



Headquarters

250 West 55th Street, 17th Floor
New York, NY 10019
tel: 212.430.5982

Southern Office

2301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

DC Office

815 16th Street NW, Suite 4162
Washington, DC 20005

Colorado Office

303 E. 17th Ave., Suite 400
Denver, CO 80203

abetterbalance.org | info@abetterbalance.org

Submitted via Regulations.gov

June 5, 2023

Richard L. Revesz
Administrator
Office of Information and Regulatory Affairs

Re: Proposed Revisions to Circular A-4, Regulatory Analysis, and Circular A-94, Federal Spending (Docket Nos. OMB-2022-0014 & OMB-2023-0011)

Dear Administrator Revesz:

I write on behalf of A Better Balance in support of the Office of Information and Regulatory Affairs' ("OIRA") recent proposed revisions to Circular A-4¹ and Circular A-94.² A Better Balance is a national legal services and advocacy organization that uses the power of the law to advance justice for workers so they can care for themselves and their loved ones without jeopardizing their economic security. In addition to our policy and litigation work, we also run a free and confidential legal helpline, through which we hear from thousands of workers—disproportionately low-income women of color—as well as pregnant and parenting students, every year.

The application of Circulars A-4 and A-94 to proposed regulations and federal spending would significantly affect the workers and students we serve. For example, Circulars A-4 and A-94 would impact Department of Labor regulations implementing the Family and Medical Leave Act ("FMLA"), Equal Employment Opportunity Commission regulations implementing the Pregnant

¹ See OMB, Request for Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis," 88 Fed. Reg. 20,915 (Apr. 7, 2023), <https://www.federalregister.gov/documents/2023/04/07/2023-07364/request-for-comments-on-proposed-omb-circular-no-a-4-regulatory-analysis>. This comment addresses both the proposed revisions to Circular A-4 and its preamble.

² See OMB, Public Comment on Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, 88 Fed. Reg. 20,913 (Apr. 7, 2023), <https://www.federalregister.gov/documents/2023/04/07/2023-07179/public-comment-on-guidelines-and-discount-rates-for-benefit-cost-analysis-of-federal-programs>.

Workers Fairness Act and the Americans with Disabilities Act, and Department of Education rules implementing schools' nondiscrimination obligations to pregnant and parenting students—all regulations that deeply affect the lives of the workers and students from whom we hear every day on our helpline and in our public education work.

The proposed revisions represent a much-needed update to OIRA's review of proposed regulations and spending. The proposals bring modern economic analysis to this review and reflect the realities of how costs and benefits are experienced in the real world. Of particular importance are the incorporation of income weighting, the renewed focus on distributional effects, and the modernization of the discount rate used by OIRA.

First, we applaud OIRA's recognition of an obvious truth: the gain or loss of one dollar means something very different to a minimum-wage worker than it does to the CEO who runs their company.

For example, the Department of Labor's regulatory requirement that employers notify a worker of their eligibility to take FMLA leave—not only when an employee requests such leave but also when the employer “acquires knowledge that an employee's leave may be for an FMLA-qualifying reason”³—has a greater marginal benefit to low-wage workers than its cost to the large companies that employ them.⁴ By combatting the differential access in knowledge between worker and employer, the Department's regulation aims to ensure that low-wage workers (nearly half of whom are 25 years old or younger⁵ and who, unlike most employers, do not have access to legal counsel) are actually able to know and use the statutory leave rights to which they are entitled.⁶ Income weighting would reinforce the benefits of notice requirements like these by

³ 29 C.F.R. § 825.300(b)(1).

⁴ The FMLA applies only to employers with 50 or more employees.

⁵ See BLS REPORTS, CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2020 (Feb. 2021), <https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm> (“Although workers under age 25 represented just under one-fifth of hourly paid workers, they made up 48 percent of those paid the federal minimum wage or less.”).

⁶ See SCOTT BROWN, JANE HERR, RADHA ROY, & JACOB KLERMAN, EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS (Rockville, MD: Abt. Associates, 2020), 10–13, https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHd_FMLA2018SurveyResults_FinalReport_Aug2020.pdf (observing that one-quarter of all employees were not aware of the FMLA; documenting significant confusion among workers about both eligibility and qualifying reasons for FMLA leave; and noting that “[a]mong employees who *have* heard of FMLA, the most commonly reported source for learning about FMLA is their employer/human resources department”) (emphasis added).

recognizing that the modest cost to employers of providing such notice is vastly outweighed by the significant benefit to workers of learning about, and being able to access, the job-protected leave they need to keep their jobs and remain in the workforce.

Likewise, we anticipate that the Department of Education’s proposed regulations under Title IX of the Education Amendments of 1972, which would require schools to provide pregnant and postpartum students the “reasonable modifications” they need to stay in school and learn, will have a greater marginal benefit to such students than cost to their schools.⁷ Applying income weighting to the Education Department’s analysis would further bolster the Department’s recognition that the true cost to a pregnant student of being pushed out of school—foregoing their education and losing out on future earning potential—due to being refused a reasonable modification, such as a larger desk or an extension on an assignment, is far greater than the cost to the educational institution of providing the needed modification.⁸ Requiring agencies to consider the true benefit or cost their actions will have in the real world—not just in a mathematical formula—is common sense.

Second, and for similar reasons, we support OIRA’s emphasis that agencies should consider distributional effects in conducting their benefit-cost analyses in appropriate circumstances. We are deeply familiar with the ways in which benefits and costs are not spread evenly among all Americans. On our legal helpline, we hear consistently from workers who are low-income, young, immigrants, or have limited English proficiency—workers for whom employer notification of their entitlement to FMLA leave, for example, is particularly vital.⁹ Focusing on distributional effects is an important way of pressure-testing theoretical benefits and costs to ensure that, in the real world, they are not benefiting those who need it least and costing those who can least afford to pay.

Finally, we support OIRA’s proposal to modernize the use of discount rates. Modern policy making should fully and accurately account for longer-term benefits and costs, but these

⁷ See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), available at <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

⁸ See, e.g., JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT (Oct. 21, 2020), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628> (noting that the costs of accommodations are often minimal, while the benefits are high).

⁹ For example, non-low-wage employees are far more likely to be aware of the FMLA than non-low-wage employees (83 percent versus 60 percent). See Brown, *supra* note 6, at 11.

consequences have been artificially discounted by the existing review process. In particular, the proposals would empower OIRA to consider, for example, the long-term benefits of guaranteeing robust job protection, strong anti-retaliation and anti-interference protections, and maintenance of healthcare coverage to workers who need time off to care for their own or a loved one's health needs. Such considerations would better account for the modest short-term costs of providing such benefits as compared to the substantial long-term costs of *not* providing them, including decreased workforce participation and potential loss of advancement opportunities as well as increased healthcare costs due to delayed care-seeking.¹⁰

Thank you for taking the time to consider our views, and the impact these proposed revisions will have on low-wage workers and students across the country. Please do not hesitate to reach out with any questions.

Sincerely,

Dana Bolger
Staff Attorney
dbolger@abetterbalance.org

¹⁰ *See, e.g.*, HEATHER BOUSHEY, ANN O'LEARY, & ALEXANDRA MITUKIEWICZ, THE ECONOMIC BENEFITS OF FAMILY AND MEDICAL LEAVE INSURANCE (Dec. 12, 2013), <https://www.americanprogress.org/wp-content/uploads/sites/2/2013/12/PaidFamLeave-brief.pdf> (documenting the effects of unpaid but job-protected leave on workforce participation and employee retention; and noting the health benefits of such leave, including in improving child health and development, duration of breastfeeding, and reduction in postpartum depression among new parents).