging the requested accommodations.

Attached is our analysis of the proposals offered by Congressman Peterson.

RECOMMENDATIONS

To be discussed.

Attachments

Amish

7/20/98

Amish asked for exception under hazardous order.

DOL said No.

Amish proposed alternatives to make the environment safer.
Still no good.

OLC (Randy, Marty, Tricia)

→ Sawmills are a principle business in Amish country.
(and woodworking)

Have Amish indicated that their religion requires them
to work in wood?

No, but they believe children should work in the
family business with them.

How are the prohibitions 14-18 work under FLSA

No manufacturing,

those that are particularly hazardous,
Sec. 7 of DOL can outlaw.

Some machines are prohibited w/in that.

Rule on Amish and farming(?)

✶ If a child of a farmer, except from FLSA.

→ Under 16, prohibits from certain machines
on a farm
(14-16)

off a farm, if under 18, prohibited from certain
machines.

Admin-
exception

Only accommodation under FLSA is for "outside of
school hours" (even though otherwise could work during
school hours)

→ Not ~~as~~ significantly more dangerous than farming

OLC preliminary view

May be a way to draft the bill w/out problems.

⊗ Problems in this bill

① § 6(A)(ii)

Disconnect btm asserted religious rationale and the accommodation.

(religious rationale is not going to school after 14
accommodation is being able to work in a
dangerous place
(sawmills))

Should ~~be~~ link the rationale better to the accommodation
(problematic to link to sawmills)

⊕

That also suggests that the bill is sect specific

Q: would Cts. be less likely to accept an accommodation that puts kids in danger.

Other Amish-specific legislation (?)

Exemption from
soc. sec. payments
(by certain
employers)

OLC - to do this, make it broader.

some state laws
exempt buggys
from slow lane or
electric light
provisions.

If religious asks that
children under 18
work alongside family or
community, they are

exempt from
FLSA

(w/some exemptions)
for very dangerous

No compelling interest
for this accommodation
(RFRA)

would not
require this,
but open Q
whether court
would permit
this accommodation

24th Cir
cases w/ other
acc. that lost

Conf. language
Labor/HHS

oppose last year that Labor should work it out w/ Amish.

Farms exempted from FLSA since 1938

DOL (?) Draft letter that opposes the bill

- not safe work for kids
- competitive advantage to those who don't employ Amish

— add DOJ has serious concerns about the constitutionality

⊕ we have the RFRA (?)

~~of the way this bill is~~ as drafted

maybe not b/c we don't want to indicate that there is a RFRA claim.

need
substantial
burden on
religion
for RFRA

Limited accommodations that we could support, such as...) in the letter (?)

Marked-up in authorizing committee on Wed.

H.R. 4257

(^{Labor} Educ. & Workforce)

Not their intention to add to approp. bill.

Prospects in the Senate (?) no position by Jeffords & hear nothing by Specter.

BM: policy Q to Labor

if this is going on on the farms, what is the analytical distinction for sawmills.

family business, but family = community for Amish.

Want a letter, b/c Dems. looking for leadership on how to vote.

07/17/98 FRI 18:27 FAX 202 218 5120

OCIA

004

ANALYSIS OF OPTIONS

I. Should 16- and 17-year-olds be allowed to work in the sawmill building at least 150 feet away from the sawmill equipment?

Pros:

- (1) Accommodation addresses the concerns raised by Congressman Peterson and the other Members.
- (2) If young workers actually stay away from the sawmill equipment, they are probably in little danger of being injured by the equipment or the material thrown off of the equipment.

Cons:

- (1) Difficult to enforce. It would be difficult, if not impossible, to substantiate whether or how often any distance rule was broken.
- (2) Difficult for employers to comply because the teens would likely be called upon or seek to help with work closer to the equipment putting them in danger of injury, either by the equipment or by projectiles near the equipment.
- (3) Even 150 feet away, minors would still be exposed to other dangers in the room, such as noise and airborne sawdust.
- (4) Unlikely to be feasible. The sawmills visited by Wage and Hour and SOL staff, which were representative of the industry, had such compact operations that any workers who must stay 150 feet away from the sawmill equipment would probably be outside of the building. The sawmill equipment is massive and takes up a lot of space. Any remaining space is used to store pallets and other materials, that are normally transported by forklifts (operation of which is prohibited under another Hazardous Order). Virtually, the only permitted work for the minors would involve clean-up work or stacking or loading that is not done by machines. It is not practical that they would be employed to only clean the area that is 150 feet away from the sawmill equipment.

II. Should 16- and 17-year-olds be allowed to work in a physically separated part of a sawmill building?

Pros:

- (1) Accommodates the concerns raised by the other Members and the Old Order Amish.
- (2) Children would be less likely to encounter the extent of dangers associated with the sawmill equipment and environment (e.g., noise and airborne sawdust) in a separate room with a separate entrance.

- (3) It would be somewhat easier to determine whether minors actually stayed in a separate room to perform their work than to determine how far away from the sawmill equipment they worked.
- (4) Employers could more easily comply with this option because the minors would be in another room with limited access to the operations in the sawmill area. If employers choose to establish this separate area, they would have to redesign their work operations to provide specific activities for the minors to perform.

Cons:

- (1) Unlikely to be feasible. Based on our visit to the sawmills there are no apparent operations that could take place in a separate room within the sawmill. The logs first enter a machine that removes the bark (either in the yard or in the sawmill building). They are then transported by conveyor through a series of saws to be cut into boards. The boards are then graded and are either processed into high-grade lumber used for furniture manufacturing or low-grade lumber used for pallets. In either case, the wood is further processed in the mill and then bundled or stacked by machine and transported for storage or shipment by forklifts.
- (2) Minors may still be exposed to some danger. The Hazardous Order was explicitly based not just on hazards from the equipment, but on hazards inherent in the operations, such as falling lumber, noise and vibration.

Employment in Sawmills is Dangerous

- Occupational fatalities are more than four times the national average.

In 1995, the "lumber and wood products" industry - which includes sawmills - had an occupational fatality rate of 22 deaths per 100,000 workers. This is more than four times the national average all private industry rate of 5.1 deaths per 100,000 workers.

The occupational fatality rate in this industry is higher than in the dangerous construction (14.7) and trucking and warehousing industries (19.9). In 1995, 182 occupational fatalities occurred in this industry.

- Occupational injuries are among the highest in this industry.

In 1994, injuries requiring days away from work were almost twice as frequent in the lumber and wood products industry (at 5.3 per 100 full-time workers) as the rate for all industries (2.8 per 100 workers).

Also, in 1995, the frequency of all non-fatal injuries was almost twice as high in the lumber/wood products industry (at 14.2 for every 100 full-time workers) as the national average for all industries (at 8.1 for every 100 workers)

The non-fatal injury rate in lumber/wood products industry was exceeded only by the primary metal industry (at 14.9) and the fabricated metal products industry (at 14.5).

And the non-fatal injury rate in the lumber/wood products industry got worse from 1994 to 1995 - increasing from 13.2 to 14.2 - while the all-industry average has been getting better (down from 8.4 to 8.1 from 1994 to 1995).

- Employment in sawmills presents a variety of dangers to workers.

OSHA sees many examples of fatalities and injuries due to a variety of different dangers in sawmills:

- ⇒ employee suffocated by saw dust
- ⇒ employee killed when run over by a front-end loader
- ⇒ employee killed when a conveyor on which he was working was activated
- ⇒ employee crushed under a load which fell from a forklift
- ⇒ employee electrocuted while working with trim saw
- ⇒ employee suffering amputation of arm while operating a radial saw
- ⇒ employee severely injured by a board kicked out of a trimmer saw

- ⇒ employee injured falling off a loader
- ⇒ employee injured by a log rolling over him
- ⇒ employee injured when caught under a forklift
- ⇒ employee injured when a board kicked back from an edger
- ⇒ employee severed finger cleaning debris from a saw

- Young workers are especially vulnerable to workplace dangers.

Youths' inexperience, smaller size, immaturity and lack of training all make employment in this industry (like other hazardous occupations) even more dangerous for children, and raise the odds that their employment would result in serious injury or death.

Even with the child labor protections in current law, NIOSH reports that in 1996:

- nearly 210,000 youth between 14 and 18 years of age are injured while working each year
- 70,000 suffer injuries serious enough to warrant emergency room treatment
- Approximately 70 young workers die on-the-job each year.

54 kds
+200k

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ROBERT B. REICH, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,
Plaintiff-Appellee.

v.

SHILOH TRUE LIGHT CHURCH OF
CHRIST, d/b/a Shiloh Vocational
Training Program; JAMES ROMMIE
PURSER; GARY LEON YORK,
Defendants-Appellants.

*to be
filed*
- 12 April
- 92-444-3-P
No. 95-2765

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, Senior District Judge.
(CA-92-444-3-P)

Argued: April 1, 1996

Decided: May 7, 1996

Before WILKINSON, Chief Judge, and WILKINS and LUTTIG,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: David Carl Cordes, Allen A. Bailey, BAILEY, PATTER-
SON, CADDELL, HART & BAILEY, P.A., Charlotte, North Caro-

lina, for Appellants. Anne Payne Fugent, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellee. ON BRIEF: Thomas S. Williamson, Jr., Solicitor, Gail V. Coleman, Deputy Associate Solicitor, William J. Stone, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant Shiloh True Light Church of Christ's members hold a religious belief that their children should receive meaningful vocational training. This belief is effectuated through the Shiloh Vocational Training Program (SVTP). The issue in this case is whether SVTP participants under the age of sixteen are "employees" entitled to the protections of the Fair Labor Standards Act. The Church argues that those children are not employees, and that at any rate, application of the FLSA would violate both the Free Exercise Clause and Department of Labor administrative policy.

The district court entered partial summary judgment against the Church, rejecting its free exercise and administrative defenses. Then, following a two-day bench trial, the court concluded that the under-sixteen participants in the SVTP qualified as employees under the FLSA. Finding no error, we affirm the judgment of the district court.

I.

Church youth perform a variety of construction projects through the SVTP, and customers pay the Church for the work. We have upheld application of the FLSA to the SVTP once before. *Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989). After the

REICH V. SHILOH TRUE LIGHT CHURCH

3

trial in *Wendell's Woodwork*, the Church reorganized the program. A principal modification was that children under the age of 16 would no longer receive a wage for their work. The SVTP also decided to segregate its work crews by age, but has since discontinued that practice — children under and over 16 now work together in combined work crews, performing largely the same tasks.

The SVTP's projects formerly consisted mostly of subcontract work at construction sites. Representative projects include installing a fireplace, constructing a carport, adding a room, laying a foundation under a garage, and building concrete retainer walls. Since 1990, the program has also been in the business of constructing entire new houses — the SVTP built 15 new homes between 1990 and 1993. Children under 16 participate in all aspects of new home construction, including roofing, building the foundation, mixing mortar, laying bricks, and installing drywall.

The SVTP charges labor costs, material costs, other general expenses, and also an administrative fee and an interest fee for its new home construction. The labor charge does not include the work of children under the age of 16, in furtherance of the policy barring payment of wages to under 16 participants. But while children under 16 do not receive a wage, they have not been completely free of financial inducement. They have received lump sum payments in the past, with the amount depending on the child's degree of experience and achievement in the program — the Church characterizes these awards as "gifts." The under 16 participants also earn "imaginary" raises on top of "imaginary" wages as a mechanism for determining their actual wage upon turning 16.

The Department of Labor filed suit against the SVTP on December 3, 1992, contending that the program violates FLSA provisions governing child labor, minimum wage, and record-keeping. The SVTP initially admitted that all of the children were employees subject to the FLSA, but then adopted a position that the children under 16 were not employees under the Act. It also challenged application of the FLSA on free exercise grounds. Finally, it asserted defenses based on the Department of Labor's non-enforcement policy with respect to some vocational programs and the Department's failure to promulgate

regulations under 29 U.S.C. § 214(d) exempting certain student employment.

On February 24, 1995, the district court entered partial summary judgment in favor of the Department. The court rejected the SVTP's free exercise defense, finding it indistinguishable from the free exercise claim denied in *Wendell's Woodwork*, 867 F.2d at 196. The court also rejected the SVTP's administrative defenses. In the court's view, though, trial was necessary to examine whether the under 16 children were employees under the FLSA.

The district court held a bench trial to answer that question on May 15 and 16, 1995. Based on the evidence presented at trial and on the 154 findings of fact set forth in its opinion, the court determined that SVTP participants under 16 were employees subject to the protections of the FLSA. As a result, the court concluded, the Church had violated the Act's child labor, minimum wage, and record-keeping requirements with respect to those employees. This appeal followed.

II.

The SVTP contends that the district court erred in concluding that the children under 16 are employees under the Act. We do not agree. The district court's ruling was based on extensive factual findings developed with the benefit of a two-day bench trial, findings that we must not lightly second-guess on appeal.

The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and "employ" as "to suffer or permit to work," 29 U.S.C. § 203(g). In some circumstances, trainees are not considered employees. See *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). In this circuit, "the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor." *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989). The inquiry is by nature a fact-intensive one. See *id.* at 1209-10.

The SVTP agrees that the "primary beneficiary" test should govern this case, but disputes the district court's application of it. In our

view, however, the district court's conclusion that the Church is the primary beneficiary of the under 16 labor finds support in the factual record. The Church admits that children over 16 are employees under the Act, and thus presumably that it is the primary beneficiary of their labor. But the children under 16 perform essentially the same tasks as their older counterparts, suggesting that they, too, are employees. An SVTP instructor, Richard Allen Bush, testified that children under 16 and children over 16 often do precisely the same work, and that age is not determinative of the work assigned.

Although the under 16 participants may not receive wage compensation, they have received substantial lump sum awards in the past (as high as \$5,500). While the Church evidently has discontinued these payments, the record suggests that it has continued to seek ways to compensate the children without running afoul of the FLSA. Moreover, workers under the age of 16 still receive "imaginary" raises that directly translate into a higher rate of pay upon turning 16. And the SVTP expert who testified as to the non-financial benefits of the program was viewed by the district court as lacking credibility. Given all of this, we cannot question the district court's finding "as a fact that the . . . church policy to not pay the minors under 16 is an attempt to label them students rather than employees."

The court also concluded that the Church benefits greatly from the work of children under 16. In the past, although the under 16 labor was not charged, the SVTP informed customers that they could make a "donation" in an amount approximating the value of the work; such a donation normally was made. While the donation practice has been discontinued, the Church still gains significant financial benefit from projects in which under 16 children participate. Between 1990 and 1993, the SVTP finished 97 construction projects and 15 complete houses with the help of children under the age of 16, producing substantial financial returns. Three of the houses, for instance, were sold for \$134,000, \$124,750, and \$213,456. By using children under 16 to complete these projects, the district court found, the SVTP enjoyed the benefit of experienced labor without incurring any cost in wages. "Clearly," the court concluded, "the program has been converted into a commercial enterprise competing with other contractors."

In short, substantial evidence in the record supports the district court's conclusion that the Church was the primary beneficiary of the

under 16 labor, and that the children under 16 are thus employees entitled to the protections of the FLSA.

III.

The SVTP also contests the district court's rejection of its free exercise claim. According to appellant, the district court failed to recognize that this was a "hybrid" claim involving both free exercise rights and other fundamental rights. See *Employment Division v. Smith*, 494 U.S. 872, 882 (1990). The court, however, plainly understood that it was dealing with a hybrid claim, and also that after the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq, hybrid claims and "pure" free exercise claims both must be analyzed under the compelling interest test.

In the circumstances of this case, the district court's application of the compelling interest test was appropriate. As the district court noted, the free exercise defense is essentially indistinguishable in relevant respects from that presented by the SVTP (and rejected by this court) in *Wendell's Woodwork*, 867 F.2d at 196. The SVTP has presented no new evidence that would warrant revisiting our conclusion in that case. We do not suggest, however, that church-run vocational programs are inevitably subject to the FLSA, or that they will always fall outside the protection of the Free Exercise Clause. Instead, our conclusion here, as was our analysis in *Wendell's Woodwork*, is based on the particular facts and on the characteristics of the program at issue.

IV.

Finally, the SVTP challenges the district court's rejection of its administrative defense. The SVTP's administrative argument is based in part on 29 U.S.C. § 214(d), which states:

The Secretary may by regulation or order provide that sections 206 and 207 of this title shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an

integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws (emphasis added).

According to the SVTP, the Department of Labor has failed to issue regulations under this provision, and schools thus lack guidance on whether their vocational programs violate the FLSA. As a result, the SVTP asserts, the Department cannot prosecute actions against vocational programs for violations of the Act.

Plainly, however, the statute only says that the Secretary "may" promulgate regulations; it nowhere requires the Secretary to issue regulations. The situation is thus far different from that in the case principally relied upon by appellant, *Mayor v. Mathews*, 562 F.2d 914 (4th Cir. 1977), cert. denied, 439 U.S. 862 (1978). The discretionary nature of the statute at issue here, as the district court appropriately found, forecloses the SVTP's argument. The Secretary has not issued regulations exempting certain categories of student employment, and so the SVTP cannot benefit from any such exemption.

Appellant's administrative defense is also based on the no-enforcement policy expressed in section 10b28 of the Department's Wage and Hour Division's *Field Operations Handbook*. That provision reads in pertinent part:

(a) Until final regulations implementing the provisions of Sec 14(d) are adopted, WH [the Wage and Hour Division] will take no enforcement action with respect to MW [minimum wage] or OT [overtime] for private elementary or secondary students employed by any school in their school district in various school-related work programs, provided, that such employment is in compliance with applicable CL [child labor] provisions. . . . (b) If such employment is not in compliance with applicable CL provisions, the students so employed must be paid MW and OT for all hours worked Also, the employer will be subject to CL/CMP's [civil money penalties].

According to the SVTP, it presumed under this provision that the Department would not enforce the FLSA against it, and that under 29

U.S.C. § 259. such good faith reliance should preclude application of the Act.*

The no-enforcement policy, however, does not apply to the SVTP. The policy is only implicated if the "employment is in compliance with applicable [child labor] provisions." As the district court determined, the SVTP has violated child labor laws by allowing children under eighteen to operate hazardous machinery, see 29 C.F.R. §§ 570.52, 570.58, 570.65, and children under sixteen to work in construction during hours prohibited by federal regulation, see 29 C.F.R. §§ 570.33(b), 570.33(f)(4), 570.35. See generally 29 U.S.C. § 203(l). As a result, the SVTP's administrative defense must fail.

V.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

*29 U.S.C. § 259 states in relevant part

[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Wage and Hour Division of the Department of Labor].

STANDARDS ACT (FLSA) AND H.R. 2038, THE MIGRANT AND SEASONAL
AGRICULTURAL WORKER PROTECTION ACT (MSPA) CLARIFICATION ACT

April 21, 1998

REPUBLICANS PRESENT: Ballenger (NC), Subcommittee Chair, Souder (TN); Peterson (PA); Goodling (PA), Full Committee Chair

DEMOCRATS PRESENT: Owens (NY); Miller (CA); Martinez (CA)

Panel I witnesses discussed the Effect of the FLSA on Amish Families. They included Representative Joseph R. Pitts (R., PA); and Amish community representatives Mr. William Burkholder, Centreville, PA and Mr. Christ Blank, Kinzer, PA.

Panel II witnesses focused on H.R. 2038, the MSPA Clarification Act. They included Representative Charles Canady (R., FL), sponsor of H.R. 2038; Mr. Guy Donaldson, President of the Pennsylvania Farm Bureau, Camp Hill, PA; Mr. Robert Williams, Director, Migrant Farmworker Justice Project, Florida Legal Services, Inc; Mr. Walter Kates, Director, Labor Relations, Florida Fruit and Vegetable Association, Orlando, FL; and Mr. Dino Cervantes, Proprietor, Cervantes Enterprises, Las Cruces, New Mexico.

Rep. Pitts began by stating that recent actions by the Department of Labor (DOL) have threatened the lifestyle of the Amish community. He explained that the Amish wish to have their youth work in vocational settings after completion of school, which is equal to the eight grade, but unfortunately, Amish-owned businesses -- particularly sawmills -- have recently received costly fines from the DOL for violation of the child labor laws (employment of youth under the age of 18 in hazardous occupations). Rep. Pitts noted that attempts to find an administrative solution to this issue have taken place over the last eighteen months with DOL, and on two occasions Members of Congress and representatives from DOL and the Amish community met to seek a solution. He also referenced language included in the FY 98 Labor/HHS Appropriations Act urging DOL to continue its negotiations to come to a compromise on the issue. Rep. Pitts offered for the Subcommittee hearing record correspondence between Congressional members and DOL on the issue and said two letters from DOL, the most recent on April 20, state that current legislative language prohibits DOL from coming to a solution on the Amish situation. He asked that the Subcommittee record reflect his concern for a more timely response from DOL on the issue, noting that he finds it unacceptable that DOL took three and four months to respond to a simple request from Members of Congress. He thinks DOL has a responsibility to evaluate the Amish in light of their unique situation since they complete their formal schooling after the 8th grade and pledged his commitment to work with the Subcommittee to find a solution to see that Amish youth can again work in supervised situations. He concluded with the following questions: Is it more dangerous to work in a sawmill than to have a Federal bureaucrat destroy the ability of a Christian community to teach their children in a way that is culturally appropriate? Is the DOL and its "child labor advocates" protecting children or a political agenda with this type of regulatory action?

Mr. Burkholder testified about the adverse impact the well intended child labor laws are having on the Amish community. He explained that despite living in a technological world, the Amish have limited themselves to occupations that leave time for their faith in God and for their families -- occupations that reinforce self-reliance within the Amish community as well as the work ethic.

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HIGHLIGHTS OF HEARING ON AMISH FAMILIES UNDER THE FAIR LABOR
HOURS ACT

Those occupations are farming, carpentry, wood and metal shops, saw mills, harness making and furniture making. Mr. Burkholder acknowledged that child labor laws were made and needed to correct abuses in the past, but emphasized the Amish pursue the same goal regarding the safety of their children. To support his position in seeking relief from child labor laws, Mr. Burkholder cited the 1971 Supreme Court decision in *Yoder v. Board of Education* which recognized the intent and purpose of the Amish to educate their children in their own schools. He said graduates from Amish schools are eager to prove themselves to be hard workers and that despite rising land costs, property taxes, income taxes, school taxes, start up costs for businesses, buildings, equipment and machinery, the Amish young people overcome many obstacles to start off on their own in the Amish community.

Mr. Blank also spoke of the infringement of child labor laws on the Amish and Mennonite community and asked that those in authority find a reasonable solution to the current problem. He explained that it is important in the Amish community that the young be trained by "learning by doing." He also commented that it is because of the high costs of dwindling farm land, that more and more of their families are forced to start small businesses such as woodworking shops, welding shops, sawmills, and pallet shops. But he said under current regulations no one under age 18 can work in a sawmill, a situation sawmill owners were unaware of until the DOL investigators showed up. He contended the owners received no warning before they were fined by DOL and even though they indicated they would comply. Mr. Blank also pointed out that the Amish recognize that historically child labor laws have been more lenient on farm labor but for many reasons beyond their control Amish youth are forced to learn other trades. He concluded by calling it coincidental that there seems to be a lot of governmental interest in finding ways to better prepare today's youth to enter the workforce, while at the same time Amish are being fined for pursuing a system which has been proven successful in preparing their youth for adulthood and to be respectful, self-supporting citizens.

During the question and answer segment, Chair Ballenger questioned the panel about the efforts to work with DOL to find a solution. Rep. Pitts reiterated that efforts to work with DOL were unsuccessful. He noted that a proposal to permit youth age 16-17 to work in sawmills but to remain at least 150 feet away from equipment was dismissed by DOL because the youth would still be subjected to dust and noise. Rep. Pitts suggested a new statute or regulations be adopted to resolve the issue.

Rep. Owens asked whether the use of power tools by the Amish contradicted their refusal to use electrical equipment for personal use and whether it is unfair to Amish competitors to exempt them from labor standards laws. Mr. Blank responded that they are only asking for an understanding of their way of life. Rep. Souder commented that DOL's response to the issue evades the fundamental question of how to operate in our society without impacting religious beliefs.

Rep. Martinez asked whether information exists on the rate of accidents in the Amish community as a result of handling hazardous equipment and chose this opportunity to note that he handled dangerous equipment as a youth and it resulted in no harm. He said there is a tendency sometimes to be overly protective. Mr. Burkholder responded that there had been one fatality but did not specify when or in what job. Rep. Peterson specifically noted that he is not hopeful for a resolution after receiving the Department's latest response. He too was disappointed with the slowness of DOL's response. Rep. Miller inquired about whether all of the youth work in family-owned businesses. Mr. Blank responded that he hoped the children would work under the parent or someone standing in the place of the parent.

Rep. Goodling commented that "family" in an Amish community means the entire community. He also expressed strong concern about DOL's invasion into the lifestyle of the Amish community while not being able to address a more serious problem with garment industry sweatshops. He urged the Department to use "common sense" when spot checking and issuing fines. Rep. Goodling also referenced an editorial which labeled him anti-labor because he complained about serious problems in the sweatshops.

On the MSPA panel, all but Mr. Williams were supportive of H.R. 2038, the MSPA Clarification Act. This bill, among other things, changes the MSPA family farm exemption; excludes from the definition of farm labor contractor farm workers who voluntarily enter into carpooling arrangements; requires DOL to meet with the farmer before and after a MSPA inspection to discuss the purpose and results of the inspection; allows farmers a 10-day grace period in which to correct MSPA violations before DOL can levy a fine or a private lawsuit can be brought; excludes from MSPA regulation any farm worker housing regulated and approved by a Federal or State agency; modifies "joint employment" under MSPA; and removes the Federal standard for farm worker vehicle insurance and provides that vehicles will be insured to applicable State standards for employer transportation of employees.

Representative Canady discussed the challenges faced by America's farming community as the world's economy changes and said that given these pressures, farmers should not have to contend with government agencies that overstep regulatory boundaries set by Congress. He said no one denies the need for reasonable migrant worker protections but that current Federal policies are placing an unfair burden upon the employer, citing the DOL interpretation of the joint employer rule as an example. He claimed the joint employer rule is written so broadly that virtually any grower can be classified as a joint employer for liability purposes. He added that this action, combined with overlapping housing regulations, DOL initiatives to classify year-round employees as seasonal workers, onerous Federal transportation insurance requirements and other policies have contributed to an adversarial relationship between growers and the government. His bill, he said, seeks to ease this situation by making a number of corrections to MSPA. He emphasized that these changes do not weaken or do away with the basic protections afforded by MSPA to migrant workers but only seek to return the original intent of Congress to MSPA.

Mr. Donaldson, speaking in support of H.R. 2038, made the following, among other points. He said regulators and courts have over the years distorted Congress' intent with regard to MSPA and the intent of the Canady bill is to restore MSPA and its implementing regulations to the intent of the original drafters. He described some of the important changes made by the bill and how they would improve application of the MSPA to agriculture. He said, for example, that the 10-day grace period provision parallels the 10-day grace period Congress allowed employers in the 1996 immigration reform act for correction of paperwork errors associated with I-9 forms and that it is obvious that education, enforcement and an allowance for correction when problems are encountered will result in better compliance with the law. He also emphasized that this 10-day grace period is not unlimited in scope and that farmers will just get "one bite at the apple." He said the clarification of the family farm exemption will prevent situations where farmers have lost this exemption because they turned to the State Job Service to recruit workers or because they hired workers who learned of available jobs through word-of-mouth reference among workers themselves. He believes the exemption of housing from MSPA requirements if it is already regulated by another State or Federal regulation eliminates unneeded double regulation. He also said MSPA should recognize that permanent, year-round employees are fundamentally different

from migrant and seasonal workers and should not be treated on the same basis as MSPA-covered employees, adding that H.R. 2038 accomplishes this. Addressing the joint employer issue, he contended that DOL changed the ground rules so that they can find a joint employment relationship between the FLC and farmer in virtually every case. He thinks farmers should have the ability to do what all businesses do to meet their temporary labor needs during high demand periods — turn to outside contractors to handle paperwork and compliance burdens so the farmer doesn't have to spend the time and undertake the expense. He said H.R. 2038 seeks to correct the joint employer situation by specifying in MSPA the standard used by the FLSA. Commenting on the bill's carpooling provisions, Mr. Donaldson said there is no reason to hold a farmer responsible for transportation of farm workers which he does not provide or direct that they use. He also thinks that since virtually all forms of casualty insurance are regulated at the State level, insurance for transportation of farm workers should be too.

Both Messrs. Kates and Cervantes also focused on what they view as positive elements of H.R. 2038. Mr. Kates said the joint employer provision is extremely important because of the unwarranted DOL expansion of the concept of joint employment within the agricultural community. He said by virtue of its recent joint employment rule DOL reversed 14 years of regulatory and judicial interpretations that clarified the standard for determination of joint employment. He called the DOL rule an effort to achieve through regulatory authority a broadened joint liability rule that circumvents its failure to enact a strict liability standard as part of the original MSPA enactment. He said it is now nearly impossible for growers to avoid joint employment liability if they use FLC's. Mr. Cervantes focused on problems caused by DOL's interpretation of what constitutes carpooling. He said the current statute and its interpretations in this regard make transportation to jobs more difficult for farm workers to provide for themselves because they virtually require farmers to discourage carpooling. He said H.R. 2038 deals with this situation by making farm employers exempt from liability when they had no knowledge of payments among farm workers for transportation and the workers voluntarily entered into the carpooling.

Mr. Williams, in opposing H.R. 2038, made two key points. One was that there is no evidence that MSPA is over enforced by DOL but that, on the contrary, the evidence is clear that DOL's current enforcement efforts are totally inadequate given the rampant violations of the Act that can be found in every area of the country. To support this point, he said from his experience almost all FLC's are involved in transporting farm workers to job sites but relatively few have obtained required authorization from DOL (526 out of 5,101 in the Southeast last year) and that similarly many FLC's are involved in providing housing to workers but are not so authorized (only 154 housing authorized in the Southeast last year). He also said violations of the Act's recordkeeping requirements are routine and that in 20 years he cannot recall a single instance where an FLC provided workers a written disclosure of terms and conditions of employment at the time of recruitment as required by MSPA. He thinks the rewards of noncompliance with MSPA are greater than the costs of compliance. He also cited Wage and Hour's decreased number of MSPA investigations (from about 5,000 in 1988 to approximately 2,000 in 1997) as further evidence that MSPA is not being over enforced by DOL. His other key point was that contrary to the growers' arguments, DOL has not expanded the interpretation of the joint employer concept beyond its statutory mandate. Instead, he believes it is the Canady bill which would make radical change in this concept. He said in limiting consideration to the five factors indicative of control as proposed, the Canady bill would narrow the definition of employment even beyond the master-servant relationship as described in common law doctrine and provide the narrowest definition of "employ" in any Federal statute.

Mr. Williams spent the remainder of his testimony on discussing the other key provisions of H.R. 2038 and how they will negatively impact farm workers. Some of his points were as follows. He said the bill would enlarge the narrow family farm exemption "to swallow the general rule" and allow businesses to obscure whether they are performing farm labor contracting. Addressing the carpooling provisions, he said the bill would authorize employers to arrange or order dangerous transportation but escape all responsibility based on a mere claim that the worker participated in a "carpool." He thinks the provision for pre-notification to employers of the purpose of an investigation would prevent workers from communicating confidentially with investigators about allegations of criminal or other illegal conduct. He said DOL cannot carry out the law if it's denied confidential access to workers. Commenting on the 10-day grace period, he asserted that such a provision would encourage unlawful activity and prevent courts from ruling in cases of admittedly illegal conduct. He said, moreover, that it would make it profitable for employers to violate the law if they could avoid the usual damages or civil money penalties, even in instances when they are caught, by belatedly "correcting" the problem. Addressing the housing provisions in H.R. 2038, he said State housing standards often have been inadequate to prevent unsafe and unsanitary housing, that the bill offers no minimum standards for State law, and the provisions would promote dangerous housing conditions for the more than 100,000 farm workers who live in several thousand labor camps around the country. Finally, he commented that MSPA's vehicle insurance requirements are needed because States have been unable to promote adequate safety, especially during interstate transportation of migrant workers. He concluded by stating that the real world consequences of the Canady bill would be to continue to deny America's poorest workers the protections of the laws that Congress has enacted for their protection and benefit -- not technicalities, but basic rights.

Most of the questions and answers focused on the issue of transportation insurance. Chair Ballenger said he thought the transportation insurance issue was addressed during the Adams Fruit debate. Mr. Cervantes responded that Adams Fruit dealt primarily with workers' compensation rather than transportation insurance. Mr. Williams suggested that a review be conducted of FLC's not authorized to transport workers. Rep. Miller asked Mr. Cervantes how his workers get to the fields and if the transportation of the workers is done for profit. He responded that they arrive by their own cars under their own arrangements.

Employment Standards Administration
Office of Management, Administration and Planning
Division of Legislative and Regulatory Analysis

Prepared by Priscilla Johnson
April 24, 1998

THE WHITE HOUSE

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PAGES TO FOLLOW: 32

COMMENTS: Here are background papers on
today's discussion on British legislation
at 3:00 pm in room 239.
Please call Sonjia at 456-5351 if fax
uncomplete. Thank you.

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Background on Amish Legislation

This week, I plan to introduce legislation that would address Department of Labor policies which are negatively impacting the Amish constituency across the country.

As you may know, individuals of the Amish faith have received substantial fines for having their youth under the age of 18 working in their family businesses. The Amish wish to have their youth work in vocational settings after completion of Amish school at age 14, and feel their religion and lifestyle have been threatened by these actions by the DOL.

A hearing was held to address this issue before the Workforce Protections Subcommittee of the Education and Workforce Committee on April 21. At the hearing, Members from both sides of the aisle expressed a desire to find a way for the Amish youth (ages 14-18) to work under the supervision of an adult, provided that they are not operating machinery. Therefore, I plan to introduce the attached legislation.

- This legislation would allow Amish youth to be employed with adult supervision in places where machinery is used to process wood products.
- This bill would only apply to individuals who are between the ages 14 and 18 whose religion does not permit formal schooling beyond the eighth grade.
- Amish youth would be prohibited from operating or assisting in the operation of power-driven woodworking machines.
- Therefore, these individuals would be allowed to perform tasks such as writing orders, sweeping, stacking wood, gluing wood pieces, etc. They still would NOT be allowed to run band saws, or any other power machinery.

Please contact me or my Legislative Assistant, Julie Hershey Carr at extension 52411 if you are interested in becoming a cosponsor.

DOL-enforced child labor laws in heavy small business sawmills

1000 National Press Bldg
Washington, DC 20045
Q001 301-71118
Q002 301-5851

Transcript

DATE May 30, 1998
TIME 9:00-11:00 AM (ET)
NETWORK NPR
PROGRAM Weekend Edition

Scott Simon, host:

Amish families in Western and Central Pennsylvania are protesting the federal government's enforcement of labor laws that are intended to protect children from workplace hazards. The Amish are turning to new businesses, such as sawmills and wood shops, as their available farmland begins to disappear. That means more children on the shop floor. The Amish contend that their religious and cultural traditions hold that children should work, but the U.S. Labor Department takes a different view. NPR's Eric Westerveld (sp) reports.

Eric Westerveld reporting:

Amish factory--it was once an oxymoron. But as tract housing, strip malls and other development eats up more and more farmland in Central and Western Pennsylvania, the once reclusive Amish are increasingly leaving the fields and starting up their own small factories.

This is the sound of Amish entrepreneurship: a metal workshop in Lancaster County. The Amish don't use electricity or many other modern conveniences; they're too worldly, they say. But many of their shops are surprisingly modern. This factory, gas-powered engines run sophisticated hydraulic tools. There are forklifts with metal instead of rubber tires. With their horse and buggies parked outside, men dressed in the traditional black pants and suspenders put on protective gear over their full-bearded faces to cut, grind and shape metal parts.

The Amish send their children to one-room schools through the eighth grade only, usually age fourteen. In the past, these kids would then work on the family farm until they're able to start their own. But today, nearly half are in nonfarm jobs. This major transformation is making it increasingly hard for the Amish to preserve their lifestyle, and it's brought unwanted attention from the U.S. Labor Department. In the last two years, the

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government has leveled tens of thousands of dollars in fines against Amish companies for using underage workers. John Fraser currently heads the Labor Department's Wage and Hour Division.

John Fraser (Administrator, Wage and Hour Division, U.S. Department of Labor): We are charged under the law with assuring that work experiences for young people are safe and healthy and don't undermine their well-being, that there is no basis in the law for different treatment of people based on race or gender or ethnic origin or religion or cultural background.

Westerveld: But the Amish say letting children work alongside their father instills core values of hard work, diligence, cooperation and responsibility, values they say are central to their faith. The Amish fled here to avoid religious persecution after breaking from the Mennonites in the late 17th century. Based on religious doctrine, they usually stay away from outsiders, the English people, as they call us. Most refuse to talk on tape. But this Amish businessman and his son said they felt so strongly about child labor, they agreed to talk with NPR if their last name and exact location weren't identified. Standing near his wood shop, Samuel says it's inevitable and vital that Amish children be allowed to work in the small factories.

Samuel (Amish Businessman): Well, we still see the same ethic that was instituted by the Bible in the first book of Moses, that man and wife should work together, have a family, and working what we call practical family. And of course, as soon as the children are old enough, they should help support the family. And by working in these shops, of course, they're going to be doing that if there's not agriculture jobs available.

Westerveld: Under federal law, the Amish are allowed to let their children work on farms. Some Amish see U.S. labor laws as part of the problem with modern America. Samuel says some kids in the outside world get into trouble with drugs and violence because they're slothful TV addicts, divorced from ever knowing the value of hard work.

A horse-drawn cart clomps its way down a dirt road outside Bird-in-Hand, Pennsylvania. Not far from this dirt road, development is booming along Route 30. There are, among many others, outlet stores for The Gap and Nike, along with fast-food chains and video stores. As more Amish leave the farm and start up small businesses, the child labor issue will be just one of many new tensions, says Amish expert Donald Krabill (sp), author of "From Plows to Profits."

Donald Krabill (Author, "From Plows to Profits"): It does mean that they will need to struggle with local zoning regulations. They will need to struggle with federal

regulations in a variety of different areas much more than they did in the past. It means that they struggle with the use of technology more. This really is a new era and a new stage for the Amish community as they interact much more with the larger world.

Westerveld: One part of the larger world many Amish still don't interact with is politics. But their desire to use child labor has prompted many Amish to ask their congressmen for help. Pennsylvania Republican Representative Joseph Pitts charges that the Labor Department is unfairly singling out his constituents.

Representative Joseph Pitts (Republican, Pennsylvania): They really don't want any kind of services from government and they pay their taxes. They want to be good citizens. It's just that this threatens their way of life, a tradition that's been going on for hundreds of years. They came here for freedom of religion. I would like to be-- have them be able to practice their religion without undue governmental interference.

Westerveld: But some Amish, like this eighteen-year-old who works in his father's wood shop making gazebos, admit that there are far less spiritual reasons for taking on the Labor Department.

Unidentified Eighteen-Year-Old: There needs to be cut-- cuts in the pricing somewhere and the children really help to do the family way of doing things.

Westerveld: You can be more competitive if you have kids helping out in the shops?

Eighteen-Year-Old: To an extent, that's the main point.

Westerveld: The Amish have successfully challenged the government before: on education, war taxes and even slow-moving vehicle laws to protect their horse-drawn buggies. And Amish businesses are already exempt from paying Social Security and Workers' Compensation. So some non-Amish businesses in Western and Central Pennsylvania are troubled by the prospective of the Amish getting even more exemptions.

Noah Shetler (sp) was raised Amish, but left at age eighteen and is now completely ostracized by his parents and his thirteen siblings, what's known as shunning. Shetler started his own sawmill. And today, says any more breaks for the Amish will put him at a distinct disadvantage.

Noah Shetler (Sawmill Owner): I'm not against people that are under the age of eighteen doing some work. But I don't--I just don't think that the Amish should be allowed

to have thirteen- and fourteen-year-olds and, you know, whatever age working in a mill and then we don't.

Westerveld: Meanwhile, Amish like Samuel are hoping they can work with the Labor Department to hammer out a nonlegislative compromise to the child labor issue, maybe allowing some kids on the shop floor doing limited work away from dangerous tools.

Samuel: If this thing is handled with common sense, this thing can be worked out real well. But we're going to all have to get a little bit more careful.

Westerveld: Careful of the buzzing saws and air-powered heavy tools and careful, too, of the Labor Department looking over their shoulder.

Eric Westerveld, NPR News, Lancaster County, Pennsylvania.

#

Employment in Sawmills is Dangerous

- Occupational fatalities are more than five times the national average.

In 1996, the "lumber and wood products" industry – which includes sawmills – had an occupational fatality rate of 25.6 per 100,000 full-time workers. This is more than five times the national average for all private industry rate – 5.1 deaths per 100,000 workers.

The occupational fatality rate in this industry is higher than in the dangerous construction (13.9) and trucking and warehousing industries (20.8). In 1996, 203 occupational fatalities occurred in this industry.

- Occupational injuries are among the highest in this industry.

In 1996, injuries requiring days away from work were more than twice as frequent in the lumber and wood products industry (at 6.5 per 100 full-time workers) than the rate for all industries (3.1 per 100 workers).

Also, in 1996, the frequency of all non-fatal injuries was almost twice as high in the lumber/wood products industry (at 14.2 per 100 full-time workers) as the national average for all industries (at 7.4 for every 100 workers).

And the non-fatal injury rate in the lumber and wood products industry got worse from 1994 to 1996 – increasing from 13.2 to 14.2 – while the all-industry average was improving (down from 8.4 to 7.4 from 1994 to 1996).

- Employment in sawmills presents a variety of dangers to workers.

OSHA sees many examples of fatalities and injuries due to a variety of different dangers in sawmills:

- ⇒ employee suffocated by saw dust
- ⇒ employee killed when run over by a front-end-loader
- ⇒ employee killed when a conveyor on which he was working was activated
- ⇒ employee crushed under a load which fell from a forklift
- ⇒ employee electrocuted while working with a trim saw
- ⇒ employee suffering amputation of arm while operating a radial saw
- ⇒ employee severely injured by a board kicked out of a trimmer saw
- ⇒ employee injured by a log rolling over him
- ⇒ employee injured when caught under a forklift
- ⇒ employee injured when a board kicked back from an edger
- ⇒ employee severed finger cleaning debris from a saw

- Young workers are especially vulnerable to workplace dangers.

Young workers' inexperience, smaller size, immaturity and lack of training all make employment in this industry (like other hazardous occupations) even more dangerous for children, and raise the odds that their employment would result in serious injury or death.

Even with the child labor protections in current law, NIOSH reports that in 1996:

- o nearly 210,000 youth between 14 and 18 years of age are injured while working each year
- o 70,000 suffer injuries serious enough to warrant emergency room treatment
- o Approximately 70 young workers die on-the-job each year.