Testimony of Lynn Rhinehart,
Associate General Counsel, AFL-CIO

Before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

On

Midnight Rulemaking: Shedding Some Light

February 4, 2009

Testimony of Lynn Rhinehart,
Associate General Counsel, AFL-CIO

Before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

On

Midnight Rulemaking: Shedding Some Light

February 4, 2009

Mr. Chairman and Members of the Subcommittee:

My name is Lynn Rhinehart, and I am an Associate General Counsel for the AFL-CIO, a federation of 55 national unions representing more than 10 million working men and women across the United States. Thank you for the opportunity to testify today about the negative impact some of the Bush Administration's last-minute regulations will have on workers, and about the tools available to the Obama Administration and Congress for preventing these harms.

It is not uncommon for outgoing administrations to produce more regulations at the end of their tenure.[1] These rules are sometimes the product of lengthy and thoughtful rulemaking proceedings involving full public participation, and in that sense, it is hard to label these rules "midnight." But the Bush Administration issued a remarkable number of final regulations in its final months that were truly "midnight" rules in the worst sense of the term – last-minute regulations on important, substantive issues that were rushed

[1] *See* "Cleaning Up and Launching Ahead," Center for American Progress (January 2009) (finding that regulatory output increased in the final years of the Reagan, George H.W. Bush, and Clinton administrations); "After Midnight: The Bush Legacy of Deregulation and What Obama Can Do," Center for American Progress and OMB Watch (January 2009) (finding that the George W. Bush administration's regulatory output in 2008 far exceeded prior years).

through the process, short-circuiting public participation along the way, in order to cement the outgoing administration's policy views and impose them (at least temporarily) on the incoming administration. The Bush Administration issued, or tried to issue, a disturbing number of midnight regulations that would undermine worker protections. The Bush Administration also took steps to make sure that many of its last-minute rules would take effect before President Obama took office, making it more difficult for the incoming Obama Administration to modify or undo these rules.

On May 9, 2008, White House Chief of Staff Joshua Bolten issued a memorandum to executive agencies that instructed agencies to avoid engaging in midnight rulemaking.[2] The memo directed agencies to finish rules by no later than November 1, 2008 (except in extraordinary circumstances), and to propose rules no later than June 1, 2008 (except in extraordinary circumstances) if the agency wanted to finish the rulemaking during the Bush Administration.

But in the waning months of the Bush Administration, it became clear that the Bolten memo was mere windowdressing. Agencies violated the Bolten memo with impunity and with no apparent consequences.

In the final months of the Bush Administration, the Department of Labor pumped out numerous proposals and final rules, including many rules that undermined worker protections. It is important to understand that this activity was carried out by the same Department of Labor that for eight years had set a low water mark for failing to pursue rulemakings of significance to *improve* worker protections, except when required to act by Congress or as the result of litigation.

---

[2] *See* Memorandum to Heads of Executive Departments and Agencies from Joshua Bolten (May 9, 2008) ("We need to . . . resist the historical tendency of administrations to increase regulatory activity in their final months.")

Take, for example, the crucially-important area of worker safety and health. After President Bush took office, the Occupational Safety and Health Administration (OSHA) removed dozens of important workplace safety and health rules from its regulatory agenda and failed to issue any significant OSHA regulations except as a result of litigation. Yet in the waning months of the Bush Administration, political operatives at the Department of Labor tried to rush through a rule on risk assessment that would slow down an already-glacial OSHA standard setting process and impose new barriers to setting strong rules to protect workers from toxic substances on the job.[3] The proposed rule was developed by political appointees at the Department of Labor, not career staff. It was never listed on the Department's semi-annual regulatory agenda, as required by Executive Order 12866, and literally came out of nowhere. In their haste to rush the rule through, DOL allowed interested parties only 30 days to comment on the proposed rule and denied requests from the AFL-CIO, other labor organizations, members of Congress, and public health groups, for an extension of time to submit comments and for a hearing on the proposed rule. The risk assessment rule also violated the Bolten memo, in that it was proposed on August 29, 2008 – well after the supposed June 1 deadline for rules to be completed during the Bush Administration. Fortunately, the Bush Administration and the political appointees at the Department of Labor failed in their effort to rush out the secret rule on risk assessment, but the rulemaking is a telling illustration of midnight rulemaking at its worst. Hopefully the proposal will be quickly withdrawn by the Obama Administration.

[3] *See* 73 Fed. Reg. 50909 (Aug. 29, 2008); *see also* Testimony of Peg Seminario, Director of Safety Health, AFL-CIO, before the U.S. House of Representatives' Committee on Education and Labor, Subcommittee on Workforce Protections (Sept. 17, 2008), available at http://edlabor.house.gov/testimony/2008-09-17-PegSeminario.pdf.

Another "near miss" involved proposed rules that made changes in the Department of Labor's regulations governing the Fair Labor Standards Act, which guarantees workers the minimum wage and overtime protections. Here again, these rules were proposed by a Department that for eight years issued ***no*** regulations to strengthen wage and hour protections for workers. The Bush Administration's only significant wage and hour rulemaking was to change the rules on overtime eligibility. Experts estimated that the rules could deprive more than six million workers of much-needed overtime pay.[4] Against this backdrop, the Bush Administration's last-minute effort to weaken its FLSA rules is that much more objectionable. DOL described the proposed rules as merely updating its rules, but in reality, many of the proposed new rules would result in less pay for workers. For example, the proposed rules would make it easier for employers to take a credit against their minimum wage obligations for employee tips and employer-provided meals. The rules would make other changes that would enlarge the overtime exemption for some employees and limit public sector workers' ability to take compensatory time. Fortunately, here again, the political operatives at the Department of Labor were unable to rush out a final rule, and hopefully the proposal will be withdrawn by the Obama Administration.

The Bush Administration did manage to finalize a number of rules that will have harmful consequences for workers. Several examples follow. These rules are listed in a chart attached to this testimony, along with additional rules issued in the final months of the Bush Administration that need to be strengthened (e.g., MSHA rules on Belt Air and Refuge Alternatives, and OSHA's rule on vertical tandem lifts).

[4] *See* Ross Eisenbrey, Economic Policy Institute, "Longer Hours, Less Pay" (2004) (estimating that DOL's changes to the white collar rules could eliminate overtime pay for more than six million workers).

H2A Rules: Undermining labor standards for temporary immigrant agricultural workers

On December 18, 2008 – well after the November 1 deadline set forth in the Bolten memo – the Department of Labor published final regulations that drastically lower wages, labor protections, and housing standards for farmworkers, severely limit the ability of U.S. workers to obtain employment with H2A employers, and limit the oversight and enforcement of the few protections that remain. The new rules replace a pre-hire certification process, under which DOL verified an employer's claims about labor shortages and wage standards, with a self-attestation system where employers merely attest that they have abided by the rules. The rules eliminate the current requirement that H-2A employers provide free housing that meets certain standards, replacing it with a voucher option. And the new rules eliminate the role of state workforce agencies in reviewing employers' applications.

The new H2A rules also abolish the "50 percent" rule, which required employers to hire qualified U.S. workers who apply for work until half of the season has elapsed. The 50 percent rule is an important method for granting U.S. workers a job preference over imported temporary workers, and creates an incentive for pre-season recruitment of U.S. workers.

In order to ensure that the new rules would take effect before President Obama took office, the Bush Administration allowed the rules to take effect in 30 days (the minimum amount of time allowed by the Administrative Procedure Act), and not the usual 60 days for significant rules of this nature. If these new rules are allowed to stand – which we hope they are not – agricultural employers can be expected to take advantage of the new "attestation" system to recruit a flood of temporary agricultural workers under

potentially exploitative conditions, thereby driving down standards for workers in the agricultural industry.

H2B: Undermining labor standards for temporary seasonal immigrant workers

The Bush Administration also rushed to get new rules in place that undermine labor standards for temporary seasonal workers under the H2B visa program. As with the H2A rules, the final rules were issued in violation of the Bolten memo on December 19, 2008. And, as with the H2A rules, the Bush Administration allowed only 30 days – until January 18, 2009 – for the new rules to take effect.

Like the H2A rules, the new H2B rules eliminate the pre-hire certification process at DOL, instead allowing employers to self-attest that they need the temporary workers and that there are not enough able and qualified U.S. workers available to do the work. The role of state workforce agencies in reviewing employer claims with respect to their need for temporary workers and the unavailability of U.S. workers is eliminated.

The rules also gut the requirement that H-2B workers be hired only into *temporary*, full-time jobs, thereby opening up many more U.S. workers to unfair competition for work. Under the prior regulations, DOL considered jobs that lasted up to ten months out of the year as "temporary". The new regulations allow employers to bring in H2B workers for a "temporary" one-time need of up to three years.

Under the new rules, employers experiencing a long-term need for a larger workforce could completely avoid the demands of the domestic labor market by serially employing H2B workers, on temporary visas, to meet this long-term need. This would drag down wages and working conditions for workers in the industry or region as a whole.

The combination of self-attestation, the elimination of the state workforce agencies, and the broadened definition of "temporary" will further depress wages in the industries in which the H2B program operates, to the detriment of U.S. workers. And, because there is an endless supply of citizens of foreign countries willing to work in the United States, and these jobs are generally classified as unskilled, employers' access to that foreign labor supply means that employers have little or no economic incentive to meet the economic demands of U.S. workers seeking a better wage. The new H2B rules need to be rescinded.

Erecting Obstacles to Workers Taking Family and Medical Leave

On November 17, 2008 – after the deadline set forth in the Bolten memo, but just in time for the regulations to take effect before the end of the Bush Administration – the Department of Labor issued final regulations under the Family and Medical Leave Act. The new rules make it more difficult for employees to take family and medical leave by erecting new hurdles and procedural roadblocks, and the rules open the door to inappropriate disclosure of information to employers by allowing them to have direct conversations with a worker's private physician about the employee's need for leave. The changes were opposed by women's rights organizations, labor organizations, and others, but favored by the business community. The new FMLA rules also contain provisions implementing the FMLA amendments to the National Defense Authorization Act for FY 2008, Pub. L. 110-181, which provide for leave for military families to care for service members. Advocates generally supported the military leave provisions.

Undermining Trucker and Highway Safety

On November 19, 2008, the Department of Transportation issued final rules increasing the allowable driving hours for truck drivers from 10 consecutive hours to 11, and shortening mandatory rest times between drives. Consumer groups and labor organizations oppose these rules because of their adverse impact on driver health and safety, and on highway safety. The rules issued by DOT on November 19, 2008 are virtually identical to provisions that have twice been rejected by the U.S. Court of Appeals for the D.C. Circuit. The final rules took effect on January 19, 2009 – the day before President Obama took office. A petition for reconsideration of the rules, submitted by worker and consumer advocates, was denied by DOT before the Bush Administration left office.

Weakening Safeguards Against Conflicts of Interest in Investment Advice

On August 22, 2008 – again in violation of the Bolten memo – the Department of Labor's Employee Benefits Security Administration (EBSA) issued proposed rules that allow for money managers to give conflicted investment advice to workers participating in individual retirement account plans such as 401(k)s, even if the money manager stands to profit from the advice. Labor organizations, senior citizen organizations, members of Congress and others strongly objected to the Department's proposal out of concern that it opened the door to conflicts of interest by investment advisers. Notwithstanding these objections, EBSA proceeded to finalize the rule, which was sent to the Office of the Federal Register on the last business day of the Bush Administration and published on January 21, 2009 – again in clear violation of the Bolten memo.

Imposing New Reporting Burdens on Labor Organizations

In stark contrast to the Bush Administration's reticence to issue rules improving workers' health, safety, wage and hour, or pension protections, the Department of Labor issued a myriad of rules requiring increased financial recordkeeping and reporting by labor organizations and union officers. During its tenure, the Bush Administration issued four major new rules imposing heavy reporting obligations on labor organizations and their officers[5] and at the same time increased resources for investigation and regulation of labor organizations.[6]

In 2003, the Bush Administration pushed through a major expansion of the annual financial reports that the largest labor organizations are required to file – called the Form LM-2. The new rules require unions to track and report their financial transactions in minute detail. This produces an avalanche of meaningless data at an enormous cost both to the labor organizations that must file the reports and to the union members whose dues pay for the new recordkeeping and accounting systems. The AFL-CIO's report, for example, went from approximately 200 pages under the old form to approximately 800 pages under the Bush Administration's new rule.

Without studying whether the new forms actually provided workers with useful information, in May 2008, the Labor Department embarked on another round of LM-2

[5] In addition to the massive expansion of the Form LM-2 described in the text above, in 2007 DOL promulgated a major expansion to the LM-30 report, which union officers and employees must file, that dramatically expanded the number of individuals that must file the reports to include union volunteers, and that dramatically expanded the types of transactions that individuals must report. 72 Fed. Reg. 36106 (July 2, 2007). Also, in 2006, the Department published requirements for a new T-1 report for unions to file concerning "significant trusts in which they are interested." 71 Fed. Reg. 57716 (Sept. 29, 2006). As with the prior version of this requirement, the new T-1 rule was struck down by the court. Undeterred, the Department promulgated another new T-1 rule in 2008, 73 Fed. Reg. 57412 (Oct. 1, 2008).

[6] According to an unpublished study by Professor John Lund, the Office of Labor Management Standards (OLMS) spends approximately $2,700 per labor organization under its jurisdiction, while OSHA and the Wage and Hour Division spend $26 each per covered workplace.

reforms, seeking even more detailed information from labor organizations. The new rules also proposed procedures for revoking the right of smaller unions to file a simplified financial report, if their report is delinquent or deficient. These small unions would then need to file the far-more complicated Form LM-2, which they are not set up to handle. Unions filed comments objecting to the proposed rule, but DOL proceeded to finalize the new rule, sending it to the Federal Register on the Friday before President Obama's inauguration so that it would be published on January 21, 2009 – the first full day of President Obama's term. The new rules take effect on February 20, 2009. If allowed to stand – which we hope they are not – the new rules will further increase the recordkeeping and reporting burden on labor organizations with no apparent benefit to workers.[7]

Removing Information from Contractors' Payroll Records

The Bush Administration also rushed through a rule that allows contractors covered under the Davis-Bacon Act and the Copeland Anti-Kickback Act to omit social security numbers and home addresses of workers on the weekly payroll reports these contractors are required to maintain and provide to the government. The deletion of this information from the payroll reports will make it harder for the government to verify the accuracy of the reports. The rule was proposed on October 20, 2008 – long after the June 1, 2008 deadline in the Bolten memo – and after a short 30-day comment period, final rules were issued on December 19, 2008, to take effect on January 18, 2009.

[7] On February 2, 2009, the Office of the Federal Register posted a notice, to be published in the Federal Register on February 3, 2009, by the Department of Labor requesting comments on a proposed 60-day extension of the effective date of the new LM2/3 rules and seeking comments on the rule generally, including the merits of retaining or rescinding the rule.

Options for Addressing the Bush Administration's Midnight Rules

It is unfortunate, given the current economic crisis and the many pressing issues facing our country, the new Administration, and Congress, that time and resources will have to be spent dealing with the Bush Administration's harmful midnight regulations – resources that should rightly be going toward the development of *protective* regulations. Fortunately both the Obama Administration and Congress have several options for dealing with rules that they find objectionable.

In considering these options, it is important to look at each midnight rule to determine the best course of action for that particular rule. No one solution fits every situation. In some cases, the best solution is to revoke a midnight rule entirely. In other cases, the better course might be to retain the midnight rule but engage in rulemaking to improve upon its deficiencies. In addition, it is important that Congress and the Obama Administration communicate with each other and coordinate their efforts, in order to facilitate the Obama Administration's efficient and prompt response to particular midnight rules of concern.

Proposed rules that were not completed by the Bush Administration, such as the proposals to weaken Fair Labor Standards Act protections or the secret rule on risk assessment, are the easiest to address. The Obama Administration's new Department of Labor can issue a notice in the Federal Register withdrawing the proposed rule in question.

For rules that were issued in final form but have not yet taken effect, the Obama Administration, via a memorandum to agencies from Chief of Staff Rahm Emanuel and a followup memo from OMB Director Peter Orszag, has instructed agencies to consider

extending the effective date of particular last-minute rules and taking public comments on whether to modify or repeal the rule. Agencies will need to justify their decisions to extend effective dates and to modify or repeal particular rules, but it is clear that they have legal authority to undertake such regulatory proceedings.

Last-minute rules that have already taken effect are obviously the most problematic category of rules. The Obama Administration will need to quickly review these rules and undertake a new rulemaking to modify or repeal rules that it finds problematic. These rulemakings can be time-consuming and burdensome, and divert resources from other important agency priorities, such as proposing new rules to ***improve*** worker protections.

Congress can assist the Obama Administration in dealing with these problematic midnight rules in a number of ways:

- Congress can adopt a rider on the relevant appropriations bill blocking implementation of new rules that it finds objectionable, which would give the Obama Administration breathing space to reconsider, modify, or revoke the rules in question;
- Congress can facilitate review of problematic rules by passing legislation authorizing the executive branch agencies to suspend immediately the effective dates of midnight rules (e.g., rules that violated the Bolten memo) that the Congress and/or the agencies find problematic;
- Congress can disapprove any of the Bush Administration's last-minute rules under the Congressional Review Act.

In addition, Congress should appropriate sufficient funds to the executive branch agencies to enable them to both review and deal with the Bush Administration's midnight rules and engage in new, protective rulemaking. Rulemaking can be a resource-intensive, time-consuming endeavor, and it is important that these agencies have the resources they need both to deal with the problems left by the Bush Administration and to move forward with protective regulations.

Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.