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*The Rising Presence of
Government in the Workplace*

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The Rising Presence of Government in the Workplace

by Murray Weidenbaum

The current debates over the controversial provisions of parental leave and civil rights legislation obscure a more fundamental trend: the rising presence of government — especially the federal government — in the workplace.

A word of caution is necessary. The argument is usually framed, erroneously, as a battle between the business beast and the beauty of the public interest. It is more useful to analyze the issue in less pejorative terms, as a continuing struggle between employers and a variety of interest groups rarely concerned with the productivity and competitiveness of the American economy. Employees are often caught in the crossfire. After all, many observers tend to forget that employers are found in both the public and private sectors; they run the gamut from profit-seeking businesses to nonprofit schools, museums, and hospitals. But they all possess one overriding characteristic: they produce goods and services in an effort to meet the needs of the public.

For government officials, however, regulation and imposing mandates on employers are easy ways of advancing policy agendas without spending much federal money. But the public does not escape paying the cost. Every time government uses regulation and mandates to impose new standards on the workplace or increase employee benefits, it imposes a more expensive method of production. The cost of products and services will necessarily go up, whether they are paid for in the form of charitable contributions or prices charged by enterprises.

Yet regulation is a hidden tax with a double payoff for politicians. First, they can

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crow to their constituents that they voted for better treatment of employees. Then they can berate "greedy" companies for raising prices even though they are merely passing on the costs of complying with those new mandates.

New Regulation of the Workplace

Americans with Disabilities Act

While public attention in the human-resource area has been focusing on the debate over a new Civil Rights Act, professionals are gearing up for compliance with the recently enacted Americans with Disabilities Act (ADA). That law will take effect on July 26, 1992, for employers with 25 or more workers and on July 26, 1994, for those with 15 or more employees. Let us examine this new law, because the way it was written may be indicative of the new wave of government involvement in the economy. Of course, the very title makes it hard to criticize the statute.

Nevertheless, both the law and regulations issued to date are vague. The Equal Employment Opportunity Commission (EEOC) says that it will evaluate claims on a case-by-case basis. This likely means the new law will be shaped primarily by court decisions to be made over the next several years. In the words of a Justice Department pamphlet explaining ADA, "Some litigation is inevitable."

Virtually every provision of ADA is judgmental. The regulations state that an employer may not deny employment to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it is significant — that is, when it poses a high probability of substantial harm. Those who will be charged with drawing the line between slight and significant may need the wisdom of Solomon.

Under the new law, a medical examination can be required only after making an offer of employment and before the applicant starts work. The job offer may be conditioned upon the results of the examination provided that all other applicants are subject to such an examination. If an applicant is screened out as a result of the medical exam, the criteria must

be shown to be job-related and consistent with business necessity. Also, it must be demonstrated that performance of the essential job functions cannot be accomplished with reasonable accommodation.

Determining what is required to satisfy the reasonable accommodation standard will vary from situation to situation and will, in part, be dependent on the size and financial strength of the employer.

The law and regulations state that they are designed to avoid imposing "undue hardship" on employers. A straightforward reading of the provisions makes it clear that, as in many other parts of ADA, the vague language will be difficult to interpret with any degree of confidence -- prior to protracted adjudication.

EEOC expects to receive 20 percent more charges of discrimination in 1992, when it begins enforcing the Americans with Disabilities Act. EEOC chairman Evan Kemp believes that the ADA is a "more complicated act to enforce" than Title VII of the 1964 Civil Rights Act. EEOC anticipates that a significant portion of ADA cases will require the use of medical, architectural, biotechnical, or vocational specialists.

The Tax Revenue Reconciliation Act of 1990 will provide some financial help, especially to small firms. This law creates a disabled "access" tax credit equal to 50 percent of eligible expenses over \$250 and up to \$10,250. Covered expenses include costs of removing barriers and providing readers, interpreters, and equipment for hearing- and sight-impaired persons. Although it is fashionable to limit the use of the term subsidy to gifts from the public Treasury to large organizations, it is apparent that Treasury receipts will diminish as smaller companies respond to ADA. Subsidy is the correct term to apply.

It strikes this observer that the new disability law can surely be justified on grounds of compassion. But in view of the public and private costs that will be involved, it is very hard to endorse the claim that the overall effect on productivity and competitiveness will be positive. On the one hand, it is heartwarming to learn that business (and other employers) will be encouraged, for example, to provide readers for the blind. On the other hand, it is difficult to

understand how paying two people to do essentially one job can be cost-effective — no matter how large and well-financed the employer may be.

Civil Rights Agreement

Turning to the new civil rights bill, while the agreement between Senator John Danforth and the White House has been hailed as a historic compromise, more charges of employment discrimination are likely to be the result. That will be due to the fact that it will be harder for business to defend itself.

For example, since the Wards Cove case in 1989, complainants have had the burden of proving that the employer had no business necessity for the disputed practice. Under the civil rights agreement, the Wards Cove decision in effect is overturned. The burden of proof shifts to the employer once a "disparate impact" is shown.

Under the new agreement, employers must meet two tests. First, they must show that employment practices are job related for the position in question. Second, they must demonstrate that the practice is "consistent with business necessity."

Fines and Jail Sentences

Meanwhile, the federal government has quietly launched an expanded effort to prosecute and jail people for "regulatory crimes" rather than to rely on traditional civil or administrative proceedings. This is reminiscent of the tendency in the former communist nations to label previously legal business activities as "criminal." But, especially if the word "environment" is included in the label, it is difficult to oppose an expansion of governmental power, no matter how arbitrary.

Nearly all federal environmental laws, including the new Clean Air Act, contain provisions that call for criminal sanctions, including fines and imprisonment. Recently revised federal sentencing guidelines greatly add to the possible severity of environmental prosecutions.

In some cases, the new guidelines can require that the maximum sentence stated in the environmental law becomes the minimum punishment allowed. A first-time violation will normally lead to time in jail. For example, under the Resource Conservation and Recovery Act (RCRA), subjecting human beings to "knowing endangerment" by exposing them to risk due to unlawful disposal, treatment, or storage of a hazardous waste can result in 15 years imprisonment as well as a million dollar corporate fine. As in the case of the other laws we discussed, the degree of "endangerment" and "risk" are not terms defined with great clarity or specificity.

It is easier to prove environmental offenses than other crimes. For most crimes, the prosecution must show that an individual acted with specific intent — that the individual knew that the activity was unlawful and acted willfully despite that knowledge. But, in environmental crimes, the prosecution must show only that an individual acted "knowingly." No proof of specific intent to cause harm or injury has to be shown. The definition of "knowing" is evolving rapidly. Some legal experts contend that the standard is getting close to that of "strict liability," where individuals can be held liable even when no personal illegal activity is involved.

For example, Disneyland recently paid a \$550,000 fine for 38 violations of toxic waste laws. What did Mickey Mouse and Donald Duck do? Disneyland's law-breaking arose because the dump sites where its waste hauler disposed of paint thinners and cleaning materials were not licensed to process those materials. What happened to "willful" and "knowingly"?

Buried in the 1990 budget deficit reduction package is a sharp seven-fold hike in maximum penalties for civil violations of Occupational Safety and Health Administration (OSHA) regulations. The top civil penalty for a single repeated or willful violation of OSHA will rise to \$70,000; the compulsory minimum penalty for a willful violation is now \$5,000.

A parallel five-fold increase is mandated for civil violations of the Mine Safety and Health Act. The federal government expects to raise more than \$1 billion over five years from the two sets of increases in fines.

Pressure for revamping the OSHA law also continues. The Senate Subcommittee on Labor has already held hearings on the 1991 version of the proposed OSHA Criminal Penalty Reform Act.

Coming Down the Pike

A variety of other pending changes in federal statutes would further complicate the job of running American businesses in an increasingly competitive global marketplace.

Coming down the pike is COSHRA, the proposed Comprehensive Occupational Safety and Health Reform Act, introduced by the chairmen of the House and Senate Labor Committees — Congressman William Ford of Michigan and Senator Ted Kennedy of Massachusetts (plus Ohio Senator Howard Metzenbaum). COSHRA would require companies with 11 or more employees to set up employer/employee safety and health committees, with an equal number of employee and employer representatives.

The joint committees would be given many rights. These include:

- Reviewing the employer's written safety and health programs;
- Reviewing incidents involving work-related deaths, injuries and illnesses, and employee complaints;
- Inspecting the worksite at least every three months and also when an employee complaint is filed; this includes interviewing employees;
- Participating in contested citation proceedings, including cases that come before the Occupational Safety and Health Review Commission;
- Challenging negotiated settlements between the company and OSHA; and
- Providing full pay and benefits for time spent on committee work.

Each company with more than ten workers would have to come up with a written health and safety program containing methods and procedures for dealing with the following:

- Identifying, evaluating, documenting, and correcting safety and health hazards;
- Providing occupational safety and health services, including emergency response and first aid;

- Responding to the recommendations of the safety and health committee; and
- Providing employee safety and health training and education.

COSHRA develops the notion of employee "right-to-act." Workers could take legally protected action to stop what they consider to be unsafe conditions or procedures, even if that brings production to a halt. On reflection, it seems clear that legitimate differences of opinion can arise about the appropriateness of a given production process or procedure. Shifting the decision-making authority away from management would be a significant departure in our private-enterprise system.

Some companies believe that giving employees such broad new rights can create opportunities for mischief during periods of controversy such as union-organizing campaigns. They note that unfair labor practice charges tend to diminish with the acceptance of a union contract or the recognition of a union. These companies see the potential for employees to use the "safety" issue in the same way as they have used the issue of union recognition.

The proposed statute also expands the "shut down" authority of OSHA inspectors. Under current law, the inspector must obtain a court injunction in order to close down a facility deemed to constitute an imminent danger. On occasion, such citations are later reversed by the courts.

Under the Kennedy-Metzenbaum-Ford proposal, equipment deemed "unsafe" would be "tagged out" by OSHA until the problem is corrected. The employer would be forced either to accept OSHA's remedy or to contest the citation while production remains at a standstill.

House and Senate committees have also been holding hearings on the Indoor Air Quality Act of 1991, co-sponsored by Representative Joseph Kennedy of Massachusetts and Senator George Mitchell of Maine. If enacted, this bill would require the Environmental Protection Agency to create a national strategy to combat indoor air pollution. OSHA would be impelled to create an indoor air-quality standard within two years.

Other regulatory programs on the congressional agenda include the proposed "workplace fairness" act (making it illegal for an employer to hire permanent replacements

during a strike), a revised Clean Water Act, an expanded toxic wastes law (the Resources Conservation and Recovery Act or RCRA), renewal of the Superfund statute (the Comprehensive Environmental Response, Compensation, and Liability Act or CERCLA), and perhaps a redo of TOSCA, the Toxic Substances Control Act.

Contrary to a widely held view, "deregulation" has been limited to traditional economic regulation, such as airline travel and railroad transportation. Social regulation, in striking contrast, is on a growth trajectory.

An indication of things to come in the years ahead is contained in an October 1991 report on employee leave issued by the National Research Council, which is an agency of the National Academy of Sciences. It is intriguing to note that the study by this prestigious organization was issued in the midst of the ongoing debate over requiring employers to provide unpaid leave for family and medical purposes. While President Bush vetoed a bill mandating unpaid leave, the National Research Council report goes much beyond that relatively modest proposal.

In its 260-page study on work and family policies, the Council concluded that U.S. employers have not kept pace with the needs of a diverse work force. To quote from the report, "Many employers have not yet adapted to the legitimate needs of workers with family care responsibilities."

The report states that one-half of U.S. workers care for children, elderly parents, or other family members. However, fewer than one-third of all employees have a spouse at home full time to perform such tasks. In view of that situation, the Council's report offered the following specific recommendations:

- Paid family leave to care for infants and ill family members;
- Paid sick leave, including leave for disabilities related to pregnancy and childbirth;

- More opportunities for flexible schedules, part-time work, and alternative work locations; and
- Resource and referral programs, employee assistance programs, and other forms of direct and indirect help.

The panel writing the report came up with an intriguing conclusion: employers should be expected to share the responsibility of making it possible for workers to do justice to both their jobs and their families.

To some extent, public policy would be forcing private practice to complete a circle of change. Just a few decades ago, women and other unmarried employees lamented the tendency for employers to be more generous to married men, which was justified on the ground that they had families to support. Since then, laws and regulations have been promulgated to prohibit such discriminatory practices.

Yet enactment of the proposals of the National Research Council would establish a new set of inequities in the workplace. Employees with greater family responsibilities would receive larger total compensation packages than workers who are identical in every way (seniority, productivity, etc.) except for family status.

A final and very uncomfortable thought: it was the now discredited communist regimes that proclaimed, "From each according to his ability, to each according to his needs."