COMMITTEE ON
EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
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March 18, 2024

SUBMITTED VIA REGULATIONS.GOV

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1205–AC13, National Apprenticeship System Enhancements

Dear Acting Secretary Su:

We write in strong opposition to the Department of Labor's (DOL or the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) entitled "National Apprenticeship System Enhancements," which is a blatant attempt to circumvent Congress and legislate through regulation.[1] The NPRM is more than 600 pages and drastically increases the regulations on registered apprenticeships under the *National Apprenticeship Act of 1937* – a two-page law that the Department is using to advance a political agenda under the guise of safeguarding "the welfare of apprentices."[2]

The most glaring issue facing registered apprenticeships is the lack of uptake from employers—particularly in industries outside of the construction trades—and the limited apprenticeship opportunities available for individuals seeking a tried-and-true alternative to a baccalaureate degree.[3] Apprentices participating in registered programs in the United States constitute only 0.3 percent of the labor force, a significantly lower share than many other developed countries.[4] Yet the Department seeks to smother an already underutilized system with more red tape and one-size-fits all mandates. The proposed rule expands federal control over apprenticeships, injects

[1] 89 Fed. Reg. 3118 (proposed Jan. 17, 2024)
[2] Codified at 29 U.S.C. 50
[3] https://www.apprenticeship.gov/data-and-statistics
[4] https://www.apprenticeshipsforamerica.org/s/Field-Report-Apprenticeship-Program-Registration-Final.pdf

political ideology and Diversity, Equity, and Inclusion (DEI) mandates into the apprenticeship system, and imposes significant burdens on apprenticeship sponsors and employers – all of which will lead to fewer registered apprenticeship opportunities for Americans and exacerbate the shortage of skilled workers facing our nation's job creators.

The Department should immediately withdraw the proposed rule and instead focus its efforts on improving the administration of the registered apprenticeship system that many of America's job creators find to be cumbersome and irresponsive to the demands of the modern economy.

Federal power grab to limit apprenticeship expansion

Thirty-one states and territories are currently recognized by DOL as "State Apprenticeship Agencies" (SAA) and granted the authority to register and oversee apprenticeship programs in their state.[5] As noted in a publication from the National Governors Association, operating as an SAA can provide states greater flexibility to administer apprenticeship programs, improve responsiveness and customer support, streamline quality assurance, and support statewide outreach efforts.[6] In Florida, the Florida Department of Education serves as the SAA and has reduced barriers and bureaucracy to streamline the approval process for programs, cutting the average time to complete the registration process of nine to 12 months down to four weeks.[7] Instead of further empowering state leadership and innovation, the Department's proposed rule significantly undermines the ability of states to expand apprenticeship programs within their state and seizes greater control over the apprenticeship system at the federal level.

Under the proposed rule, DOL's Office of Apprenticeship has sole discretion to determine if an occupation is suitable for apprenticeship, revoking SAAs' ability to recognize suitable occupations in their states. In the proposed rule's regulatory analysis, the Department acknowledges that there are currently occupations determined suitable by SAAs, though admits DOL does not have data on how many occupations are currently determined to be suitable for registration by SAAs. The lack of basic due diligence makes clear the Department is not concerned with the scope of the potential reduction in the number of occupations that are eligible to participate that would result from the proposal. For DOL, it seems fewer occupations deemed worthy of registered apprenticeship is a feature, not a weakness, of a proposed rule that proclaims, "ultimately, registered apprenticeship training is not suitable for all occupations, including many occupations that are essential for the healthy functioning of the national economy."[8]

The implications of concentrating suitability determinations at the federal level are amplified by the proposed section 29.7. The establishment of these new, arbitrary requirements that an occupation must be "a standalone, distinct occupation" and "lead to a sustainable career" in order

[5] https://www.apprenticeship.gov/about-us/apprenticeship-system

[6] https://www.nga.org/publications/leveraging-registered-apprenticeship-to-build-a-thriving-and-inclusive-economy/

[7] https://www.fldoe.org/core/fileparse.php/9904/urlt/2122ApprenticeshipReport.pdf

[8] https://www.federalregister.gov/documents/2024/01/17/2023-27851/national-apprenticeship-system-enhancements

to be deemed suitable for apprenticeship is designed to limit the number of occupations that can participate in the registered apprenticeship system. DOL is made the sole arbiter of these criteria

The proposed rule's requirement that an occupation must be standalone and distinct is promoted by the Department to address "splintering" and prevent the approval of an occupation that includes similar competencies and work-processes of a previously approved occupation. This assumes a level of nationwide uniformity to occupations that simply does not exist in the United States. The NPRM even acknowledges this in proposed section 29.14 pertaining to National Program Standards for Apprenticeship. The proposed rule limits occupations eligible for National Program Standards to those that are national in scope and specifically notes that occupations with state or local licensing requirements cannot operate with a uniform set of standards nationally.[9] However, the suitability provision to prevent splintering makes no exception for occupations that are not multi-state in design, forcing occupations that may differ across states and regions to subscribe to a uniform approach—and in some cases apply the standards of the state with the most heavily regulated occupational licensure regime—or risk being deemed ineligible for apprenticeship. Further, it will prevent employers that operate in specialized fields from participating in the apprenticeship system and will cut off career pathways into these occupations, regardless of the quality of the programs or employment opportunities available to individuals who complete them.

Additionally, what constitutes a "sustainable career" is not clearly articulated in the proposed rule. It appears to place the onus on applicants seeking a suitability determination to discern how they must make the case for the "sustainability" of the career through information on the compensation or opportunities for career progression. Ultimately, this element of the proposed rule will lead to inconsistent application of an ambiguous standard and give DOL another tool to pick winners and losers. The Department has contorted its statutory authority to safeguard the welfare of apprentices into a directive to play big brother and "safeguard" Americans from their own career decisions.

Eliminating Competency-Based Programs and Forcing a One-Size-Fits-All Approach

Competencies are increasingly becoming the currency of the labor market, as more employers are focusing on the skills and competencies a worker possesses, not how long it takes to acquire them.[10] Amidst this transition into a skills-based economy, the Department is proposing to move apprenticeships in the opposite direction by eliminating the competency-based approach that currently permits registered apprenticeship programs to measure skill acquisition through the demonstrated attainment of the competencies instead of the amount of time spent in on-the-job learning. The proposed rule claims to be instituting a "streamlined, unitary approach" in imposing a minimum of 2,000 hours of on-the-job learning and 144 hours of related instruction in addition to a demonstration of occupational competencies to "ensure an apprentice's acquisition of proficiency in all the skills and competencies relevant to an occupation."[11] Yet this is precisely the benefit of the existing competency-based model that DOL has on the chopping

[9] https://www.federalregister.gov/d/2023-27851/p-614
[10] https://hbr.org/2022/02/skills-based-hiring-is-on-the-rise
[11] https://www.federalregister.gov/d/2023-27851/p-394

block, as the progression of apprentices is not based on their time in a seat but upon their mastery of the content.

The Chairman of the Alabama Workforce Council recently wrote that "the competency-based model of training has become Alabama's bread and butter for apprenticeship expansion."[12] The proposed rule acknowledges about 3,500 apprenticeship programs currently registered under the competency-based model. And seemingly in error, the NPRM's regulatory analysis includes projections for the numbers of registered apprenticeship programs through 2034 and continues to include competency-based programs in these projections. In fact, the proposed rule projects the existence of 6,412 competency-based registered apprenticeship programs in 2034 and that the rise in competency-based programs will constitute one-third of the overall growth in apprenticeships over that period.[13] None of those new programs would be allowed to come to fruition under the proposed rule.

The proposed rule goes beyond just setting minimum time-based requirements of 2,000 hours of on-the-job training and 144 hours of related instruction; rather, it invites the establishment of higher "industry standards" that all programs in that occupation would be forced to adhere to. Through this provision, existing registered apprenticeship programs that are achieving successful outcomes for their apprentices could have their model upended by another entity within their industry and be required to either increase the length of their program or lose registration—not because of any problem with their current program but simply because of a new arbitrary standard. Further, while the proposed rule indicates that DOL will solicit public comment to evaluate a submission seeking to set an industry standard, how the Department is supposed to adjudicate opposing claims from entities within an industry is unclear at best. Based on the Department's misguided fixation on program length as a proxy for quality, it is safe to assume those advocating for longer programs and stronger protection against competition can count on having the Department in their corner.

While the proposed rule openly touts the centralization of occupation suitability determinations at the Department, the role of SAAs in registering programs within the DOL-approved occupations is also significantly diminished. Proposed section 29.10 asserts that DOL's Administrator of the Office of Apprenticeship may, "…in their sole discretion, determine that a work process schedule and related instruction outline submitted for registration substantially differs from those previously approved as suitable for registered apprenticeship…" and require such program to pursue a new suitability determination as a separate occupation.[14] It is clear that SAAs are only in charge of registering apprenticeship programs within their state until the moment DOL comes to a different conclusion about a program seeking registration. Further, if the Department concludes that the work process schedule for a program seeking registration does not match that of other approved programs within that occupation and requires a new suitability determination, that suitability determination runs straight into the NPRM's "splintering" buzzsaw. Under the proposed rule, an apprenticeship program cannot exist in an existing occupation and differ in substance from other programs, or else it must be considered a separate

[12] https://aldailynews.com/column-why-we-cant-have-nice-things-president-bidens-hostile-apprenticeship-takeover/

[13] https://www.federalregister.gov/d/2023-27851/p-1057

[14] https://www.federalregister.gov/d/2023-27851/p-1674

occupation, and yet concurrently it cannot be approved as a separate occupation so long as there is some overlap with an existing occupation. These provisions are circular, and the result is an apprenticeship program must subscribe to a one-size-fits-all approach or face rejection from the Department.

With the approval of occupations and the registration of apprenticeship programs placed squarely in the hands of the Department, the proposed rule further empowers DOL to create its own apprenticeship standards and curriculum—referred to as "National Occupational Standards." This proposal raises serious questions about the Department's capacity and ability to develop apprenticeship standards and curriculum that is aligned with the evolving demands of industry. While the proposed rule indicates that DOL will convene industry leaders for input and seek public comment on the National Occupational Standards it creates, the Department would also be able to ignore or discard input and comments as it sees fit. Seeking comment alone does not automatically transform DOL's creations into "industry-validated" standards and curriculum.[15]

In isolation, potential effects of the federal government creating its own apprenticeship curriculum and standards could be of more limited consequence. But under the proposed rule, the Department serves as both the creator and approver of program standards and curriculum, with the authority to reject apprenticeship programs that don't adhere to the federally created standards. The "National Program Standards for Apprenticeship" and "National Guidelines for Apprenticeship Standards" in proposed sections 29.14 and 29.15 both expressly require the use of any DOL-created National Occupational Standards if an apprenticeship program seeks to operate on a multi-state or nationwide basis with automatic or expedited approval state-to-state. More subtly, for any apprenticeship program seeking registration—even through an SAA—the Department could swoop in and use its "sole discretion" to determine that a work process schedule does not match that of an already approved program using DOL's National Occupational Standards.

We do recognize the value of the provision in section 29.26 of the proposed rule that clarifies that SAAs are not permitted to delegate registration to any third-party entity, including a State Apprenticeship Council. As the Department notes in the NPRM, in some instances states have improperly ceded the authority to register new apprenticeship programs to State Apprenticeship Councils, which have misused this gatekeeping authority to prevent the registration of new programs.[16] However, the benefit of such clarification is overshadowed by the numerous ways in which the proposed rule would allow for existing program sponsors and allied stakeholders to block new entrants from gaining approval of an occupation or registering a program. Removing a state-level barrier to apprenticeship expansion only to apply new barriers at the federal level and coronate the Department as the sole arbiter in the inevitable picking of winners and losers is hardly a favorable outcome—especially when the improper use of State Apprenticeship Councils could be addressed through more robust enforcement of existing 29 C.F.R. § 29.13(a)(2).[17]

Concocting "Registered Career and Technical Education Apprenticeships"

[15] https://www.federalregister.gov/d/2023-27851/p-595
[16] https://www.federalregister.gov/d/2023-27851/p-921
[17] https://www.ecfr.gov/current/title-29/subtitle-A/part-29/section-29.13

There may be no clearer example of the Department legislating through regulatory fiat than the proposed rule's creation of new "registered Career and Technical Education (CTE) apprenticeship" programs. This provision will force a rigid variation of the registered apprenticeship model on state CTE agencies even though the proposal lacks a coherent purpose or industry demand. The NPRM's regulatory analysis estimates that in 2025 only one state would become a CTE SAA to register CTE apprenticeship programs and that 1 percent of current CTE programs would seek to participate in the Department's regulatory concoction.[18] Yet the Department is plowing ahead with a divisive proposal that would expand federal control over CTE—which Congress rejected in the most recent reauthorization of the *Carl D. Perkins Career and Technical Education Act* (Perkins) —and risk driving a wedge through the robust bipartisan, bicameral support that exists around CTE.

While the proposed rule makes multiple indications that CTE apprenticeships are meant to be a voluntary model, proposed section 29.24 appears to require the CTE agency in each state to coordinate with the apprenticeship registration agency. Compelling state CTE agencies to participate in this model would impose new, unfunded federal mandates and administrative burdens that would inevitably require the diversion of valuable time and resources from their current missions. In furthering the federal overreach contained within this aspect of the proposed rule, the NPRM directs the Department to oversee the development of "industry skills frameworks" that programs seeking registration as CTE apprenticeships would be required to include in their program standards. The Department likens this to the proposed rule's National Occupational Standards under which DOL would create apprenticeship standards and curriculum that would then be imposed upon apprenticeship programs seeking registration. In the context of CTE apprenticeships, one-size-fits-all federal frameworks that CTE program sponsors and participating employers would be required to adhere to is stunningly at odds with longstanding tradition and statutory provisions against the federal government exercising control over educational programs and curriculum.[19] While the proposed rule claims not to alter existing authorities of state CTE agencies under Perkins directly, it is likely that states and CTE programs would nonetheless have to modify their current operations if they wish to fit under the proposed regulatory scheme for CTE apprenticeships. All the while, the Department is ignoring existing and ongoing state efforts in developing pathways that align classroom education and work-based learning, particularly youth apprenticeships and pre-apprenticeships.

Further, the value the proposed CTE apprenticeships are intended to create for employers and participants is not clearly established in the proposed rule. Since the industry skills frameworks that would drive the content of a CTE apprenticeship program are not occupationally specific, employers may lack the ability and financial incentive to pay progressively increasing wages throughout the required 900 hours of on-the-job learning that is not directly tied to employment in a particular occupation. Additionally, the rigid requirements of 900 hours of on-the-job learning and 540 hours of related instruction is likely to stifle the interest of potential program sponsors and participating employers that would be inclined to participate in a more flexible model. For students that complete CTE apprenticeships, it is not clear if the certificate of completion they will earn will hold any value with employers due to the lack of occupational

[18] https://www.federalregister.gov/d/2023-27851/p-1066
[19] 20 U.S.C. 1232a

specificity. The Department's effort to create a market for these CTE apprenticeship programs and credentials through regulation is destined to fail.

Injects Political Ideology into the Apprenticeship System

Apprenticeships can offer a powerful opportunity for all Americans to gain industry-relevant skills and embark on a successful career. Unfortunately, the Department has shunned the flexibility that will be needed to make registered apprenticeship a meaningful pathway into the middle class for more industries and communities in favor of scoring political points on the progressive left with the imposition of the DEI agenda that seeks to divide Americans. If registered apprenticeships are transformed into a tool to advance progressive policy objectives, employers looking to build a stronger workforce and individuals seeking career opportunities are simply going to look elsewhere.

The Department's Advisory Committee on Apprenticeship (ACA), whose recommendations are cited as a driving force behind the policies in the proposed rule, assert that registered apprenticeships have often been "the domain of white, able-bodied men" and that in some cases apprenticeship sponsors "are actively hostile" to hiring individuals from underrepresented communities.[20] These assertions from the ACA seek to paint a dire picture of the current state of registered apprenticeships, which the Department elsewhere refers to as the "gold standard" of work-based learning, in an effort to impose its DEI agenda on the system.[21] The ACA's 2023 Biennial Report includes numerous recommendations on how "diversity, equity, inclusion, and accessibility" (DEIA) can be embedded into the registered apprenticeship system, including through using "Equity Indices" to track apprentices from certain demographic groups, offering financial incentives for underrepresented demographics to enter apprenticeships, and curbing the use of aptitude tests in the selection of applicants. The ACA report further promotes DEIA in apprenticeship as a means to "combat occupational segregation" and that "DEIA goals be leveraged as a mechanism to achieve Environmental, Social, and Governance (ESG) objectives."[22] At its core, the DEI agenda foments the discriminatory treatment of individuals in pursuit of fulfilling diversity quotas.

The proposed rule heeds the advice of the ACA and injects DEIA at each level "to further promote DEIA principles and goals throughout the National Apprenticeship System."[23] Proposed section 29.3(f) explicitly establishes promoting DEIA in apprenticeship as a core function of DOL's Office of Apprenticeship. Precisely how the Office of Apprenticeship will be fulfilling this requirement is left unsaid, but one could expect to see promotion of the ACA's recommendations or the like. Most concerningly, the line between promoting voluntary practices and compelling employers and apprenticeship sponsors to adhere to DEI policies is blurred when it is the Department that has the final word on program registration, as it does under the proposed rule.

[20] https://www.apprenticeship.gov/sites/default/files/Final%20ACA%20Biennial%20Report%20-%20May%2010%202023.pdf
[21] https://blog.dol.gov/2023/08/16/apprentice-trailblazers-share-your-story-build-the-future
[22] https://www.apprenticeship.gov/sites/default/files/Final%20ACA%20Biennial%20Report%20-%20May%2010%202023.pdf
[23] https://www.federalregister.gov/d/2023-27851/p-123

For states that wish to retain their ability to register apprenticeship programs as an SAA, the State Apprenticeship Plan required to be submitted under the proposed rule must include a strategic plan for increasing access to and support for individuals from underserved communities. Specifically, states must develop specific goals and milestones—i.e., diversity quotas—for each race and the other demographic groups identified in the proposed rule's broad definition of "underserved communities." Proposed section 29.27(c)(2) describes how DOL may not award a state full recognition as an SAA and instead give them provisional recognition if the strategic planning elements are nonresponsive, which leaves open the question of whether the Department could deem a state's diversity quotas insufficient as a basis to reject full recognition. Further, it is unclear whether a state falling short of fulfilling its diversity quotas could be grounds for derecognition or remedial measures under proposed section 29.29. Even if the Department stays out of setting and judging attainment of state diversity quotas, their very existence as a requirement will fuel a race-conscious approach to apprenticeship expansion that is antithetical to the equal opportunity the proposed rule purports to promote.

The proposed rule also seeks to achieve DEI objectives through new requirements on apprenticeship sponsors in the program registration process in proposed section 29.10. These requirements include writing a plan for the equitable recruitment and retention of apprentices, including those from underserved communities; building a list of recruitment sources that will generate referrals from all demographic groups within the relevant recruitment area; and providing the schedule and content of required anti-harassment education. DOL or the SAA must then determine that the equitable recruitment plan, recruitment sources, and anti-harassment education are "satisfactory" for the apprenticeship program to gain approval. Each of these requirements are intended to bolster the requirements in existing 29 C.F.R. Part 30, which already includes written affirmative action plans and race-based enrollment goals.[24] The proposed rule cites "advancing DEIA" as the basis for many of the other new arbitrary mandates imposed on program sponsors and employers, all of which place diversity above individual merit and complicate legal compliance, which will lead employers to opt out of offering registered apprenticeship programs. The predictable result will be fewer opportunities for Americans of all backgrounds to enroll in registered apprenticeship programs and achieve the American Dream.

Imposes Significant Burdens on Sponsors and Employers

While the apprenticeship system is in desperate need of less paperwork and red tape, the proposed rule imposes significant new registration, compliance, and recordkeeping burdens on apprenticeship sponsors and employers that will stifle the growth of registered apprenticeships. Apprenticeships For America's recent report effectively articulated this problem: "From our analysis, the proposed rules do not eliminate a single employer or sponsor requirement. Instead, the rules bring new requirements in related instruction, recordkeeping, complaints processes, and more."[25] In seeking to register with the Department or an SAA, an employer or apprenticeship sponsor is voluntarily opting into regulation of their apprenticeship program. Any employer looking at the proposed rule will see greater compliance costs and greater risk involved with

[24] https://www.ecfr.gov/current/title-29/section-30.6
[25] https://adobe.ly/3UTZOFx

registering an apprenticeship program with the government and many, including those that currently participate in the apprenticeship system, may rationally decide to abstain.

Proposed section 29.9(d) would prevent apprenticeship sponsors and employers from using non-compete provisions that restrict an apprentice from seeking or accepting employment while participating in an apprenticeship program. One reason employers may use non-compete provisions is to encourage and protect investments made in the skills of their workforce. A report published by the U.S. Department of the Treasury explained how non-competes offer a solution to what is referred to as the "investment hold-up problem," stating that "[n]on-competes offer an alternative: firms get an assurance that workers are unlikely to leave for some period of time, allowing the firm to capture more of the increased productivity from costly training it provides, and workers receive more training than they would otherwise."[26] Registered apprenticeships are among the most costly of investments in workforce development that an employer can make, as a 2016 report on the cost and benefits of apprenticeship found that, excluding start-up costs, the most expensive programs cost $250,000 per apprentice and the least expensive cost a still sizeable $25,000 per apprentice.[27] Employers will become less likely to invest their own resources into the development of registered apprenticeship programs if competitors have the ability to poach apprentices just as they are beginning to excel at their craft.

The proposed rule acknowledges the decrease in employer investment in apprenticeships that is likely to result but asserts this would be "outweighed on a macroeconomic level by the substantial economic benefits that would accrue to other employers in the same sector or occupation that can offer a more competitive salary and package of benefits to those employees."[28] The assumption that employers would continue offering apprenticeship programs – at substantial financial cost – to pump out a steady stream of skilled apprentices for their competitors to employ is not rooted in reality.

In addition to the implications for employer investment in apprenticeships, the prohibition on non-compete provisions, as well as the prohibition on non-disclosure provisions in proposed section 29.9(e), could pose specific challenges for employers in the technology sector and other industries where safeguarding intellectual property is paramount. While the proposed rule does assert that non-disclosure provisions can be used as it relates to the protection of an employer's confidential business information or trade secrets, opening the door to the Department's Office of Apprenticeship serving as the arbiter of what qualifies as an allowable use of non-disclosure agreements could have a chilling effect on employer participation from these industries.

Expanding this chilling effect is the requirement in proposed 29.10(6) that stipulates that a registration application include a written disclosure "of all instances where a federal, state, or local government agency has issued a final agency determination that the prospective sponsor (or any of its officers or employees) has violated any applicable laws pertaining to occupation safety and health, labor standards (including wage and hour requirements), financial management or

[26]https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

[27] https://www.commerce.gov/sites/default/files/migrated/reports/the-benefits-and-costs-of-apprenticeships-a-business-perspective.pdf

[28] https://www.federalregister.gov/d/2023-27851/p-1037

abuse, EEO, protections for employees against harassment or assault, or other applicable laws governing workplace practices or conduct" and a description of the actions taken by the prospective sponsor to remedy the violation.[29] The proposed rule asserts that this information will be considered in the review of an application and that registration may only be granted if the Department or SAA determines that the misconduct has been satisfactorily addressed, subjecting employers to a form of double jeopardy, notwithstanding the fact that neither DOL's Office of Apprenticeship nor an SAA has any expertise, knowledge, or jurisdiction over the applicable workplace laws. And the explicit threat of a criminal referral to the Department of Justice for failure to disclose a violation is sure to land well with employers deciding if it is worth participating in the registered apprenticeship system.[30]

Another new registration burden is the requirement in proposed section 29.10(5) that a registration application include information showing that the program sponsor possesses and can maintain financial capacity to operate the apprenticeship program. The proposed rule asserts that "the Department anticipates that the submission of a forward-looking narrative around the sponsor or sponsor organization's financial planning, funding streams, and overall financial solvency would satisfy the financial integrity provisions."[31]As with the required disclosure of any past violations, the Department's Office of Apprenticeship or an SAA does not have the knowledge or expertise to evaluate the financials of the prospective apprenticeship sponsor and to project the future solvency of their businesses. The provision will impose yet another burden on employers and sponsors while providing little if any benefit to the registered apprenticeship system.

Additionally, the prosed rule imposes a new mandate on program sponsors to disclose the nature and amount of any unreimbursed costs, expenses, or fees that an apprentice may incur and limits such costs to what are "necessary and reasonable" and do not result in "inequitable financial barriers." The Department confesses to not having data on the prevalence of excessive costs to apprentices but nonetheless is convinced that it is a problem that must be remedied in the proposed rule.[32] The arbitrary nature of determining when "necessary and reasonable" expenses cross the line into "inequitable financial barriers" is prone to inconsistent enforcement by the Department and will leave program sponsors guessing as they attempt to design apprenticeship programs that can make it through this proposed regulatory gauntlet. The result of this provision intended to be "a transfer payment from sponsors or participating employer to apprentices" will surely be fewer programs that decide the benefits of registering their apprenticeships outweigh the costs.

The end-point assessments under proposed section 29.16 that program sponsors would be required to develop and administer to each apprentice prior to his or her completion of the program raise several questions and present a new legal risk to offering a registered apprenticeship program. First, the proposed rule refers to an apprentice being awarded a certificate of completion if he or she "completes" the end-point assessment. Completing an assessment generally connotes a separate meaning than "passing" an assessment, so while it

[29] https://www.federalregister.gov/d/2023-27851/p-1661
[30] https://www.federalregister.gov/d/2023-27851/p-476
[31] https://www.federalregister.gov/d/2023-27851/p-530
[32] https://www.federalregister.gov/d/2023-27851/p-1184

appears the Department seeks the assessment to be used to reserve a certificate of completion for those who have "made the grade" and can demonstrate mastery of the competencies necessary to perform the occupation, the language in the proposed regulatory text does not make that clear.[33] The second concern is the requirement in the proposed rule that an apprentice who is not successful in completing the end-point assessment must be offered at least one additional opportunity to complete the assessment. The proposed rule does not clarify when the additional attempt must be provided, the timeframe it must be requested within, and if the apprentice has discretion on setting the time for his or her second attempt.

Most concerningly, the Department fails to recognize the legal hurdles that surround the use of assessments when making employment decisions and the cost of ensuring compliance when estimating that the new requirement will cost program sponsors a mere one hour of staff time per apprentice.[34] To avoid running afoul of Title VII of the *Civil Rights Act*, employers may seek to validate their assessment in accordance with the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) to ensure their use of such assessment is job-related and consistent with business necessity.[35] Even if the employer is using an assessment that has been developed and validated by a third party, the Uniform Guidelines generally require selection procedures to be validated locally by the user, although they allow for criterion-related validity evidence to be "transported" from other organizations if the user can demonstrate the job the user is assessing with the selection procedure is similar to that for which the procedure was validated.[36] The proposed rule makes no mention of assessment validation, nor does it contemplate ways the Department could ease the burden it is imposing on program sponsors and employers, such as offering a presumption of content validity for assessments that are constructed around the recognized competencies for a suitable occupation. While we recognize the value some employers may reap in assessing knowledge, skills, and abilities to facilitate the skills-based hiring and promotion of employees, the proposed rule imposes the end-point assessment as a requirement on all programs without providing any solutions to overcome the legal barriers that the use of assessments may pose.

Section 29.17 of the proposed rule alters the complaint process in multiple ways that could fuel a rise in complaints and pose additional burdens on employers. Notably, while current regulations specify that a complaint can be filed by an apprentice or his or her authorized representative, the proposed rule allows non-apprentices to file complaints and allows for complaints to be filed anonymously, both of which may invite meritless claims that taxpayer dollars and employer resources must be spent investigating and adjudicating. The proposed rule also allows complaints to be filed directly to the Department or SAA without the complainant first attempting to resolve the issue locally, as is required under the current regulations. Further, the proposed rule extends the period for which complaints can be filed from the 60 days of the final local decision to 300 days after the conclusion of the events that gave rise to the dispute, with the ability for the registration agency to extend the period of time. All these regulatory changes will increase the

[33] https://www.federalregister.gov/d/2023-27851/p-639
[34] https://www.federalregister.gov/d/2023-27851/p-1110
[35] https://www.govinfo.gov/content/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1607.xml
[36] https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines

time and expense employers and sponsors may face when complaints are made about their apprenticeship programs and hinder the swift resolution of any legitimate grievances.

Section 29.18 of the proposed rule imposes new additional recordkeeping requirements on program sponsors and participating employers that pose substantial burdens and raise serious questions about how such records will be used by the Department. For example, the proposed rule requires that all records be maintained for five years and provided to DOL or SAAs upon request. The proposed rule asserts that information obtained by the Department or applicable registration agency will be used only "in connection with the administration of this part or other applicable laws."[37] Without providing more clarity on precisely what the Department considers an applicable law, an apprenticeship sponsor or participating employer would be rightly concerned that their records could be passed from DOL's Office of Apprenticeship to the enforcement agencies within the Department which would subject them to additional scrutiny and potential unrelated investigations. If that is not the intent of the recordkeeping provisions, then the proposed rule should have made it explicitly clear so the Department could be held accountable for only using apprenticeship sponsor records for the purposes of overseeing compliance with the requirements of the registered apprenticeship system.

There are numerous other provisions of the proposed rule that will impose new mandates and burdens on program sponsors and employers, notably the new requirements in proposed section 29.12 related to the qualifications of journeyworkers and providers of related instruction and the prescriptive new wage progression requirements in proposed section 29.9. Apprenticeships for America created a burden analysis of the proposed rule, which identified 37 different provisions that would constitute a four or five out of five on their scale of the burden it would impose on apprenticeship stakeholders.[38] Any one of these provisions may constitute the reason an individual employer or workforce organization decides participating in the registered apprenticeship system is simply not worth it.

Fails to Consider Program Outcomes Effectively

The Department frames many of the new requirements established in the proposed rule as necessary to ensure the quality of registered apprenticeship programs, including the new data collection and quality metrics established in proposed section 29.25. This section of the NPRM requires apprenticeship sponsors to submit information annually on at least 10 different "quality metrics," some of which are to be calculated on an annual basis and others calculated by cohort or by individual apprentice. Further, the proposed rule directs the registration agency to collect data on at least five additional post-completion metrics, which is to be done using supplemental sources such as wage records and surveys. Despite proposing 15 unique metrics, the proposed rule fails to articulate clearly how the Department aims to use these effectiveness metrics in the course of program reviews.

Proposed section 29.19 covers how the Department or SAA must conduct reviews of registered apprenticeship programs and asserts that as a part of the review, the registration agency must review the program's performance on the 10 effectiveness metrics for which programs submit

[37] https://www.federalregister.gov/d/2023-27851/p-1779

[38] AFA+Burden+Analysis+Final+Draft.pdf (squarespace.com)

annual data. However, it is unclear both how an apprenticeship program's performance would impact its review and whether low performance could be the basis of corrective action or deregistration proceedings. The proposed rule specifies that the registration agency is to present a written Notice of Program Review Findings to the sponsor that identifies areas of noncompliance with the regulations, yet that seemingly would not cover low performance. After all, an apprenticeship program could be in compliance with all of the requirements of the proposed rule and yet have an extraordinarily low completion rate or employment retention rate. If the Department believes that low performance on these metrics could in fact constitute noncompliance with the regulations, the proposed rule is certainly not clear precisely what levels of performance the Department would deem deficient. The same issues apply to the process established for deregistration of a registered program under proposed section 29.20.

The collection and dissemination of new performance information on registered apprenticeship programs could have served as the basis for streamlining the burdensome, input-based quality assurance regime that is expanded throughout the proposed rule. Instead, apprenticeship programs that are delivering results for Americans and launching them into well-paying careers could be pushed out of the system for not adhering to the rigid, one-size-fits-all approach prescribed in the proposed rule while programs with low rates of completion and job retention are allowed to remain. The Department articulates a vision of "expansion with quality," yet the proposed rule would assure neither expansion nor quality.[39]

Conclusion

The last thing the registered apprenticeship system needs is hundreds of pages of top-down regulations, more power centralized in the hands of the federal government, injections of partisan and divisive ideologies, and arbitrary requirements that will lead to inconsistent enforcement and political favoritism. If the proposed rule is finalized, states, local workforce leaders, and employers will simply disengage and forgo the federal government's tarnished stamp of approval as they set out to build their own apprenticeship systems that are responsive to the ever-changing demands of the economy. The current administration appears to be acutely aware of this dynamic, and on March 6, President Biden issued an executive order that directs federal agencies to use their contracts and grant programs to coerce job creators into subjecting their apprenticeship programs to federal control at risk of being pushed out of federal funding opportunities.[40] We urge the Department to avoid doing such damage to the registered apprenticeship system under the *National Apprenticeship Act*, which the administration is preparing to wield as a weapon against those who don't wish to subscribe. Accordingly, we ask you to rescind the proposed rule.

Sincerely,

[39] https://www.federalregister.gov/d/2023-27851/p-144

[40] https://www.whitehouse.gov/briefing-room/presidential-actions/2024/03/06/executive-order-on-scaling-and-expanding-the-use-of-registered-apprenticeships-in-industries-and-the-federal-government-and-promoting-labor-management-forums/

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Tim Walberg
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Rick Allen
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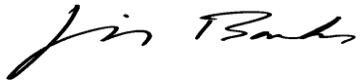

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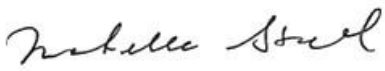

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